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**Study on the feasibility of reducing obstacles to the transfer of
assets within a cross border banking group during a financial
crisis**

National Report

NETHERLANDS

By

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Part I - National regulation

1 Summary

1.1 Generally speaking, is the transfer of assets allowed (could you please precise briefly under which conditions):

In crisis situation:

- from parent to subsidiary

In principle a transfer of assets is allowed. The main conditions to be taken into account are (including, but not limited) the following:

the transfer must occur at arm's length;

- **The transferor (in case of a bank) needs to comply with the ratio's (solvency, liquidity) set out in the FSA;**
- **the transfer may not prejudice the creditors of the transferor (*actio pauliana*); and**
- **certain type of transfers (mainly related to shares and voting rights) need approval by DNB or require a declaration of no objection.**

- from subsidiary to parent

same applies as from parent to subsidiary

- from subsidiary to another subsidiary

same applies as from parent to subsidiary

In going concern situations:

The same conditions have to be met. In a going concern situation the changes are higher than the transferor can meet the ratio's set out in the FSA. Also it is less likely that the other creditors are prejudiced by the transfer of assets.

Are there specific regulations for cross-border transfer of assets?

There are no specific regulations regarding cross-border transfers in the Netherlands.

- Are there any specific rules in Banking Law in relation to transfer of assets?

The most important specific rules in banking laws relate to the fact that the transferor (in case of a bank) needs to comply with the ratio's (solvency, liquidity) set out in the FSA.

2 Scope

2.1 Does the notion of company groups exist?

- Generally speaking in corporate Law? (If it exists, please give a definition, conditions and the main applications?)

2.1.1 Yes, the notion of company groups exists under Dutch corporate law. Laws applicable to company groups have not been systematically codified in the Netherlands. Laws which address the notion of company groups are found mainly in book 2 of the Dutch Civil Code (DCC), but the notion of company groups is also used in certain specific laws.

2.1.2 In section 2:24b DCC the notion of a group is described with the following: "A group is an economical unity in which legal entities and partnerships are organizationally connected. Group companies are legal entities and partnerships who are connected with each other in a group."

2.1.3 Section 2:24 DCC sets economical criteria: companies are considered a group if there is an organizational and economical unity. In principle a subsidiary (*dochtermaatschappij*) will belong to a group.

2.1.4 The notion of group companies is mainly used in laws on the consolidation of annual accounts of companies (2:403 DCC, 2:405 DCC et seq.), laws regarding the statutory two-tier company (*structuurvennootschap*) (2:153 (3) b and c DCC, 2:263 DCC, 2:155 (3) DCC and 265 DCC) and laws regarding capital contribution in kind (2:204a (3) DCC and 204b DCC).

- Is there in your national law a definition of "group interest" that specifically allows or facilitates intra-group transfer of assets?

2.1.5 "Group interest" is not a term which is defined in Dutch company law. Company law in the Netherlands is based on the theory that every individual legal entity has an independent economic interest which serves as the primary and decisive guideline for the actions of the board of management. The term "group interest" is used in Dutch literature regarding company groups, when describing the interest of a group to which the company belongs rather than the interest of an individual legal entity. The term does not specifically refer to intra-group transfer of assets. A more detailed description of the role or group interest in corporate law is set out in the attached article.

- Are there specific tax issues that need to be addressed in intra-group transfers of assets?

2.1.6 Yes, there specific tax issues that need to be addressed in intra-group transfers of assets. We refer to the question 0 and note the below.

2.1.7 For Dutch corporate income tax purposes group companies may elect to form a tax consolidated group or fiscal unity (*fiscale eenheid*). A fiscal unity (Article 15 Corporate income tax act, *Wet op de vennootschapsbelasting 1969*) (CITA) allows the companies involved to file a consolidated corporate income tax return.

2.1.8 The subsidiaries belonging to the fiscal unity are considered, for corporate income tax purposes, to be "absorbed" by the parent

company. As a result transactions between companies belonging to the fiscal unity (ie transaction between parent and subsidiaries and between one subsidiary and another subsidiary) do in principle not give rise to taxable profits or losses. However, anti-abuse measures exist for the prevention of using the consolidated group regime to avoid taxation on the disposal of such assets and liabilities to third parties (see 0).

2.1.9 A company can become a member of a consolidated tax group if:

- (a) the members of the group own a legal and beneficial interest of at least 95 percent in that company.**
- (b) the company and the tax consolidated group have the same financial year.**
- (c) the companies are subject to the same tax regime, e.g. it is not so that one is a fiscal investment fund, and the other not;**
- (d) either the companies are resident in the Netherlands for tax purposes or they have permanent establishments in the Netherlands and fulfil a number of additional conditions;**
- (e) a request to form a tax consolidated group is filed by the parent and the subsidiary to form a tax consolidated group. The group can not be formed earlier than three months prior to the time of filing the request; and**
- (f) the shares in the subsidiary are not held as stock in trade.**

2.1.10 Non-resident taxpayers incorporated under the laws of the Netherlands Antilles, Aruba, a member state of the European Union or another treaty country (which treaty contains a non-discrimination clause) and resident in such a country, with a taxable permanent establishment in the Netherlands can have that permanent establishment form part of a Dutch fiscal unity provided certain additional requirements are being met.

2.1.11 Article 15ai CITA provides for an anti-abuse measure in case of intra-group transaction. This measure concerns the transfer of hidden reserves within the tax consolidated group, followed by a tax

free disposal of those reserves, e.g. through the participation exemption.

2.1.12 The most common example of this is a company (ACo) having an asset worth 1000, including a hidden reserve of 500. Instead of selling that asset directly to a buyer and paying 25.5 percent tax on the 500 hidden reserve realised, ACo incorporates BCo; forms a consolidated group with BCo; transfers the asset to BCo; deconsolidates BCo and sells BCo to the buyer. The hidden reserve remains with BCo and ACo is said to have transformed its taxable profit into an exempt gain under the participation exemption. In order to prevent this, the law dictates that the asset must be marked to market just before the deconsolidation of BCo. If the taxpayer can prove the value of the asset at the time of the transfer, then the asset may be marked to its value at the time of the transfer, less subsequent depreciations instead.

2.1.13 No mark-up is required if:

- (g)** the hidden reserves were transferred within the tax consolidated group in connection with an asset merger solely against the issue of shares of the acquirer, and more than 3 years expired (same anti-abuse period applies for tax free asset mergers outside a tax consolidated group); or
- (h)** more than 6 calendar years expired since any other transfer of the hidden reserves; or
- (i)** the transfer took place in connection with ordinary business activities fitting the size and nature of the transferor and the acquirer.

