
Q&A FOR INVESTMENT IN THE NETHERLANDS

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CMS Derks Star Busmann is part of CMS, the pre-eminent provider of high quality legal and tax advice in Europe. With offices in Shanghai and Beijing and China Desks in The Netherlands and other European countries, CMS has an unrivalled ability to provide operational support to China headquartered organisations that are present in The Netherlands and the rest of Europe. As the largest provider of legal services in Europe, CMS has a strong presence in almost all of the European territories. CMS delivers client-focused services through a joint strategy executed locally across 27 jurisdictions with 53 offices in Western, Central and Eastern Europe and beyond. CMS was established in 1999 and today we employ over 2,800 lawyers.

Jurjen Groot has been working in the CMS Shanghai office since 2008, after having worked for CMS in The Netherlands for several years. He is an experienced Dutch law qualified lawyer, specialized in corporate and commercial law. Jurjen assists Chinese companies on all legal and tax aspects of setting up and expanding their business in The Netherlands and through The Netherlands in the rest of Europe.

Steve Yu is a partner of CMS China. He has more than 12 years of experience in cross-border transactions and

international investment relating to China. His recent representation includes advising European and American corporations on their investment projects in a wide range of businesses. He also advises Chinese State-owned companies and privately owned companies on their outbound investment projects in Europe.

What are the latest legal developments in relation to distribution and aftersales in Europe?

It may often be desirable to include certain competition restrictive clauses in distribution agreements. After-sales agreements may also contain such provisions. It is important to note that under EU law, agreements which significantly restrict competition are prohibited and considered null and void unless they fulfil certain conditions.

Certain groups of (sector specific) agreements are however automatically exempted if they fall within the scope of a so called "block exemptions regulation ("BER")". In April this year, the European Commission ("EC") issued a new BER for vertical agreements, which covers distribution agreements of all products and services in Europe ("general BER"). The general BER entered into force on 1 June 2010.

In addition, the European Commission issues sector specific BERs. The EC has for example recently issued a BER specifically for the automotive sector ("automotive BER"), which came into effect on 1 June 2010. The automotive BER includes rules for the distribution of after sales services and spare parts for cars. Moreover, the automotive BER provides that as of 1 June 2013 the distribution of motor vehicles will be covered by the general BER. This will provide more possibilities for Chinese car makers to shape their distribution networks.

Can you give Chinese companies in The Netherlands any practical tips for renting offices/premises?

Most landlords will try to subject the lease to the so called "ROZ Conditions". These are standard rental conditions that have been drawn up by the Council for Real Estate (*Raad voor Onroerende Zaken*). The problem with those conditions is that they are clearly biased towards the landlord and can confront the lessee with unexpected and considerable costs.

The ROZ Conditions for example require prior approval from the landlord for all changes to the property, allowing the landlord to block any plans for (re)decoration. Furthermore, when terminating the lease, the lessee must undo and remove – at its own expense – all changes it has made to the property. The lessee is also not allowed to sub-lease the property. The ROZ Conditions in addition oblige the lessee to pay contractual penalties in the event of non-performance, whereas the landlord has no such obligation. Finally, the lessee must pay the landlord all costs, damages and interest if it prematurely ends the lease. As those costs include the lease sum of the remaining contractual term, this can be very costly for the lessee.

The above examples demonstrate that it is not in the interest of the lessee to (fully) accept the ROZ Conditions. In the current economic situation, supply exceeds demand on the Dutch business property market. Therefore, any Chinese company leasing property in The Netherlands should be able to negotiate more favourable conditions.

What legal implications should Chinese companies take into account when expatriating employees to The Netherlands?

Chinese companies with overseas operations in the Netherlands often relocate some employees to the Netherlands. For these companies, it is most favourable if the employment agreements remain subjected to PRC law. There is a risk however that Dutch employment law automatically becomes applicable and that Dutch

Courts become competent in case of disputes. Although Chinese law would in such case not be set aside entirely, the Dutch courts will apply Dutch law to the extent that it offers more protection to the employee. This could be of substantial benefit for the employee, but is not attractive for the company.

The applicability of Dutch law can result in *more protection* for the employee against dismissal and higher severance payment, which could be as high as 2 months of basic salary per year of employment. Moreover, Dutch Courts will generally apply a so-called correction factor to express the merits of the case. This factor is in essence a multiplier of the severance payment. Practically, this allows a Dutch Court to award high severance payments to the employee, if it feels the dismissal is largely attributable to the employer.

