How to invest in commercial real estate in the Netherlands

A practical guide from CMS

2025

Contents

Introduction

This is a practical guide from CMS on how to invest in commercial real estate in the Netherlands. The guide starts off with a brief explanation of the Dutch legal system. Key information about and an outline of the preferred ownership and transfer structure for commercial real estate assets is provided. We also outline the most common transaction process as well as costs and taxes to consider.

Key issues include financing of acquisitions, responsibilities and liabilities associated with owning commercial real estate assets, as well as an overview of the latest ESG regulations to be taken into account.

Certain issues to be considered post-acquisition are important for the buyer to be aware of. We have therefore outlined some of the responsibilities and liabilities that come with ownership and the way that buildings are managed.

CMS is highly experienced and competent to advise in all phases of a commercial real estate acquisition, including post-acquisition acquisition aspects of a real estate transaction.

The Dutch real estate market at first glance

The Dutch commercial real estate market continues to attract foreign investment. Emphasis on sustainability and ESG makes the Netherlands an attractive market for commercial real estate investors.

After a difficult start in the beginning of 2024, the hope for revival of the Dutch investment market exists, with macroeconomic stability as a prerequisite. According to Savills, investors view the Netherlands as the 5th most favourable European country to invest in, behind the UK, Germany, France and Spain. It confirms the position of the Netherlands as one of the most important real estate markets in Europe and the Middle East. Over the next 12 months, investors expect that most transactions will take place in the EUR 0 – EUR 100 million category. High (re) financing costs are expected to remain a barrier for larger transactions. A recent CBRE study shows that the occupier markets in the Netherlands are still struggling with scarcity. As a result, only a limited decline in demand can be expected, as well as ongoing growth of both market rents and contract rents, thanks to a historically high indexation. This shows there is still interest in the Dutch real estate market, albeit at a different price level.

The market for commercial real estate in the Netherlands is viewed as a stable and growing market, with a high demand for modern and sustainable properties we expect ESG to become one of the most important factors in investment and investment decisions. Furthermore, refinancing may lead to significantly higher interest costs, which can influence the decision whether or not to dispose real estate.

Issues around refinancing and access to affordable debt are likely to remain pressing in 2024. Probable consequences include an increase in the forced sales of property, more businesses searching for additional equity, and a growth in the number of owners in distress. The current investment climate may also prove to be a fertile one for non-traditional lenders. The continuing uncertainty in the sector could lead to a higher cost of capital for the traditional bank lenders, which would increase margins and – when added to a lower risk appetite – may provide an opportunity for alternative lenders. We have also noticed that alternative lenders' speed of execution gives them an advantage over banks in certain circumstances.

With the largest commercial real estate team in Europe and one of the biggest worldwide, CMS is well positioned to help investors, funders, developers, landlords and occupiers navigate all aspects of the real estate market and maximise their assets. Whatever the size and scope of your project or deal, with almost 800 Real Estate lawyers in more than 40 countries we have the resources to meet your needs quickly and efficiently, offering deep local expertise. We have been active in real estate in our markets for decades, so we understand the culture, the economic context, the local legal context and the history.

General remarks on the Dutch Legal System

The Dutch legal system is based on a civil law tradition. Certain legal principles are emphasised throughout the legal system, notably the principle of freedom of contract.

The legal system in the Netherlands is based on civil law, which means that the main sources of law are written laws and regulations, rather than judicial precedents or common law. The Netherlands is a founding member of the EU, and participates in the EU's legal and political integration. The principles of the European Union (EU) law, which has supremacy over national law in matters of EU competence.

The Netherlands has a strong commitment to combat corruption, both domestically and internationally. Dutch anti-corruption laws prohibit bribery, fraud, money laundering, and abuse of office, and apply to public officials, private individuals, and legal entities. The Dutch anti-corruption laws are enforced by the Public Prosecution Service, the National Police, the Fiscal Intelligence and Investigation Service, and the Financial Supervision Authority, which cooperate with each other and with foreign authorities. The Netherlands also ratifies and implements various international anti-corruption conventions.

The reliability of Dutch governmental entities is generally high, as the Netherlands has a stable and democratic political system, a transparent and accountable public administration, a robust and independent judiciary system, and a vibrant and diverse civil society. The Netherlands ranks among the top countries in the world in terms of the rule of law, the quality of governance, the control of corruption, and the respect for human rights. The Netherlands also has a well-developed and efficient legal framework for resolving disputes, enforcing contracts, protecting property rights, and facilitating business transactions.

In terms of foreign investment, the Dutch legal system is characterized as rather predictable, with public authorities usually being relatively experienced in corresponding with foreign entities. Additionally, national authorities make considerable efforts to ensure that online information, as well as standardized forms, are available in English.

The Dutch civil law system is organized in a hierarchical structure of courts, which are independent and impartial. The lowest level consists of eleven district courts, which have general jurisdiction over civil, criminal, and administrative cases. The next level consists of four courts of appeal, which review the decisions of the district courts on questions of law and fact. The highest level consists of two supreme courts, which are the Supreme Court of the Netherlands and the Council of State. The Supreme Court is the final court of appeal for civil and criminal cases, and ensures the uniformity and development of the law. The Council of State is the highest administrative court, and also advises the government and parliament on legislative and administrative matters.

Title to real estate

Any legal "person" may own real estate. This will include individuals, companies, entities established by statute and certain charitable bodies. Partnerships (e.g. limited partnerships, public partnerships, undisclosed partnerships) cannot legally own real estate in their own name (only beneficially). Owners of commercial real estate include private developers, insurance companies, pension funds, banks and other financial institutions, private or public property companies, charities, the government and local authorities.

There are no restrictions preventing foreign nationals or companies from owning real estate. Real estate refers to 'immovable property' (*onroerende zaak*) under Dutch law. There are two types of real estate rights under Dutch law: 'rights in rem' (*zakelijk recht*) and 'personal rights' (p*ersoonlijk recht*). Rights in rem are the most extensive and apply to both movable and immovable properties. The main right in rem is the right of ownership. Other rights in rem related to real estate are derived from or similar to the right of ownership, such as the right of leasehold the right of superficies and apartment rights.

Ownership (*eigendom*) is the most comprehensive right to real estate. Freehold ownership of Dutch properties entails both rights and duties for the owner. The owner has the exclusive right to possess, use, enjoy, dispose or encumber the real estate according at his sole discretion. Limitations to the right of use may exist in public law.