- Are there specific regulations for banking groups?

2.1.14 There are specific regulations for banking groups. The main provisions regarding financial groups are set out in chapter 3.6 of the Financial Supervision Act of the Netherlands (FSA).

- Please specify any relevant information relating to intra-group transfer of assets that has not been dealt with in the previous questions and that would be useful for the study.

2.1.15 [Left blank]

3 Conditions and sanctions

a) Authorization

3.1 Do decisions to transfer assets have to follow specific approval procedures such as the approval of the board of directors or the transferor or transferee or the approval of shareholders obtained through a special meeting of shareholders?

3.1.1 Both Dutch private companies with limited liability (hereinafter also referred to as B.V.'s) and Dutch public limited companies (hereinafter also referred to as N.V.'s) have a management board and a general meeting of shareholders. Dutch public limited companies that (i) employ at least 100 employees in the Netherlands, (ii) have a works council, and (iii) an issued share capital greater than EUR 16.000.000, are also required to have a supervisory board. The management board, general meeting of shareholders and the supervisory board are considered the corporate bodies of Dutch B.V.'s and N.V.'s.

3.1.2 Sections 129 (for the N.V.) and 239 (for the B.V.) of Book 2 of the DCC state that, barring any restrictions under the articles of association, the management board shall be responsible for the management of the company. Paragraph 3 of the abovementioned sections of the DCC states that, by or pursuant to the articles of association of the company, resolutions of the management board may only be made subject to the approval of a corporate body.

3.1.3 Furthermore, it is stated in section 2:107a paragraph 1 DCC that, inter alia, the decision to sell off assets that make up at least one third of the assets on the balance sheet, is subject to the approval of the general meeting of shareholders.

3.1.4 A more general provision is included in provision IV.1 of the Dutch Corporate Governance Code (referred to in section 2:391 paragraph 5 DCC), namely that any decisions of the management board on a major change in the identity or character of the company shall be subject to the approval of the general meeting of shareholders.

3.1.5 There are no specific regulations that deal with the approval of the transfer of assets by Banking groups, nor are there any specific regulations regarding the approval of cross-border transfer of assets.

3.2 Do transfers of assets need to be approved by other third parties or supervisory authorities?

3.2.1 The approval of third parties or supervisory authorities is not required. This also no approval required for the cross-border transfer of assets.

3.2.2 An exception is laid down in the FSA in relation to shares and voting rights. Pursuant to the FSA (section 5:38 sub 1 and 2) any person acquiring or losing the disposal of shares or voting rights as a result of which, as this person knows or should know, the percentage of share capital or voting rights at its disposal reaches, exceeds or falls below a threshold value shall, without delay, notify the Netherlands Authority for the Financial Markets.

3.2.3 The threshold value is a percentage of the share capital or the voting rights which, when a person holding or acquiring shares or who may exercise or acquire voting rights attains, exceeds or falls below it, may lead to a notification under the FSA. In case of section 5:38 sub 1, the threshold values are: five per cent, ten per cent, fifteen per cent, twenty per cent, 25 per cent, thirty per cent, 40 per cent, 50 per cent, 60 per cent, 75 per cent and 95 per cent.

3.2.4 Other rules in relation for notifying, voting rights control and share capital interests in issuers are set out in chapter 5.3 FSA.

3.2.5 For certain transfers of assets a declaration of no objection from DCB may be required. Pursuant to article 3:95 FSA, a person can not hold, obtain or increase a qualifying holding or exercise any control relating to a qualifying holding in:

- (a) a bank established in the Netherlands**
- (b) a management company of an undertaking for collective investment in transferable securities established in the Netherlands;**
- (c) an investment firm established in the Netherlands; or**
- (d) an insurer established in the Netherlands,**

unless a declaration of no-objection from DCB has been obtained (or in the exceptions set out in Section 3:97 FSA).

3.2.6 Further to this it is specified in article 3:96 FSA that a bank established in the Netherlands may not, except after obtaining a declaration of no-objection from DCB (or in the exceptions and in the exceptions set out in Section 3:97 FSA):

- (a) reduce its own funds by redemption or distribution of reserves or make a payment from an item for reserve of all general banking risks, meant in Section 424 of Book 2 of the Dutch Civil Code;**
- (b) acquire or increase a qualifying holding in a bank, an investment firm, a financial institution or an insurer where the balance-sheet total of that bank, investment firm, financial institution or insurer at the time of acquisition or increase amounts to more than one per cent of the consolidated balance sheet total of the bank, meant in the opening words;**
- (c) acquire or increase a qualifying holding in an undertaking, other than a financial undertaking as meant under b if the amount paid for the acquisition of that qualifying holding or the increase of that qualifying holding together with the amounts paid for the acquisition and previous increases of that qualifying holding amount to more than one per cent of the consolidated own funds of the bank meant in the opening words;**
- (d) take over all or the major part of the assets and liabilities of another undertaking or institution, directly or indirectly, if the total amount of the assets to be taken over or the liabilities to be taken over amount to more than one per cent of the consolidated balance-sheet total of the bank, meant in the opening words;**
- (e) merge with another undertaking or institution if the balance-sheet total of the merging undertaking or institution amounts to more than one per cent of the consolidated balance-sheet total of the bank, meant in the opening words;**
- (f) commence a financial or company reorganization;**

(g) have a managing partner join the bank;

3.3 Do transfers of assets have to be notified to other third parties or supervisory bodies or published?

3.3.1 There is no general requirement to notify third parties or supervisory bodies of transfers of assets or to publish such information, though it is required in certain specific cases.

3.3.2 Provision III.6.4 of the Dutch Corporate Governance Code stipulates that all transactions between a company and legal or natural persons that hold at least 10% of the shares in the company, shall be published in the annual report, along with a declaration that this corporate governance provision has been observed.

3.3.3 The assignment (*cessie*) of claims against debtors (monetary or other rights) is also a transfer of assets in accordance with Dutch law. Dutch law distinguishes between disclosed assignment (*openbare cessie*) and undisclosed assignment (*stille cessie*). In the case of disclosed assignment, the rights to be exercised are transferred/ delivered by means of a (private) deed along with a notice thereof given by the transferor or transferee to the debtor.

3.3.4 Save for the exceptions set out above, banks are not required to inform third parties or the supervisory authorities if and when they want to carry out a transfer to another bank within the group.

3.4 Would a specific agreement incorporating the terms and conditions of the transfer between transferor and transferee and executed by their authorized representative be required?