Dutch law becomes applicable if the employee has worked for a longer period in The Netherlands than anywhere else during his employment. Other factors that prove a close and direct connection with the Netherlands can contribute to this result as well.

Chinese companies can implement a few practical measures to avoid this risk as much as possible. Firstly, they should ensure that the intended term of expatriation does not exceed the time of employment in China. Also, it is advisable to regularly reshuffle employees back to China and make sure they spend an adequate amount of time there before being expatriated again. Explicitly choosing for Chinese law in the agreement is also important, as well as drafting the agreement in Chinese (instead of in Dutch or English). Furthermore, employment conditions should be included to demonstrate that the connection with China is closer than to the Netherlands, such as providing that the Chinese mother company directly pays the salary in RMB, as well as including typical expatriate arrangements such as compensation of relocation costs, financial incentives for relocating and reimbursed return trips to the country of origin.

Are there any recent developments in the hybrid and electric automotive sector in The Netherlands that create attractive opportunities for Chinese investors or car manufacturers?

The Netherlands is an international frontrunner in introducing and expanding electric driving. There is an active joint cooperative approach between government and private parties, that is showing clear results. Initiatives of the Dutch Formula E-team (*Formule E-team*) and the central government have led to a successful tender for 9 subsidized projects for the nationwide pilot hybrid and electric driving (*Proeftuin hybride en elektrisch rijden*). Also, there is a joint government-corporate tender for electric cars for employees.

A universal agreement has been reached in The Netherlands for a standardized plug, that will expectedly be a new European standard by the end of 2010. Investments in charging infrastructure can be subsidized under the so called MIA/VAMIL regulations and the current network and charging point administrators have reached agreement on shared access to all such mutual networks and charging points in the start-up phase, free of charge until at least September 2011.

In addition, electric car buyers get very substantial subsidies that can be as high as 27.4 percent of the price of the car. Electric and hybrid corporate car leasing is also materially subsidized, which has already led to a substantial increase in sales of such vehicles in The Netherlands. In the coming years, until mass utilization of the fully Electric Vehicles ("EV"), the Plugin Hybrid Electric Vehicle ("PHEV") and Extended Range Electric Vehicle ("EREV") will also play an important role as intermediary cars.

For Chinese investors wanting to invest in real estate projects in The Netherlands, it is not always easy to get a clear vision on the large amount of legal aspects involved. How can they get a quick and clear insight into this?

For any Chinese investor looking to invest in real estate projects in the Netherlands, it is now easy to get a quick and clear vision of the main legal aspects involved. The practice area group Real Estate of CMS Derks Star Busmann has written the Yearbook Real Estate 2010, which covers all legal aspects of real estate law.

It reviews all relevant areas of law such as contract law, administrative law and property law. Particularly, it provides insight into property rights, project development and Public Private Partnerships, the Land Development Act (*Grondexploitatiewet*), construction law, (public) procurement law, competition law, rent and leasehold rights, the Spatial Planning Act (*Wet op de Ruimtelijke*

Ordering), the Housing Act (*Woningwet*), the Act General Provisions on Spatial law (*Wet Algemene Bepalingen Omgevingsrecht*), the Expropriation Act (*Onteigeningswet*), the Facilities for Disabled Act (*Wet Voorzieningen Gehandicapten*), environmental and spatial law, as well as regulations concerning monuments and archaeology. The Yearbook Real Estate 2010 is available for our clients free of charge.

Can you shed some light on how Chinese companies can optimally structure their cash position for their European operations?

Cash pooling enables corporate groups to 'pool' the cash of all their entities into one bank account. Each company regularly transfers their surplus cash to the single "master" bank account, and then draws funds to satisfy their own cash flow requirements. Such economies of scale help group companies to minimise bank charges and maximise interest payments.

Corporate groups can choose to physically or virtually transfer the funds. Either way, there are risks involved in setting up arrangements with banks and with setting up "cash pooling agreements" for each group company – specifically civil or criminal liabilities for the company and their officers.

For any Chinese company that is currently using or considering cash pooling, the CMS Cash Pooling guide contains very useful information. It details the risks of civil and criminal liability associated with cash pooling in nine European countries: The Netherlands, Austria, Belgium, France, Germany, Italy, Spain, Switzerland and the United Kingdom. It also discusses ways to help corporate groups reduce their risks.

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