Leasehold (*erfpachtrecht*) can be used for various purposes, such as residential, commercial, agricultural, recreational, or public use. The right of leasehold may be vested for a defined period or perpetually whereby the conditions of the leasehold (for example, the amount of the ground rent) may be adjusted from time to time. A right of leasehold may be vested on a right of ownership, but also on another right of leasehold (sub leasehold) or on an apartment right. The right of leasehold is frequently used by municipalities as owner of the land, particularly in urban areas such as Amsterdam, to enable the municipality to pursue a specific land-use policy. The ground rent received is also a welcome source of revenue for the municipality. Leasehold in Amsterdam has been a source of controversy and litigation, especially regarding the valuation of the land, the calculation of the ground rent, and the renewal of the contracts.

The **right of superficies** (*opstalrecht*) is the right to own buildings, works or plants in, on or above another person's real estate. It has various similarities with the right of leasehold described above and regulates the ownership of certain structures. The right of superficies is often used to govern the entitlement to renewable energy projects such as windfarms, solar parks or thermal heating systems.

A right of ownership, right of leasehold or right of superficies can be divided in **apartment rights** (*appartementsrechten*). An apartment right gives entitlement to a share in the divided real estate, with the right of exclusive use of a certain part thereof. Certain parts can also be designated for communal use by the collective owners of the apartments. Each apartment unit has its own owner, who also owns a share of the common parts of the building or complex. The owner of an apartment right has the exclusive right to use and dispose its apartment right. By operation of law, each holder of an apartment right is a member of the owners' association. The owners' association is responsible for the management and maintenance of the common parts of the building or complex, as well as for the representation and protection of the collective interests of the respective owners of the apartment rights. The owners' association has a reserve fund to cover the costs of the common parts. The apartment owners usually pay a periodical sum to the association. In cities such as Amsterdam, for example, large old warehouses are often split up into apartments for residential use. Other cases in which apartment rights are used is in case of multifunctional building which include residential apartments, offices and parking facilities.

Land Registry

The Dutch Land Registry, or *Kadaster,* is a public organization that registers and provides information about the legal status and location of real estate, ships, aircrafts, cables, pipelines, and other spatial data in the Netherlands. It also maintains the national coordinate system, the topographic map, and the cadastral map of the country. Recorded in the Land Registry is the nature of the entitlement, legal restrictions that apply to the entitlement, and whether the plot is subject to an attachment or right of mortgage.

The Land Registry is part of the legal system of land registration in the Netherlands, which is based on the civil law tradition and the principle of registration. This means that the transfer of ownership or other right in rem over real estate require a notarial deed and registration in the Land Registry. The registration creates a presumption of validity and enforceability of the rights, and also serves as a public notice to third parties. In real estate transactions the registration at the Land Registry of a transfer or establishment of a rights of rem, including the vesting of a mortgage, is a condition precedent for payment of the (purchase) price by the notary.

The Land Registry is publicly accessible through an electronic account. The fees charged by the Land Registry for the registration of rights are relatively low. The Land Registry provides accurate and fast information on land and properties and is updated every business day. The reliability of the Land Registry together with the Dutch notarial system is the reason that title insurance is very rare in the Dutch market.

Acquisition process

Offer / Accept

If a buyer wishes to engage with a seller for a potential purchase, this usually happens in the form of an offer letter, where the details of the deal, such as price, timeline and transaction structure are presented. The bidder may at this stage also include certain preconditions for the deal. In certain instances, several rounds of bidding and negotiating takes place before the bid is accepted.

Unless explicitly stated otherwise in the offer, an accepted offer legally obliges the parties to complete the deal. Offers therefore usually specify that a letter of intent (**LOI**) is signed between the parties which is subject to a satisfactory outcome of the due diligence, a signed sales and purchase agreement (**SPA**), obtaining of all internal/external approvals and the execution of the deed of transfer.

Due Diligence

Once the LOI is signed by the parties, the buyer, assisted by its advisers, will normally carry out a due diligence process, based on documentation and information provided by the seller. This review includes a physical due diligence where the seller instructs building surveyors to examine the property and report on the technical/environmental condition of the building. The due diligence may uncover circumstances that may lead to increased operating costs, which is something the buyer will use in negotiations concerning the final purchase price.

Next to the technical due diligence, a legal due diligence is normally also carried out. Lawyers instructed by the buyer assess any legal liabilities that need to be addressed in the sale and purchase agreement. Legal due diligence typically involves the following steps and aspects:

- Reviewing the title deeds and cadastral records of the property to verify the ownership, boundaries, encumbrances, easements, and any other rights or obligations affecting the property. The buyer's lawyers also check for any pending or potential disputes, claims, or litigation involving the property or the seller. From the Land Registry, the buyer's lawyers will verify the title of the seller to the property. Additional details of the registered interests then also need to be retrieved from the Land Registry.

- Verification of the applicable zoning and planning regulations to determine the permitted use, development potential, environmental requirements, and any restrictions or obligations imposed by the authorities. The buyer's lawyers also verify the compliance of the property with the relevant permits, licenses, certificates, and approvals, and identify any violations, fines, or sanctions that may affect the property or the transaction.

- The buyer's tax advisers assess the tax implications of the acquisition, such as the transfer tax, value added tax, income tax, and any other levies or exemptions that may apply to the property or the parties. Tax advisers instructed by the buyer will also advises on the optimal structure and timing of the transaction to minimize the tax burden and risks.

- Evaluation of the contractual arrangements related to the property, such as the lease agreements, service contracts, management agreements, insurance policies, and any other relevant documents.

- If the acquisition is structured in the form of a share deal, the corporate entity holding the asset will also be subject to due diligence.

The buyer's lawyer prepare a due diligence report that summarizes the findings, conclusions, and recommendations of the legal due diligence, and highlights any significant issues, risks, or contingencies that may require further investigation, negotiation, or resolution. The due diligence period normally takes several weeks, which is dependent on the number of properties, the cooperation of the seller and the complexity of issues.

Sale and purchase agreement terms negotiations

At the end of, or in parallel with the due diligence period, the parties will negotiate the terms of the SPA. Some of the commercial and/or legal terms may already have been included into the LOI, subject to further detail and negotiation between the parties.

A SPA for commercial real estate properties in the Netherlands is a legally binding contract that sets out the terms and conditions of the transfer of ownership and possession of the

property from the seller to the buyer. While a SPA for commercial properties can also be concluded by means of an oral agreement, the vast majority of SPAs are documented in writing. The SPA typically includes the following specific clauses, among others:

- Identification of the parties, the property, and the purchase price.