3.4.1 Although not required as such, a specific agreement would be prudent for evidentiary purposes. Formalities apply in relation to the transfer of certain specific assets.

3.5 Are there differences between transfers in going concern situations / transfers in crisis situations?

3.5.1 In accordance with section 215 paragraph 2 of the Insolvency Act (*faillissementswet*), if and when the competent judge grants suspension of payments (*surséance van betaling*), he shall also appoint one or more administrators (*bewindvoerders*) who, together with the debtor, shall administer the affairs of the debtor. As a result thereof the right to manage (*beheerbevoegheden*) and to a certain

extent the right to dispose (*beschikkingsbevoegdheden*), require the administrator's cooperation in order to transfer the goods.

3.5.2 Banks have specific requirements that they must take into account. Article 3:53 of the Financial Supervision Act of the Netherlands (FSA) stipulates, inter alia, that credit institutions established in the Netherlands shall have a minimum amount of own funds at its disposal. If the credit institution expects or may reasonably expect that the minimum amount of own funds does not or will not comply with the rules mentioned in the FSA, it shall inform the Dutch Central Bank forthwith.

3.5.3 The Dutch Central Bank may, if so requested, grant a waiver, fully or in part, whether or not for a fixed term, of the minimum amount of own funds, if the applicant shows proof that it cannot reasonably comply with minimum required capital level and that the objectives that the minimum funds requirements seeks to attain shall be attained otherwise.

3.5.4 Article 3:57 FSA stipulates, inter alia, that credit institutions established in the Netherlands shall be sufficiently solvent. If a credit institution (or any of the other financial undertakings) expects or may reasonably expect that it does not or will not comply with the minimum solvency ratio, it shall inform the Dutch Central Bank forthwith.

3.5.5 The Dutch Central Bank may, if so requested, grant a waiver, fully or in part, whether or not for a fixed term, of the minimum solvency requirement, if the applicant shows proof that it cannot reasonably comply with minimum required capital level and that the objectives that the solvency requirements seeks to attain shall be attained otherwise.

3.5.6 Furthermore 3:63 FSA stipulates, inter alia, that credit institutions established in the Netherlands shall be sufficiently liquid. As in the case of expected insolvency, the credit institution shall inform the Dutch Central Bank forthwith if it expects or may reasonably expect that its liquidity does not or will not comply with the minimum required level, and the Dutch Central Bank may, if so requested, grant a waiver if the bank can prove that it can meet the objectives of the liquidity requirements otherwise.

3.5.7 The Dutch Central Bank does not automatically provide such a waiver. In accordance with 3:111a FSA, if a bank (or investment

firm) does not satisfy the requirements under or pursuant to the FSA with regard to the business operations and the required capital, the Dutch Central Bank may impose the following measures:

- (i) it may require the bank to maintain a higher amount in required capital than the required level pursuant to 3:57 FSA;**
- (ii) require the bank, in connection with the solvency requirements, to pursue a certain policy with regard to provisions or to treat its assets in a specific manner; or**
- (iii) require the bank to decrease the risk to which it is exposed.**

3.5.8 The Dutch Central Bank shall lift the measures as soon as the bank again satisfies the requirements under or pursuant to the FSA.

3.5.9 Moreover, in accordance with 3:160 FSA, if the solvency or liquidity of a (licensed) credit institution established in the Netherlands shows signs of dangerous development and no improvement of those developments is reasonably expected, or in the case that the insolvency or liquidity is such that it is reasonable to expect that the bank will be unable to honour all or part of its obligations in respect of the funds received by it, the competent court in the Netherlands may, if so requested by the Dutch Central Bank, apply the emergency regulations (*noodregeling*) to the credit institution in the interest of the creditors.

3.5.10 On declaring the emergency regulations applicable, the judge shall also appoint one or more administrators (*bewindvoerders*). The judge may authorise those administrators to:

- (iv) transfer all or part of the obligations (*verbintenissen*) of the credit institution, which it has assumed in the pursuit of the business of a credit institution to raise funds;**
- (v) wind up in full or in part the business of the credit institution; or**
- (vi) a combination of both.**

3.5.11 Furthermore, in accordance with 3:175 FSA, the administrators shall, solely and exclusively, exercise all powers of the management board and/or the supervisory board of the credit institution.

b) Counterpart for the asset transfer

3.6 Is the transfer of assets treated differently by your national Law :

- if it respects the arm's length principle/normal market conditions dealing (please explain what is considered as arm's length)

3.6.1 The tax aspects are set out immediately below. The legal aspects are set out in paragraph Erreur ! Source du renvoi introuvable..

Arm's length principle

3.6.2 The arm's length principle has been explicitly incorporated in Dutch tax law (Article 8b CITA) and closely adheres to with the wording of Article 9(a) and (b) of the OECD Model Convention, which is in line with the international practice to avoid international double taxation as much as possible.

3.6.3 If conditions (transfer prices) are made or imposed between related entities in their mutual legal relationships which differ from conditions which would have been agreed between independent parties in their business dealings, then the (Dutch) profits of these entities will be determined as if the latter conditions would have been agreed (see *Transfer pricing adjustments and penalties*). For the purpose of the Dutch transfer pricing rules, entities are deemed related if one entity participates directly or indirectly in the management, control or capital of another entity.

3.6.4 In addition Dutch taxpayers should maintain in their files documentation from which, amongst other things, the applicable transfer prices and the calculation thereof can be deduced, and from which it can be deduced that the applicable transfer prices are at arm's length (see *documentation requirements*).

3.6.5 If a taxpayer wishes to have advance comfort as regards its transfer pricing, it may apply for an advance pricing agreement with

the Dutch tax authorities (APA). This may be in either unilateral or multilateral form and is governed by detailed procedural regulations.

Documentation requirements

3.6.6 The documentation requirements of Article 8b CITA do not contain a specific and exhaustive list of information that taxpayers should maintain in their files. In practice, a taxpayer will only be able to demonstrate the arm's length character of a transaction by an economic analysis. For this reason taxpayers who want to take a prudent approach include an economic analysis in their transfer pricing files. This view is strengthened by the fact that when a taxpayer has not met the documentation requirements of Article 8b CITA, the taxpayer must demonstrate that the applied transfer prices are at arm's length.