- Representations and warranties of the seller and the buyer, such as the legal status and authority of the parties, the title and encumbrances of the property, the compliance with laws and regulations, and the absence of defects or liabilities.

- Conditions precedent and subsequent, such as obtaining of financing, permits, approvals, or consents, the completion of due diligence, or the fulfilment of other obligations by the parties.

- Closing and delivery, such as the date, place, and manner of the transfer of the property, the payment of the purchase price, the adjustment of costs and taxes, and the delivery of the deeds and documents.

- Remedies and indemnities, such as the rights and obligations of the parties in case of breach, default, or dispute, the allocation of risks and liabilities, and the procedures for arbitration or litigation.

A general starting point for the SPA is the as- is-where-is principle, which means that the seller sells the property in its current condition and state, without any guarantees or warranties, and that the buyer accepts the property as such, with all its faults and risks. The as-is-where-is principle implies that the buyer is responsible for conducting a thorough due diligence of the property before closing, and that the seller is not liable for any defects or damages that may arise after closing. However, the as- is-where-is principle is not absolute, and the parties may agree to modify or limit it by including specific representations, warranties, or indemnities in the SPA, depending on the nature and circumstances of the transaction. Usually, the as-is-where-is principle does not apply to the title of the property nor in cases of willful misconduct or intent on the side of the seller.

Nowadays, due to economic circumstances sellers are facing more pressure and competition to attract and retain buyers in a challenging market. As a result sellers are willing to provide more generous representations and warranties to buyers in a SPA, even if they entail more exposure and obligations for the sellers.

There is no set period between signing and completing the transaction, which can also occur on the same date, depending on pre completion actions to be taken between signing and closing.

Completion – notarial system

Any transfer or encumbrance of real estate in the Netherlands requires the execution of a notarial deed, to be executed by a Dutch civil law notary followed by registration of the deed with the Land Registry.

A Dutch civil law notary is a public official who is appointed by the Crown and subject to strict professional and ethical standards. In principle, the notary acts as an impartial and independent adviser to both parties in a property transaction and ensures that the legal formalities and obligations are met. The notary also safeguards the interests of third parties, such as creditors, tax authorities, and the public. However, in a commercial real estate transaction it may occur that the notary is associated with the buyer's lawyer and as such does act as a party adviser, which is only possible if the seller and the buyer agree to this concept.

One of the main tasks of the notary in a property transfer is to conduct Land Registry checks, which involve verifying the identity and authority of the seller, the legal status and description of the property, the existence and priority of any mortgages, easements, or other encumbrances, and the compliance with any zoning, environmental, or planning regulations. The notary also checks whether the seller is insolvent or subject to any bankruptcy, seizure, or attachment proceedings that could affect the transfer of the property.

Another important task of the notary is to ensure the payment of the purchase price and the settlement of any taxes, fees, or costs related to the transaction. The notary holds the purchase price in a special escrow account until the transfer is completed and registered with the Land Registry. The escrow account is held separately from the assets of the notary and is as such not affected by a bankruptcy of the notary. The notary pays the seller, the mortgage lender, and any other creditors or parties entitled to a share of the proceeds. The notary also pays the transfer tax (*overdrachtsbelasting*) and the Land Registry fees (*kadasterkosten)* to the tax authorities and the Land Registry on behalf of the parties.

The Dutch notarial system is widely regarded as reliable, efficient, and secure. The notary is liable for errors or omissions in the preparation and execution of the notarial deed and the registration of the transfer. The notaries are subject to strict ethical and quality standards, and are liable for any errors or damages caused by their acts. The civil law notaries also have a duty of confidentiality and a duty of advice towards the parties. The notarial acts and deeds are considered authentic and conclusive evidence of their content and validity,

and are enforceable against third parties.

The notarial system aims to prevent and resolve any legal conflicts or uncertainties in the transfer of property, and to protect the interests and rights of the parties and the public. Furthermore, the notary is obliged to maintain professional indemnity insurance and to contribute to a collective guarantee fund that covers any claims or losses arising from the notary's activities. CMS has several corporate and real estate inhouse civil-law notaries, who are qualified lawyers and are also partner at CMS Netherlands.

Asset vs share deal – civil law aspects

As transactions in the real estate industry grow more complex, they require integrated services that cover legal, tax and notary aspects asking for specific advice. One such area is indirect real estate transactions by means of a share deal, a challenging legal field in which CMS excelled over the past years, offering integrated legal and tax advice.

Civil law aspects

Both a direct acquisition of the property (asset deal) and the acquisition of the share capital of the corporate entity entitled to the property (share deal) are a common manner to structure a real estate transaction in the Netherlands.

An asset deal requires the purchase and transfer of the right related to the property. Not many statutory requirements apply to the purchase agreement (e.g., the purchase agreement does not necessarily have to be in the form of a notarial deed). The actual legal transfer of the property is executed by signing a notarial deed on the transaction date. After signing, the civil law notary will register the deed with the Land Registry. In addition to an asset deal, real estate may also be acquired through the purchase of shares or interest in the legal entity that owns the real estate. The transaction will be effected by way of a share purchase agreement. Transfer of the shares takes place upon the execution of a notarial deed of transfer of shares, to be executed by a civil law notary. No registration at the Land Registry will be required.

Asset vs share deal – tax aspects

While an asset deal is the most common manner of acquisition in the Netherlands, a share deal is often initiated by a seller for reasons of tax optimization, which generally benefits the seller and/or the buyer.

General tax aspects (VAT/RETT/CIT)

Value Added Tax (VAT)

Asset deal

The direct acquisition of immovable property is generally VAT exempt. However, VAT at a rate of 21% is due:

(1) on the supply of building land (i.e., land that has not been built on, but is apparently intended to be built on with one or more buildings);

(2) on the supply of a newly developed property (i.e., a building that has not yet been used or is in use for less than two years);

(3) on the transfer of rights in rem relating to a building land or newly developed property.

Parties can also opt for a VAT taxable transfer (which option can only be exercised if the property is used for at least 90% VAT taxable activities), which can be considered if a VAT adjustment period is pending. When opting for a VAT taxable transfer certain specific formal requirements should be taken into account.