3.6.7 From legislative history, it appears that taxpayers must provide the following information with respect to associated transactions and the relation between the entities involved:

3.6.8 A functional analysis made by the taxpayer of the controlled transactions they are engaged in with related entities. With respect hereto, the following characteristics as comparability factors should be documented:

- (vii) the characteristics of intra-group services provided between the related entities;**
- (viii) the functions performed, the risks assumed and the assets used by the related entities;**
- (ix) the contractual terms of the transactions between the related entities;**
- (x) the economic circumstances; and**
- (xi) the business strategies applied.**

3.6.9 The relevance of these factors depends on the facts and circumstances of the particular case.

- (h) Description of the transfer pricing method applied.**
- (i) Description of the resulting transfer price.**

3.6.10 Using the elements above, the company should be able to meet the documentation requirements of Article 8b CITA. However, no safe harbour rules have been introduced concerning the documentation that should be available.

3.6.11 The documentation must be in place at the time the intra-group transaction is entered into or within a reasonable time thereafter. Documentation should in principle be available within 3 months after the transaction took place.

3.6.12 According to the State Secretary, taxpayers can obtain certainty in advance whether they meet the documentation requirements of Article 8b. In practice however, it may be difficult to only provide certainty on the documentation requirements without assessing the arm's length character of the resulting transfer price. For this reason, when a taxpayer wishes to increase its level of comfort, it would in principle be possible to obtain certainty in advance by applying for an APA, however, this may be a lengthy process.

3.6.13 If the company complies with the documentation requirements and the information supplied constitutes sufficient proof that the transfer prices are at arm's length, the burden of proof is on the tax inspector. However, if it is clear that the company does not comply with the documentation requirements, the burden of proof shifts to the company. In such a case, the company should present a reasonable case that its transfer prices were determined taking into account the arm's length principle.

Transfer pricing adjustments and penalties

3.6.14 If the burden of proof has shifted to the taxpayer and the taxpayer is unable to prove that the transfer prices are at arm's length, the tax authorities may adjust the taxable income of the enterprise based on their own findings. In addition hereto, penalties may be imposed. When an adjustment is imposed, the taxpayer is also liable for the interest on the additional tax due.

3.6.15 Failure to comply with the documentation requirements can lead to penalties of up to 100 percent of the amount of tax due. However, it has been indicated that penalties for incorrect transfer pricing would be imposed only in cases of wilful misconduct.

3.6.16 If the Netherlands tax authorities impose a transfer pricing adjustment in an international transaction, this may lead to double taxation. The Netherlands tax authorities can only adjust the Dutch tax position.

Primary adjustments

3.6.17 Primary adjustments are the adjustments made to the applied transfer prices by the tax authorities on the basis of the arm's length principle as laid down in Article 8b CITA and Article 9, paragraph 1 of the OECD Model Convention. A primary adjustment leads to a corporate income tax adjustment (ie, increase or decrease).

Secondary adjustment

3.6.18 If by means of a primary adjustment and a corresponding adjustment, the transfer prices are brought in line with the arm's length principle, the factual allocation of profits will also need to be brought in line herewith.

3.6.19 The Netherlands tax authorities always require a transfer pricing adjustment to be processed by means of a secondary transaction. A secondary transaction may lead to a secondary adjustment, such as the attribution of interest to the current account, the levying of dividend withholding tax on a deemed distribution of income (constructive dividend) or recognition of an informal capital contribution.

Corresponding adjustment

3.6.20 When the tax authorities of one country make a transfer pricing adjustment without an adjustment being made in the pricing of the other country, international double taxation exists. To eliminate the resulting double taxation, the other country can make an opposite adjustment, a so-called corresponding adjustment (which can either be negative or positive).

3.6.21 Finally, a transaction that is done at arm's length / on market terms is less likely to be set aside as a transaction that is prejudicial to other creditors (*Actio Pauliana*) (see also below).

- if it is agreed under preferential conditions or disadvantageous to the transferee but advantageous to transferor and the group as a whole

3.6.22 A transaction done under preferential conditions disadvantageous to the transferee could be set aside by creditors of the transferee on the basis that it is prejudicial to them, and provided that:

(j) the transferor was under no legal obligation to carry out the transfer; and

(k) both the transferor and the transferee knew or should have known that the transfer was prejudicial to other creditors. If the transfer was for no consideration, this requirement applies only to the transferor;

- if there is no counterpart/compensation for the transfer

3.6.23 If there is no counterpart, knowledge of the transferee of the prejudicial nature of the transaction is not required. However, the avoidance of the transaction has no effect on the transferee if he provides evidence that he did not benefit from the transfer.

- if the transfer is included in a loan or credit agreement between transferor and transferee.

3.6.24 There is no specific regulation for a transfer that is included in the loan agreement.

3.7 Are there differences between transfers in going concern situations / transfers in crisis situations?

3.7.1 Yes, in the event of a transfer in a crisis situation, the preferential transfer is tested against the *Actio Pauliana* in bankruptcy. The most relevant provisions are:

(l) the transferor was under any legal obligation to carry out the transfer;

(m) the transfer is prejudicial to the interests of other creditors;

(n) both the transferor or transferee were aware (or should have been aware) that the transaction was prejudicial to the other creditors; and

(o) In the case of granting security this awareness is deemed to exist if the security was provided within a year of the date it is first contested or within a year before the date of the bankruptcy.

c) Compulsory counterparts and guarantees

3.8 Is there any compulsory counterpart or guarantee that transferee should provide to transferor?

3.8.1 There is no obligation under Dutch law that the transferee should provide any counterpart or guarantee to the transferor.

3.9 Please specify any other relevant information relating to the conditions to be met for a transfer of asset to be authorized that has not been dealt with in the previous question and that would be useful for the study

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d) Financial capacities of the transferor and the transferee

3.10 Does the decision to transfer have to comply with conditions relating to the financial capacities/health of the transferor/transferee?

This has been addressed above. A bank must continue to be able to meet its solvency or liquidity requirements.

What are the consequences when the transfer has occurred but those conditions have not been respected?

3.10.1 The mere failure to respect the solvency or liquidity requirements does not make the transfer itself void or avoidable, but the relevant transferor/transferee runs the risk of becoming subject to certain actions/procedures established to ensure the financial health of the credit institution.

3.11 Are there any conditions relating to the consequences of the transfer on the financial situation of the group?

- **No**

3.12 What is the rank of claim of the transferor in case of insolvency proceedings of the transferee ?

3.12.1 In accordance with 3:277 paragraph 1 DCC, all creditors shall have, amongst themselves, an equal right to be paid from the net proceeds of the debtors goods, in proportion to their claim. However, if there are grounds for preference (*voorrang*) recognised by Dutch law, the creditor with a preferred claim shall have a higher rank in case of insolvency.

3.12.2 Section 3:278 paragraph 1 stipulates that preference shall result from pledge (*pandrecht*), mortgage (*hypotheek*), privilege and other grounds provided for by law.

3.13 Please specify any other relevant information relating to Financial capacities of the transferor and the transferee that has not been dealt with in the previous question and that would be useful for the study

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3.14 Are there differences between transfers in going concern situations / transfers in crisis situations?

- **this question is dealt with above.**

e) Information and transparency

3.15 Does specific information have to be communicated on the transfer to :

- supervisors

3.15.1 In principle no specific information on a transfer of assets has to be communicated to any supervisors.

3.15.2 If a credit institution expects or may reasonably expect that, pursuant to the transfer of assets, it does not or will not comply with the rules with regard to (i) the minimum amount of own funds (3:53 FSA), (ii) the minimum solvency level (3:57 FSA) or (iii) the minimum liquidity level (3:63 FSA), it has an obligation to inform DCB forthwith.

- shareholders

3.15.3 It is stated in section 2:107a paragraph 1 DCC that, inter alia, the decision to sell off assets that make up at least one third of the assets on the balance sheet, is subject to the approval of the general meeting of shareholders.

3.15.4 The decision to transfer assets (in general or intra-group) can furthermore be made subject to the approval of the general meeting of shareholders or the supervisory board of a company pursuant to the articles of association of the company (sections 129 subsection 1 and 3 (for the N.V.) and section 239 subsection 1 and 3 (for the B.V.) of Book 2 DCC).

3.15.5 In the event where approval from the general meeting of shareholders is required for the transfer of assets, the shareholders should be informed with the details of the intended transaction.

- employees

3.15.6 Section 2 of the act on works councils (*wet op de ondernemingsraden*) (hereafter WOR) states that a company with over 50 employees is obligated to install a works council. A company is required to give its works council the opportunity to advise on the decisions of a company set out in section 25 WOR.

3.15.7 The works council of a company must be given the opportunity to advise on the decision to attract an important loan for the benefit of the company (section 25 sub i WOR) and the decision to extent an important credit for the benefit of the company (section 25 sub j WOR).

- third parties (specify who can have an access to this information and how)

3.15.8 No specific information on the transfer of assets has to be communicated to any third parties.

- If yes should this information be communicated before the transfer or after it :

- Shareholders - Before

3.15.9 If the decision to transfer assets is made subject to the approval by the general meeting of shareholders or the supervisory board of a company pursuant to the articles of association of the company (sections 129 subsection 1 and 3 (for the N.V.) and section 239 subsection 1 and 3 (for the B.V.) of Book 2 DCC) or if the decision is subject to the approval of the general meeting of shareholders pursuant section 2:107a paragraph 1 DCC, then information on the decision to transfer assets should be communicated prior to the transfer of assets.

3.15.10 The approval of the decision by the general meeting of shareholders or the supervisory board should in principle be obtained prior to the transfer of assets. If prior approval is, for any reason, not possible, then it is also an option to have the general meeting of shareholders or the supervisory board ratify the decision of the board of managing directors after the transfer of assets.

- Employees - Before

3.15.11 If advice from a works council is required, then this advice should be requested before the decision is made to make the intra-group transfer of assets. It is laid down in Section 25 subsection 2 WOR that the proposed decision (in this case relating to the transfer of assets) must be submitted in writing to the Works Council for its advice and that the advice must be requested at a time when it can still significantly affect the decision to be taken.

3.16 Please specify any other relevant information relating to Information and transparency that has not been dealt with in the previous question and that would be useful for the study

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- f) Sanctions

3.17 When a transfer of assets has occurred what are the sanctions (civil liability of the manager or the supervisory authorities, nullity, criminal penalty, ...) that may be incurred :

- under Insolvency Law

3.17.1 If, after the transfer of assets, the transferor goes bankrupt, the bankruptcy trustee (appointed by the court) may, pursuant to section 42 of the Insolvency Act invoke 'actio pauliana'. This means that, under certain circumstances, the bankruptcy trustee has the right to invalidate voluntary legal acts by the debtor conducted prior to the bankruptcy of the debtor and also has the right to invalidate obligatory legal acts by the debtor performed prior to the bankruptcy if, a consequence of such acts, the creditors of the debtor were prejudiced.

3.17.2 A legal act performed by a debtor who is a legal person with or in respect of a group company is on the list of situations in which the knowledge of prejudice is presumed by virtue of law.

- under Civil Law

3.17.3 Section 6:162 section 1 DCC stipulates four conditions for a person's obligation to compensate damage based on an unlawful act (tort) (i) a person has committed an unlawful act (*onrechtmatige daad*) against another person and (ii) the act can be attributed (*toegerekend*) to that person and (iii) another person has suffered damage (*schade*) and (iv) the unlawful act has caused these damages (*causaal verband*). Section 6:163 DCC provides for an exception to the general rule of section 6:162 DCC; it sets out that there is no obligation to repair damage when the violated norm does not have as its purpose the protection from damage such as the damage suffered by the victim.

3.17.4 Depending on the circumstances, it could be claimed by the person(s) who has/have suffered damages pursuant to the transfer of assets that the transfer of assets was an unlawful act as meant in the above described Section 6:162 DCC.

- under Company Law

3.17.5 A director can be held internally liable by their company based on section 2:9 DCC. Each director shall be responsible to a legal entity for the proper performance of the duties assigned to him. If a matter of the board falls outside the scope of responsibility of two or more directors, each shall be jointly and severally liable for any shortcomings, unless he proves that it is not attributable to him and that he was not negligent in acting to prevent its consequences.

3.17.6 The acts of a director can only be considered improper performance as meant in section 2:9 DCC if his acts would not have been performed by any reasonably acting director in the same circumstances. A director must be 'seriously to blame' in order for him to be liable pursuant to section 2:9 DCC (Staleman/Van de Ven-case, HR 10 January 1997, JOR 1997, 29)

3.17.7 According to section 2:248 DCC and 2:138 DCC a director may also be personally liable in case of a bankruptcy of the BV or NV of which he is a director. In a bankruptcy of a B.V. or an N.V., each director shall be jointly and severally liable to the estate for the amount of the obligations to the extent that these cannot be satisfied out of the liquidation of the assets, provided that the board has apparently performed its duties in an improper way and it is plausible that this is an important cause of the bankruptcy.

3.17.8 If the board of directors has not complied with its obligations under section 2:10 DCC (maintaining an adequate administration of the company) or 2:394 DCC (timely publication of the annual accounts and annual reports of the company), it has performed its duties in an improper way and it shall be presumed that this constitutes an important cause of the bankruptcy.