Share deal

The indirect acquisition of immovable property by means of a share deal is not subject to VAT. The historical VAT position (e.g., pending VAT adjustment periods) will be continued and that VAT on costs in relation to the share deal may not be (fully) recoverable.

Transfer of going concern (TOGC)

The acquisition of immovable property in conjunction with the transition of one or more lease agreements generally qualifies as a TOGC for VAT purposes, provided that the buyer continues the operation of the immovable property by means of continuation of the lease(s). This means that such transaction is 'out of scope' for VAT purposes (i.e., it is deemed that no supply of goods or services takes place and no VAT becomes due). In the event of a TOGC, the historical VAT position (e.g., pending VAT adjustment periods) will be continued.

Dutch real estate transfer tax (RETT)

Asset deal

RETT is in principle levied on the acquisition of the legal title to and/or beneficial interest in immovable properties located in the Netherlands or real right (rights in rem) to such properties. The standard RETT rate is currently 10.4% (and 2% for owner-occupied dwellings), calculated over the fair market value of the property or – if higher – the purchase price. With regard to right in rem, the RETT base amount will be increased with the capitalized value of future payments (i.e., ground rent or user fees).

Share deal

RETT also becomes due in respect of the acquisition (or increase) of a substantial interest (i.e., an interest of 1/3rd or more) in a legal entity that qualifies as a real estate entity for Dutch RETT purposes. A legal entity with a capital divided into shares qualifies as a real estate entity for Dutch RETT purposes. If each of the following conditions are met at the time of the acquisition (or were simultaneously met at any point in time during the 365 days prior to the acquisition):

1. the assets of the company predominantly (>50%) consist of property (or shares in other real estate entities);
2. at least 30% of the assets consist of immovable property located in the Netherlands; and
3. the property is mainly (i.e., for 70% or more) held or used for development or exploitation purposes.

RETT exemptions

Dutch RETT legislation provides for several RETT exemptions (such as the RETT *concurrence exemption* and the exemptions for mergers, demergers, and internal reorganizations).

The RETT concurrence exemption (*samenloopvrijstelling*) generally applies for the acquisition of building land and newly developed property provided that:

1. the transfer of the immovable property is subject to VAT by virtue of law (see also under VAT / asset deal above); and
2. for properties used for VAT taxable activities: the acquisition takes place before or within 6 months after the first use of the property (i.e., before or within 6 months after the first occupation of the property or – if earlier – before or within 6 months

after the lease commencement date); or

3. for properties fully used for VAT exempt activities (meaning that the acquirer is not entitled to any recovery of input VAT): the acquisition takes place before or within 2 years after the first use of the property.

According to the Dutch Supreme Court the RETT concurrence exemption also applies to share deals, provided that at the moment of the share acquisition the underlying immovable property qualifies as building land or as a newly developed building that has not been first used and that the concurrence exemption would apply in case of an asset deal.

Cancellation of the RETT concurrence exemption for certain share deals:

As part of future legislation, as of 1 January 2025 the RETT concurrence exemption will be abolished for the acquisition of shares in a real estate company. As a result, the indirect acquisition of building land or newly developed real estate will be subject to RETT at the new rate of 4%, calculated on the fair market value of the building land or new building(s). However, the concurrence exemption remains available if during the first 2 years after the share acquisition the underlying real estate is used for activities that entitle the owner (entity) to VAT recovery of at least 90%.

Dutch corporate income tax (CIT)

Asset deal

A realized capital gain on the sale of a property is subject to CIT at a rate of 19% up to a profit of EUR 200,000 and 25.8% for the excess. The realized capital gain is the difference between the fair market value and the tax book value of a property. After the purchase, the buyer can activate the property on its balance sheet for the purchase price. A property can only be depreciated to the floor value (i.e., 100% of the WOZ value, which is the value of the property yearly determined by the municipality). Depreciation can be applied if the book value of the building is higher than its floor value.

Share deal

A realized capital gain on the sale of a property is in principle exempt from CIT, provided that the participation exemption applies. As the buyer (at the level of the target) continues the lower book value of the property a hidden reserve remains for CIT purposes. This means the buyer is obligated to pay CIT in case of a future asset sale. In this respect it is common that seller and buyer negotiate a discount as compensation for the buyer's deferred liability to pay tax. The discount is an outcome of negotiations between parties, although a 50/50 split is often agreed upon in the market. After the purchase of the shares, the buyer will activate the participation in the corporate entity at cost. With regard to the property, the buyer will not receive a step-up to the fair market value of the property. Therefore, the depreciation is based on the existing book value (within the aforementioned depreciation restriction for properties to floor value).

Acquisition costs: Required and typical fees

Acquisition costs payable may include:

Investment broker fees

These fees are be subject to negotiation, often a percentage of the purchase price. We further refer to the guide on agents: Guide to Agent Introductions (cms.law)

Legal fees

Each party will cover its own legal fees. Legal fees are often pre discussed between parties. Different than in other countries, the fees charged by a Dutch civil law notary are not based on a fixed percentage of the purchase price and can be freely negotiated.

Stamp duty

The Netherlands does not levy stamp duty on the acquisition of properties or shares.

Land Registry costs

The Land Registry does charge relative low fees. Registration fees for a transfer or mortgage deed are EUR 165 (2024 rates).

Tax

As described above.

Lease agreements

The aim for most commercial real estate acquisitions is to invest in the projected increase in value of the asset, as well as the constant cash-flow derived from current leases on the property. Customarily, lease income is the basis on which real estate assets are evaluated and the purchase price of real estate assets is calculated.

15-11-2024

The majority of commercial lease agreements are based on the so-called ROZ-template, to which the general terms and conditions of the ROZ apply. The template and general terms and conditions are drawn up by the Real Estate Council of (R*aad voor Onroerende Zaken*) (ROZ). It is not uncommon for the standard lease agreement and the applicable general terms and conditions to be modified and amended in negotiations between the parties.

The Dutch lease legislation distinguishes between (i) residential lease; (ii) retail lease (the lease of commercial space to be used for retail, hotels, restaurants etc.; and (iii) office/ industrial lease of other types of commercial space (e.g. office spaces, factories, warehouses, banks, etc.).

Dutch residential lease law is, for the most part, mandatory. For instance, mandatory law applies with respect to termination (the lessor can only terminate based on a limited number of statutory grounds and on the basis of a court order only), the rights of the lessee's partner, the rent level and rent review and the duration of the lease agreement (a temporary lease agreement is in principle not allowed, unless an exception category applies and the relevant conditions are met).

Dutch residential lease law is lessee friendly and lessees are well protected by law. The mandatory character of Dutch lease law holds that parties may only deviate from mandatory law in favour of the lessee. Furthermore, the residential market can be divided into three segments; the low-end (formerly social housing) regulated housing sector, middle segment and high segment (formerly private rental sector) the non-regulated, liberalized sector. From 1 July 2024, both the low and middle segments are regulated, with the maximum rent price determined by the number of points based on the Housing Evaluation System (*woningwaarderingsstelsel*). For the low and middle segments different annual rent price indexation methods apply. As a result, the residential properties that

fall within the regulated sector segments are subject to stricter governmental supervision. As per 1 July 2024 the possibility of entering into temporary lease agreements is significantly limited in all three segments.

With respect to lease agreements relating to commercial retail space (such as restaurants, hotels, retail space), under Dutch lease law, the initial term of the lease agreement is usually 5 years (or more). If the initial lease period is five years, then after its expiration the lease agreement will be extended by operation of law with a second lease period of five years. If the initial lease period is longer than five years, but less than ten years, then after its expiration the lease agreement will be extended by operation of law with a second lease period which is so much shorter than five years as the initial lease period was longer than five years. Furthermore, Dutch lease law includes mandatory provisions with respect of the termination grounds to be used by the lessor when terminating the lease agreement.

Lease agreements agreed for a (and with an actual) duration of less than 2 years, are not subject to the mandatory provisions of of Section 7:291-7:300 of the Dutch Civil Code.

The lessor and lessee are free to agree on the rent payable. Under Dutch law the lessee and lessor are entitled to request the court to adjust and assess the rent in accordance with the rent of comparable local retail space during a reference period of 5 years preceding the rent review date. The court is entitled to do so as per the end of the initial term and subsequently after every 5 consecutive years after the last adjustment of the rent by the parties. From the mandatory provisions as included in the Dutch Civil Code, can only be deviated to the disadvantage of the lessee if the deviating clauses have been approved by the court.

With regard to office space, Dutch lease law does neither contain provisions concerning the terms of the lease, nor termination grounds, nor for rent revision. The lessor and the lessee are free to make arrangements on durations, rent level, notice periods, rent revision and other commercial topics. The lease agreements concerning office and industrial space are subject to the mandatory provision of article 7:230a of the Dutch Civil Code as a result of which the lessor, in order to effect the vacation of the leased space by the lessee, must also give a notice of vacation to the lessee. From the date of vacation set forth in the notice of vacation, in principle – unless the

lessee has agreed to a termination, terminated the lease agreement itself (or agreed to termination) or was ordered to vacate the leased space by court order because of default – the obligation for the lessee to vacate the leased space is suspended for a period of two months by force of law. The lessee may within the two-month period request the court to extend the term of suspension to a term of one year. By filing this request, the obligation to vacate is further suspended until the court has given a judgment. As the lessee is entitled to repeat this request two more times, in the most optimal case the lessee can – in theory – suspend the obligation to vacate the leased space with a maximum of three years.

A range of circumstances in the lease agreement may make the asset more or less desirable, such as the duration of the lease period, the rent, the rent indexation, the cost distribution and the question whether the lease agreement takes into account sustainability aspects (green lease).

Duration of the lease period

Office/industrial lease: Parties are free to decide on the duration of the lease period regarding an office/industrial lease. However, a 5-10 year lease period is common. Leases often include one or two renewal terms and or one or more so called – lessee's options.

Retail: Usually, retail leases are entered into for an initial duration of 5 years followed by a subsequent term of 5 years, so up to a total of 10 years. The term of a retail lease is subject to mandatory law as briefly outlined above. Retail lease agreements can only be terminated by the lessor using the statutory termination grounds on the basis of a court order, so not out of court (unless parties have agreed a contractual arrangement to the contrary, which is approved by the court).

Rent

For retail and offices/industrial leases, parties are free to mutually agree upon the rent. Usually the rent will be paid monthly or quarterly, mostly prior to commencement of the specific term of payment.

Rent indexation

The most common type of rent adjustment for commercial properties is indexation, which means that the rent is adjusted annually according to the changes in the consumer price index (CPI) published by Statistics Netherlands. Indexation clauses usually include a base year, a base index, and a formula for calculating the rent adjustment. Sometimes a cap on rent review can be negotiated by the parties. For regulated residential properties the rent may be indexed with a maximum percentage set by the government. The annual rent increase in the middle rent segment is capped at the collective wage development (CAO) plus 1 percent. For non-regulated properties, parties are in principle free to agree upon any method of indexation, provided that indexation may only take place once a year. Commonly, the rent is adjusted based on the CPI. However, up to 1 May 2029, a maximum rent indexation as set by the Dutch government is applicable.

Cost distribution

With regard to cost distribution in commercial leases (i.e. not residential leases) the following applies. Parties are free to agree upon the way operating costs (such as maintenance/ renewal, insurances, taxes, etc.) are passed on to the lessee. In short, the ROZ template lease agreement provides for an allocation of the maintenance costs between the parties, and the taxes in relation to the use of the leased space are for the expense of the lessee. Parties can also agree upon a double or triple net lease, whereby the lessee also pays the insurance and/or the taxes in relation to the ownership of the leased space.

Green leases

Green leases are optional in the Netherlands. However, green leases and their provisions are encouraged by the authorities. Lessors are obliged to provide the lessee/purchaser an ‘energy label’ (similar to an EPC) when selling or leasing the building. Office buildings require a minimum C label.

Real Estate financing

Real estate financing in the Netherlands are typically provided by Dutch and foreign banks, insurance companies, pension funds, private equity and hedge funds.

Real estate debt financing will be secured against the capital value of the property and serviced by rental income. A lender typically will requires security over the asset. In case of a share deal the lender will normally also require security over the shares in the corporate entity holding title to the property. The most common types of securities granted in Dutch real estate financing are:

Mortgage rights

A mortgage right is a security right over a registered immovable property, such as land, buildings, or leasehold rights, that secures the repayment of a loan. A mortgage right is created by a notarial deed and registered in the public Land Registry. A mortgage right can be granted by the owner of the property or by a third party with the owner's consent. A mortgage right can be ranked in priority according to the date of registration or by contractual agreement.