- under Banking Law

3.17.9 According to section 1:80 FSA the supervisor may impose an administrative penalty in relation to a violation of regulations laid down under the sections listed in the annex to section 1:80 FSA and the Prospectus Regulation and in relation to a violation of section 5:20 of the General Administrative Law Act. The administrative penalty shall accrue to the supervisor which has imposed the penalty. In section 1:81 FSA it is stated that the amount of the administrative penalty shall be determined by order in council, it being understood that the penalty per violation may not exceed €900,000.

3.17.10 The order in council shall determine per violation the amount of the administrative penalty to be imposed. The supervisory may reduce the amount of the administrative penalty as laid down by order in council if the amount of the penalty would be disproportionately high in a specific case.

3.17.11 Section 3:111a FSA states that if a bank or investment firm does not satisfy the requirements under or pursuant to the FSA with regard to the business operations and the required capital, DCB may impose the following measures on that bank or investment firm:

- (p) require it to maintain a higher amount in required capital than that laid down pursuant to Section 3:57 FSA;**
- (q) require it, in connection with the solvency requirements, to pursue a certain policy with regard to provisions or to treat its assets in a specific manner; or**
- (r) require the bank or investment firm to limit the risk to which it is exposed.**

3.17.11 If, on the basis of the evaluation meant in Section 3:18a FSA, DCB is of the opinion that the strategies, procedures and measures pursuant to Section 3:17 FSA or the required capital of the financial undertaking concerned do not guarantee a controlled and sustainable cover of its risks, DCB shall require the bank or investment firm to maintain a higher amount in required capital if other measures cannot, in reasonableness, ensure that the requirements pursuant to Section 3:17 FSA are satisfied within a reasonable period.

3.17.12 DCB shall lift the measures meant in the first and second subsections as soon as the bank or investment firm again satisfies the requirements under or pursuant to this Act with regard to business operations and required capital.

- under Criminal Law

3.17.13 The members of the organs of an insolvent entity can become subject to criminal prosecution, if they have prejudiced creditors or other claimants as referred to in Title XXVI of the Dutch Criminal Code (Art. 340 *et seq.*). This would require a clear criminal act by a director of a legal entity. The mere fact that a legal entity goes bankrupt, even in the event of bad administration that can be imputed to an individual, does not constitute a criminal act.

- Other

- g) Third parties

- Supervisory authorities

3.18 What is the role of the supervisory authorities in case of a transfer of assets (right to be informed, have to give an authorization..)? Please distinguish the home/host supervisory authorities.

3.18.1 Supervisory authorities in principle do not have a role in case of a transfer of assets.

3.18.2 This may be different for the supervisory authorities of the transferor if the transferor is a bank that does not meet the minimum capital requirements (Section 3:53 FSA), the solvency requirements (Section 3:57 FSA) or liquidity requirements as set out in the FSA (Section 3:63 FSA).

3.19 Are there any conditions or consequences relating to solvency ratios (implementation of Basle I et II notably)?

3.19.1 There are consequences relating to solvency ratios in relation to the transfer of assets.

3.19.2 Article 3:57 subsection 2 FSA is the basis for the regulations relating to solvency ratios. The solvency requirements for a bank are set out in further detail in chapter 10 of the Act prudential rules Wft (*Besluit prudentiele regels Wft*).

3.19.3 Section VII, subsection 2 of the Decree on the Implementation of the Basel II Capital Accord (*Besluit implementatie kapitaalakkoord Bazel 2*) states that the minimum amount of the regulatory capital (*toetsingsvermogen*) of a bank or investment firm which covers the solvency requirements for the purpose of covering of operational risk (calculated in accordance with section 78 Decree Prudential Rules under the Wft (*Besluit prudentiële regels Wft*)) should in the book years 2008 and 2009 be at least equal to 90% respectively 80% of the minimum amount of regulatory capital (as calculated in accordance with section 60 to 62 of the Decree Prudential Rules under the Wft).

3.20 Are there differences between transfers in going concern situations / transfers in crisis situations?

3.20.1 We refer to clause 0 above.

3.20.1 In case of a crisis situations, the transferor may not meet the minimum capital requirements (Section 3:53 FSA), the solvency requirements (Section 3:57 FSA) or liquidity requirements as set out in the FSA (Section 3:63 FSA).

3.20.2 As set out above, Section 3:111a FSA states that if a bank (or investment firm) does not satisfy the requirements under or pursuant to the FSA with regard to the business operations and the required capital, DCB may impose the following measures on that bank or investment firm:

- (s) require it to maintain a higher amount in required capital than that laid down pursuant to Section 3:57 FSA;**
- (t) require it, in connection with the solvency requirements, to pursue a certain policy with regard to provisions or to treat its assets in a specific manner; or**
- (u) require the bank or investment firm to limit the risk to which it is exposed.**

3.20.3 If DNB decides to take measures based on Section 3:111a FSA, this may impact the ability of a bank to transfer assets.

3.21 Please specify any relevant information relating to the supervisory authorities that has not been dealt with in the previous questions and that would be useful for the study

3.21.1 The FSA includes specific regulations applicable to financial conglomerates and credit institutions or investment firms with a mixed-activity holding company.

3.21.2 Section 3:280 subsection 1 FSA states that where a Dutch credit institution (or investment firm) has a mixed-activity holding company as a parent undertaking, DCB shall supervise the intra-group contracts and situations with the mixed-activity holding company and its subsidiaries.

3.21.3 Section 3:280 subsection 2 and 3 FSA furthermore state that the credit institution has to calculate and safeguard its intra-group contracts and situations with the mixed-activity holding company and its subsidiaries and that the credit institution has to, periodically, within the terms fixed to that end, submit to DCB a report including significant intra-group contracts and positions with the mixed-activity holding company and its subsidiaries.

3.21.4 Where the intra-group contracts and situations show that the financial situation of the credit institution is or might be jeopardized, DCB shall take measures in respect of that credit institution (Section 3:280 subsection 5 FSA).

3.21.5 Section 3:298 FSA sets out regulations in respect of financial conglomerates. It states that an undertaking which (alone or with another undertaking) is at the head of a financial conglomerate which includes a regulated entity established in the Netherlands shall report regularly and at least once a year all significant intra-group contracts and situations of regulated entities in the financial conglomerate to the DCB where the latter is the coordinator. In addition to this subsection 2 of 3:298 FSA states that DCB may (after consulting the other relevant Supervisory Authorities and the financial conglomerate) determine that a regulated entity it designates shall submit the report to DCB.