Pledge rights

A pledge right is a security right over a movable property, such as shares, receivables, bank accounts, or intellectual property rights, that secures the repayment of a loan. A pledge right is created by a written agreement and, depending on the type of property, may require notification, registration, or possession by the pledgee. A pledge right can be granted by the owner of the property or by a third party with the owner's consent. A pledge right can be ranked in priority according to the date of creation or by contractual agreement.

Guarantees

A guarantee is a contractual obligation by a third party, such as a parent company, a subsidiary, or a bank, to pay the debt of the borrower in case of default or insolvency. A guarantee can be personal or corporate, and can be limited or unlimited in amount, duration, or scope. A guarantee can be governed by Dutch law or by a foreign law, depending on the parties' choice.

In real estate financing, the following financial covenants are regularly included:

- loan to value;
- debt service cover ratio; and
- interest cover ratio.

Enforcement of security

Pledge and mortgage rights are enforced through a sale by public auction initiated by the foreclosing financier. In an enforcement process, Dutch law provides for the following possibilities for a public auction:

- in case of enforcement of a right of mortgage, the property can also be sold by a private sale, provided that this is approved by the court in preliminary relief proceedings after a request for these from the mortgagor or mortgagee;

- in case of enforcement of a right of pledge, the sale can also be concluded other than by a public auction, at the request of the pledgor or pledgee and after approval by the court in preliminary relief proceedings, unless the deed of pledge stipulates otherwise;

- in case of enforcement of a right of pledge, the pledgee can also request the court in preliminary relief proceedings that the pledgee will acquire the encumbered property against a sum to be determined by such court; and

CMS has extensive experience with working with clients to ensure swift finalization of financing and securities processes with lenders and is a well-known specialist for restructuring of debt.

For a more detailed overview of distressed real estate and enforcement of security we refer to our expert guide.

Property management

Proper management of the property is important for a number of reasons:

Good relations with tenants

Most tenants expect the property, for which they pay rent to occupy, to be properly managed. Ensuring that the property is in good technical condition and that contact with the tenants happens in a timely and orderly manner, reduces the risk of souring the relationship and makes the tenants more likely to pay rent on time and to exercise any options for a longer lease period (if applicable). Proper management also decreases the risk of technical failures and tenants directing claims towards the owner.

Lowering operating costs over time

Good management ensures that the technical well-being of the building and its technical installations are continuously tended to. As landlords often have a contractual obligation to replace technical installations when maintenance is no longer economically advised, proper maintenance is key to keeping the operating costs at a minimum. While the managers will require a fee, this cost can be passed on to the tenants.

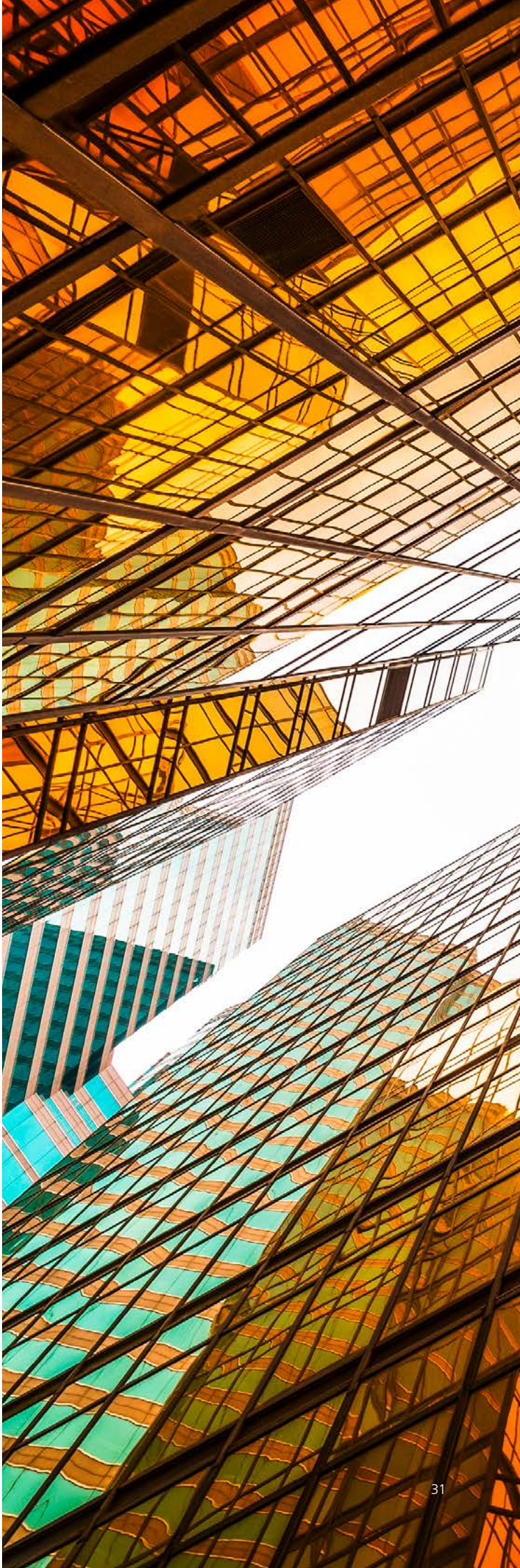
Eases future sale

Assets that are well managed will likely be easier to dispose in the future. Proper management tends to lead to a higher purchase price, seeing as the buyer's due diligence is less likely to uncover technical deficiencies with the property as a result of negligent maintenance and management.

Once an asset has been acquired by the investor, proper management of the property becomes the investor's responsibility. Most large scare real estate investors outsource management to professional property management firms, who are experienced in day-to-day operations and handle budgeting, maintenance and day-to-day contact with tenants.

ESG aspects are increasingly important for property management of commercial properties in the Netherlands, as they affect the value, reputation and performance of the assets, as well as the expectations and satisfaction of tenants, investors and regulators. Property management of commercial properties in the Netherlands involves collecting, analysing and reporting

data on various ESG indicators, such as energy efficiency, carbon emissions, water consumption, waste management, biodiversity, indoor air quality, health and safety, accessibility, diversity, community engagement and ethical conduct. Data on ESG performance of properties can be used to identify risks and opportunities, benchmark against peers and standards, implement improvement measures, communicate with stakeholders and demonstrate compliance with regulations and certifications, such as the Dutch Building Decree, the Energy Performance Certificate and the BREEAM or LEED certification.



Planning and permit matters and liabilities

With respect to Dutch real estate investments, various planning, permits and environmental aspects are of importance.