3.21.6 It is furthermore set out in subsection 3 and 4 that rules will be laid down under or pursuant to order in council with regard to the reporting meant in the first subsection. Those rules concern the content, the manner, the periodicity and the deadlines of the reporting. Rules may be laid down under or pursuant to order in council with regard to the quantitative or qualitative limits for intra-group contracts or situations or with regard to measures seeking to attain the same objective.

3.21.7 Finally it is stated in 3:298 subsection 5 that where a mixed financial holding company is at the head of a financial conglomerate and a regulated entity established in the Netherlands belongs to that financial conglomerate, any sectoral rules regarding intra-group contracts and situations applicable to the most important subgroup of the financial conglomerate shall concern the financial market sector as a whole, including the mixed financial holding company. Where a management company as meant in Section 3:292 (1) FSA forms part of a financial conglomerate, DCB shall determine to which subgroup that management company must be allocated.

- Minority shareholders

3.22 Does a minority shareholder of the transferor have any right concerning the transfer :

- before the transfer or the decision to transfer (eg. right of opposition, right of approval, right to be informed...),

3.22.1 As previously mentioned it is possible that, according to the articles of association of a company, the decision to transfer assets is subject to the approval of the general meeting of shareholders of a company (sections 129 subsection 1 and 3 (for the N.V.) and section 239 subsection 1 and 3 (for the B.V.) of Book 2 DCC).

3.22.2 If the transfer of assets is subject to prior approval of the general meeting of shareholders, then the minority shareholders has the right to be informed about the decision of the management board of the company to transfer assets and will also be allowed to cast their vote with regard to the approval of the decision (section 118 and section 228 Book 2 DCC).

- after the transfer (eg. Right to have the transfer annulled when transfer disadvantageous to transferor, request for an audit...).

3.22.3 [In section 15 of book 2 DCC the right is laid down to request nullification of a resolution if the shareholder who requests nullification has a reasonable interest in the due performance of the obligation which has not been performed. This right can be exercised with regard to a resolution by any constituent body of the legal person.]

3.22.4 Sections 344 to 359 Book 2 DCC relate to the right of minority shareholders to demand an inquiry. Section 2:345 subsection 1 states that the object of the inquiry is the policy and the conduct of business. The court may limit the inquiry either to a specific subject or to a specific period of time. The plaintiff cannot claim for damages through the inquiry proceedings. At the end of the proceedings he can only request measures which are purported to further the interests of the company.

3.22.5 Section 2:346 subsection b gives the power to request an inquiry to both to a shareholder and to a group of shareholders and to a depositary receipt holder or to a group of depositary receipt holders who represent at least 10% of the issued capital, or who are

entitled to an amount in shares or depositary receipts issued therefore with a nominal value of Euro 225,000 or such lesser amount as is provided by the articles of association of the company.

- Creditors
 - Do Creditors of the transferor have any rights concerning the transfer :
 - before the transfer or the decision to transfer (eg. Right of opposition, acceleration rights, or right of approval, right to be informed...),

3.22.6 Creditors do not have a statutory right concerning the transfer of assets before the transfer or on the decision to transfer.

3.22.7 Depending on the agreements made between the creditors and the transferor, the creditor(s) and the transferor, creditors may have certain contractual rights in relation to the transfer. It can, for example, be agreed between parties that the creditor has a right of approval, a right to be informed or a right of acceleration in the event of a transfer of certain assets by the transferor.

- after the transfer (right to have the transfer annulled for fraud when transfer disadvantageous to transferor and aimed at fleecing creditors...)

3.22.8 Pursuant to section 3:45 DCC a creditor has the right to declare a voluntary legal act by the debtor null and void if the debtor and his counterparty knew or should have known that this act would adversely affect the means of recourse of one or more creditors of the debtor. This is called an 'actio pauliana'.

3.22.9 Actio pauliana can be invoked by any creditor whose means of recourse against the debtor have been adversely affected, irrespective of whether the claim arose prior or after the voluntary legal act by the debtor. Creditors lose their right to invoke actio pauliana as soon as the transferor is declared bankrupt.

- Employees

3.23 Do Employees of the transferor have any right concerning the transfer :

- before the transfer or the decision to transfer (eg. Right of opposition, acceleration rights, or right of approval, right to be informed...),

3.23.1 The works council of a company must be given the opportunity to advise on the decision to attract an important loan for the benefit of the company (25 sub i WOR) and the decision to extent an important credit for the benefit of the company (25 sub j WOR).

- after the transfer (right to have the transfer annulled when transfer disadvantageous to transferor and likely to result in redundancies...)

3.23.2 The Works Council may lodge an appeal with the Enterprise Section (*Ondernemingskamer*) of the Amsterdam Court of Appeal against a decision by a company as meant in section 25, subsection 5 WOR, either if the decision does not accord with the advice of the Works Council or if facts or circumstances have become known which, if they had been known to the Works Council at the time of rendering its advice, could have been grounds for not rendering the advice as rendered.

- Deposit holders
 - Regarding the directive 94/19 : Who provides the deposit guarantee (the government, national bank, insurers...)? For which amount?

3.23.3 DCB administers the deposit guarantee scheme which is guaranteed (not funded) by the participating institutions. In section 3:260 FSA it is set out that DCB shall decide to apply a guarantee scheme where a financial undertaking (as meant in Section 3:258 (1) FSA) is unable to make payments. DCB shall publish a notification of the decision in the Government Gazette (3:260 subsection 3 FSA). In the application of a guarantee scheme DCB determines the size of the claims eligible for compensation, as well as the amount of the claims of investors or deposit holders eligible for compensation.

3.23.4 The Decree on Special Prudential Measures, Investor Compensation and Deposit Guarantees under the Wft (*Besluit*

bijzondere prudentiële maatregelen, beleggerscompensatie en depositogarantie Wft) (hereafter Decree Prudential Measures) elaborates the rules from chapter 3.5 of the FSA, namely special rules and measures with regard to financial undertakings.

3.23.5 Section 21 of the Decree Prudential Measures states that the banks (as referred to in section 18 Decree Prudential Measures) shall reimburse the amount, paid out under the deposit-guarantee scheme, to DNB in accordance with the apportionment percentage to be determined by DNB.

3.23.6 Section 22 of the Decree Prudential Measures sets out that DNB shall determine (in its own official capacity or at the request of official representatives and after consultations with these representatives) the apportionment percentage applicable to each bank on the basis of the consolidated prudential balance sheet submitted by the bank concerned to DNB prior to the point in time when DNB established inability to pay as referred to in Section 3:260 subsection 2 FSA. Section 22 of the Decree Prudential Measures furthermore states that DNB shall determine (after consulting official representatives) which prudential balance sheets are to be used and which items from these balance sheets are eligible for this calculation. In this calculation the total amount of these items for each bank shall be divided by the total amount of these items for all the banks together and the resulting figure shall be multiplied by 100 percent. The data for the bank that is unable to pay shall be excluded from the calculation.