1. Environmental plan

As of 1 January 2024 the Environment and Planning Act (*Omgevingswet*) has come into force. Under the Environment and Planning Act, every municipality should have an environmental plan. The environmental plan contains rules for the use of the physical environment. These plans for example include rules and restrictions regarding the use of a specific location, regarding building activities and regarding the quality of the environment (such as rules on soil quality). The environmental plan can also create permit obligations, for example with conditions for building or for felling trees. A project must meet all the site-specific and general requirements of the environment plan. If these cannot be met, a permit to deviate from the environmental plan must be applied for. It is in the discretion of the competent authority whether such a permit will be issued or not.

2. Environmental (building) permits

The Environment and Planning Act and the Structures Decree (*Besluit bouwwerken leefomgeving*) stipulate that structures higher than 5 meters or located underground require an environmental building permit. The Structures Decree also stipulates the requirements a structure must meet. These requirements for example cover (fire) safety, health standards and sustainability of buildings.

The Structures Decree regulates the technical building permit. As mentioned above an environmental plan may also contain a permit requirements for construction activities, relating to the spatial (non-technical) aspects of a building. This may for example include requirements for the external appearance of a building.

3. Energy saving measures and energy label

Under the Structures Decree, amongst others, a general energy-saving obligation applies. All measures with a payback period not exceeding 5 years must be implemented. A list of approved measures is available. This requirement is addressed to building owner. Users of buildings are also subject to an energy-saving obligation under the Living Environment (Activities) Decree (*Besluit*

activiteiten leefomgeving), focusing on energy saving measures within the business activities. Sometimes both the owner and user of a building structure can be responsible for taking the same energy-saving measure (e.g. in the case of the use of a combustion plant which is both part of the building and part of the business activity). In this respect, arrangements about the responsibility to take measures can be made between the landlord and tenant in a lease agreement.

The Structures Decree requires the seller or lessor of a building (or part thereof) to submit an energy label upon completion. For office buildings, an energy label of (at least) class C is required (with certain specific exceptions).

4. Occupancy notification

Under the Structures Decree, under circumstances a notification is required prior to occupying a building. Whether such a notification is required depends on the function of a building in combination with the maximum number of persons that will be present (at any time) in the building. For example, an occupancy notification is required prior to the use of an office building in which more than 150 persons will be present. As another example, an occupancy notification is required for a retail function if more than 50 persons will be present in the retail unit at any time.

A notification under the Structures Decree may lead to an inspection on compliance with the decree by the competent authority. Technical due diligence is required to assess whether a building complies with the Structures Decree.

5. Environmental notification or permit

The Living Environment (Activities) Decree contains regulations for activities with (potential) impact on the environment. Under certain circumstances, it is required to submit a notification under this Decree to the competent authorities and/or to obtain an environmental permit.

Under the Living Environment (Activities) Decree, filing a notification or obtaining a permit is a responsibility of the operator of the (business) activity. Furthermore, notifications under the Living Environment (Activities) Decree may trigger inspections on compliance with the Decree by the competent authority. Such inspections can also regard technical aspects of a building that are a responsibility of the owner of a property and/or a shared

responsibility of the owner of a property and the user/tenant of a property.

A technical advisor should check whether an activity factually complies with the regulations of the Living Environment (Activities) Decree.

6. Nature conservation law (protected species and areas)

Under the Environment and Planning Act, a permit is required for projects and businesses that may result in negative consequences for nature conservation areas (*Natura 2000-gebieden*). With regard to real estate, the focus is mostly on the potential impact that exhaust from traffic (both in the construction and operational phase) can have on nature conservation areas. On the basis of a so called AERIUS calculation, it can be determined whether a project and its expected traffic movements will have an impact on protected nature or not. If so, a permit is mostly required, as many Dutch nature conservation areas are overburdened with nitrogen. A permit for nitrogen deposition on a nature conservation area is difficult to obtain, as it generally requires existing emission rights which are scarce.

Furthermore, in case of a renovation, demolition or new construction project, it is also advisable to have a quick scan of flora and fauna carried out by an expert consultant. On this basis it can be determined whether protected species are present in or around the property, which should not be disturbed (for a certain period of time or at all). Sometimes compensatory or mitigating measures are needed and a permit under the Environment and Planning Act may be required. This can cause for a delay in projects.

7. Quality of soil and groundwater

The Environment and Planning Act contains various rules and duty-of-care provisions to prevent soil contamination. In case soil contamination does occur, in principle the polluter must remove it. Furthermore, the environment plan can set conditions regarding soil quality. This can mean that a specific building or use is only allowed if the soil quality is improved. In case soil contamination is found by chance that was previously unknown, the owner or leaseholder may be obliged to take measures in case the

contamination causes a risk (to human health or nature). This is particularly the case if it is historical soil pollution and/or if the polluter is not known.

In case there is an order to take measures in place which was issued (by the competent authorities) under the former Soil Protection Act (*Wet bodembescherming*), such order remains in full force and effect under the transitional law of the Environment and Planning Act.

8. Asbestos

Based on the Working Conditions Decree (*Arbeidsomstandighedenbesluit*), asbestos-containing materials in new constructions and renovations have been prohibited since 1993. However, there is no general legal requirement to remove asbestos, unless the presence of asbestos exposures risks to employees. Currently, asbestos is only to be removed if it forms a risk to employees and/or in case of renovation works. Reconstruction and demolishing works involving the removal of asbestos are bound to strict legal requirements under – amongst others – the Asbestos Removal Decree 2005 (*Astbestverwijderingsbesluit 2005*) in order to prevent human exposure to asbestos. In general, this implies additional removal costs.

9. Housing Act 2014

The national Housing Act 2014 (*Huisvestingswet 2014*) grants municipalities the discretionary power to decide (amongst others) that houses in certain areas may not be used for other than residential purposes, to decide that houses in certain areas may only be used by a single household Also, the municipality has the discretionary power to decide that in certain areas multiple houses may not be converted into a single house and to decide that houses in certain areas may not be split up in multiple houses. Exceptions can be made, which may be linked to a licensing system. If municipalities decide to use their discretionary power under the Housing Allocation Act 2014, they must do so by adopting a municipal housing regulation (*huisvestingsverordening*). As such, any locally applicable rules on housing allocation will be found in the municipal housing regulation and will differ from municipality to municipality.

The significance of ESG

According to recent studies, environmental, social, and governance (ESG) is a key value driver of real estate investments. Both investors and lenders are increasing their focus on ESG, not only because it may be part of their core values or to meet governmental obligations, but also because the sustainability performance can have a financial impact, both downward and upward.

As to upward potential, real estate with an excellent sustainability rating is likely to be an attractive proposition for buyers and lenders. Reduced energy consumption may well be an important factor in attracting tenants in a high energy-cost environment. Moreover, investors are expected to be eager to add prime sustainable real estate to their portfolio, as this may allow them to tap into real estate funds earmarked for "green" investments.

Also in real estate financing ESG plays an important role. In recent years as a result of the increasing relevance and popularity of forms of sustainable financing, several sustainable financing instruments have been developed for both loans and bonds. For loans in the international financing market, the 'Green Loans' and 'Sustainability-Linked Loans' become more popular and may even provide more attractive financing options.

A key concept in this context is the EU Taxonomy Regulation. The Taxonomy introduces a classification system for environmentally sustainable activities and investments. The Taxonomy requires funds to classify investment products that they promote as sustainable under the classification system that follows from the Taxonomy.

New European regulations and directives in the field of sustainability will have significant impact on real estate enterprises in the short term. Real estate enterprises will have to work their way through the reporting requirements, sustainability qualifications and material requirements for their buildings. But even for enterprises for who real estate is not their core business, the sustainability requirements and reporting obligations to which (the use of) real estate is subject, will be of importance in relation to the real estate that is owned or used by these enterprises for the operation of their business. ESG will present challenges, in particular as regulations in this area are still evolving. We will continue

to monitor these developments closely. Since the most important ESG regulations and directives originate from the European Union, we as CMS follow developments not only in Amsterdam but with our colleagues throughout Europe. In an European context, we develop tools for our clients so that they can stay up-to-date.

For a more detailed outline of ESG aspects we refer to our specific ESG white paper: Future Proof Real Estate.

Experience and expertise

The CMS Real Estate Group is the largest specialist real estate team in Europe and one of the biggest worldwide. Our European Real Estate team consists of more than 800 qualified lawyers working in real estate and construction across all major European countries and cities.

The multi-disciplinary CMS Real Estate team in the Netherlands is one of the most specialised local teams with an international reach. We provide full-service legal assistance in all real estate matters and have deep experience in all Dutch real estate sectors.

Multi-disciplinary support across the full life cycle

We can support you across the full life cycle of an asset: from financing, acquisition, development, construction, asset management and optimisation to eventual sale.

This includes domestic and international real estate transactions, project development, including refurbishment of real estate, real estate finance, environmental & zoning work, procurement, construction, litigation, lease transactions and security rights advice.

We have gained substantial transactional experience and expertise to advise, assist with, and conduct proceedings concerning all (complex) real estate matters. Our commitment, to both the detail and the bigger picture, allows us to highlight issues as they arise. We are used to working closely with our clients and their teams to develop commercial and creative solutions in order to maximize the potential of their investment.

Our expertise goes beyond the traditional boundaries of pure real estate law and enables us to offer clients a one-stop-shop. You can be sure we have the experience and expertise required foreign and Dutch investors or development companies who want to successfully conduct real estate deals in the Netherlands.

About us

CMS. Ready for your future.

We are CMS, one of the biggest law firms in the world, with more than 70 offices in over 40 countries. We combine in-depth knowledge of the Dutch market, which we have been serving for over a century, with a global network and perspective.

We are CMS, one of the biggest law firms in the world, with more than 70 offices in over 40 countries. We combine in-depth knowledge of the Dutch market, which we have been serving for over a century, with a global network and perspective.

Excellence calls for specialisation, which is why we choose to focus on complex briefs in sectors including real estate. Above all, we specialise in you, in our clients. We know your market, the arena in which you operate. We are proactive, a useful sparring partner and a dependable resource at crucial moments.

Our knowledge is extensive, and that includes knowing what we don't know. Like you, we don't know what tomorrow will bring. To lead is to look ahead, but the view is often restricted. So we'll work with you to get to grips with possible changes to legislation and regulations, future developments in your markets and its impact. Where are opportunities likely to arise, which threats are lurking, what can we already anticipate now?

Those who are prepared for an uncertain future can look forward to that future with more confidence. Our aim is to be lawyers, notaries and tax consultants who think ahead.

'Ranked Band 1 in Chambers Global Real Estate 2024'

'Ranked Band 2 in Chambers Europe Real Estate 2024'

'Ranked Tier 2 in Legal 500 EMEA Real Estate 2024'

Our experts

For more information on investing in commercial real estate in the Netherlands, please feel free to contact one of our real estate experts in the Netherlands or visit our website.

Femke Stroucken
Partner | Notaris
T +31 20 3016 328
E femke.stroucken@cms-dsb.com

Arnout Scholten
Partner | Advocaat
T +31 20 3016 472
E arnout.scholten@cms-dsb.com

Jan Peter IJspeert
Partner | Advocaat
T +31 20 3016 260
E janpeter.ijspeert@cms-dsb.com

Tijmen Brüne
Senior Associate | Advocaat
T +31 20 3016 340
E tijmen.brune@cms-dsb.com

Klaas-Jan de Groot
Senior Associate | Kandidaat-notaris
T +31 20 3016 430
E klaasjan.degroot@cms-dsb.com

Alexander IJkelenstam
Counsel | Advocaat
T +31 20 3016 274
E alexander.ijkelenstam@cms-dsb.com

Etienne Cox
Counsel | Belastingadviseur
T +31 20 3016 425
E etienne.cox@cms-dsb.com

Marita van der Werff
Senior Associate | Advocaat
T +31 20 3016 219
E marita.vanderwerff@cms-dsb.com

CMS Law-Now™

Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.
cms-lawnow.com

CMS locations:
Aberdeen, Abu Dhabi, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Bergen, Berlin, Bogotá, Bratislava, Brisbane, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Dublin, Duesseldorf, Ebene, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Gothenburg, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Liverpool, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Maputo, Mexico City, Milan, Mombasa, Monaco, Munich, Muscat, Nairobi, Oslo, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Riyadh, Rome, Santiago de Chile, São Paulo, Sarajevo, Shanghai, Sheffield, Silicon Valley, Singapore, Skopje, Sofia, Stavanger, Stockholm, Strasbourg, Stuttgart, Sydney, Tel Aviv, Tirana, Vienna, Warsaw, Zagreb and Zurich.

Further information can be found at **cms.law**