3.24 Is there a specific regulation concerning the deposit guarantee in case of a transfer of assets in another Member State?

3.24.1 There is no specific regulation concerning the deposit guarantee in case of a transfer of assets in another member state.

3.25 If a transfer of assets including deposited funds occurs, does the deposit insurer or guarantor have to be notified?

3.25.1 DNB does not have to be notified in case of a transfer of assets including deposited funds.

3.26 Do Deposit holders of the transferor have any right concerning the transfer :

- before the transfer or the decision to transfer (eg. Right of opposition or right of prior approval)

3.26.1 [Deposit holders do not have rights before the transfer or the decision to transfer.]

- after the transfer (eg. right to have the transfer annulled as deposited funds not part of transferor's assets but belong to deposit holders...)

3.26.2 [Deposit holders do not have rights after the transfer or the decision to transfer.]

- Member State

3.27 In case of transfer of assets to/from a transferee/transferor located in another Member State, has the host/home Member State any right or obligation?

3.27.1 [The host/home member state does not have any right or obligation in case of a transfer of assets from a transferee/transferor located in another member state]

3.27.2 Article 1:51a (1) FSA states that for purposes of the supervision as meant in Part 3.6.2 FSA (*Consolidated supervision of investment firms and credit Institutions*), DCB works together with the Supervisory Authorities concerned of other Member States. In that context, DCB, if so requested, shall furnish all relevant information to that Supervisory Authority, with due regard to the provision under Section 1:90, subsections 1 - 3 FSA (Section 1:90, subsections 1 - 3 FSA gives certain cases in which confidential information or data may not be supplied to the Supervisory Authorities concerned of other Member States).

3.27.3 Article 1:51a (2) FSA furthermore states that DCB shall furnish to the Supervisory Authorities concerned of other Member States, of its own accord, all information that is essential for them to carry out their task of supervision, as meant in Part 3.6.2 FSA. Essential information as meant in the second subsection includes information on: developments in investment firms, credit institutions or other undertakings of the group that could have serious detrimental consequences for the investment firms or credit institutions (sub c) and important sanctions and special measures

taken by DCB or the Supervisory Authorities of other Member States with regard to the financial undertakings meant in Part 3.6.2 (sub d).

3.27.4 DCB has an obligation to collaborate with the Supervisory Authorities of other Member States in exercising the supervision meant in part 3.6.4 FSA (*prudential control on financial conglomerates*). This obligation is set out in section 1:54 FSA DCB shall supply the Supervisory Authorities, on request, with all relevant information and it shall supply them with all essential information on its own initiative. In subsection 2 of article 1:54 FSA it is set out that, in relation to this collaboration, DNB shall at least provide for the collection and exchange of information with regard to the certain items. Of the described items is the financial conglomerate's financial situation, in particular on capital adequacy, intra-group transactions, risk concentration, meant in Section 3:289 subsection 1 and the profitability.

- Others
 - Please specify any other relevant information relating to third parties that has not been dealt with in the previous question and that would be useful for the study

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h) Private international law

- What is the applicable law in case of transfer of assets:

3.28 If the transferor located in your member state and the transferee in another member state?

3.28.1 In principle, the applicable laws in respect of a transfer of assets are the laws of the member state chosen by the parties to the transfer.

3.28.2 On May first 2008 the act on the conflict of laws, property law (*wet conflictenrecht goederenrecht*) (WCG) came into effect in the Netherlands. This act codified a substantial part of Dutch international property law.

3.28.3 According to section 3 of the WCG, the property law applicable on assets (*zaken*) is the law of the state in which the asset is

located. This means that in principle the law of the transferor (in this case Dutch law), would be applicable.

3.29 If the transferor located in another member state and the transferee in you member state?

3.29.1 In principle, the applicable laws in respect of a transfer of assets are the laws of the member state chosen by the parties to the transfer.

3.29.2 According to section 3 of the WCG, the property law applicable on assets (*zaken*) is the law of the state in which the asset is located. This means that in principle the law of the transferor (in this case the law of the other member state), would be applicable.

3.30 Please specify any other relevant information relating to Private international law that has not been dealt with in the previous question and that would be useful for the study

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ANNEX A National regulations relevant in assets transfers between banks part of a same banking group

Tax regulations

Article 8b Corporate income tax act (*Wet op de vennootschapsbelasting 1969*)

"Paragraph 1: Where an entity participates directly or indirectly in the management, control or capital of another entity and conditions are made or imposed (transfer prices) between the two entities in their legal relations with each other which differ from those conditions which would be made between independent entities in the free market, the profit of those entities are determined as if the latter conditions have been agreed.

"Paragraph 2: The first paragraph is also applicable if the same person directly or indirectly participates in the management or control of, or the equity of, the one and the other entity.

"Paragraph 3: The entities meant in the first and second paragraph include information in their authorities from which the manner in which the transfer prices meant in that paragraph were formed can be demonstrated and from which it can be deduced whether, with regard to the transfer prices formed, it can be said that these are conditions which would have been agreed to between independent parties on the free market."

Article 15 Corporate income tax act (*Wet op de vennootschapsbelasting 1969*)

"Paragraph 1: If a taxpayer (parent) holds the legal and beneficial title of at least 95 percent of the shares in the par value of the paid up shares of another taxpayer (subsidiary), then, at the request of both taxpayers, the tax is levied from them as if there is one taxpayer, in the sense that the activities and the equity of the subsidiary form part of the activities and equity of the parent.

The tax is levied from the parent. In that case, the taxpayers are treated as a tax consolidated group ("fiscal unity" - Dutchtax.net). More than one subsidiary can form part of a tax consolidated group.

Paragraph 2: Holding shares as meant in the first paragraph includes an indirect holding of shares, provided that these are directly held by one or more taxpayers forming part of the tax consolidated group.

Paragraph 3: The first paragraph is only applicable if:

- a. the periods over which tax is levied are the same for both taxpayers, provided that a part of a financial year which is treated as a separate year under article 7, fourth paragraph, is not treated as a separate period for the purposes of this section;
- b. the same measures are applicable to the determination of the profits of both taxpayers;
- c. both taxpayers are resident in the Netherlands and if the Tax Agreement for the Kingdom of the Netherlands or a treaty for the prevention of double taxation is applicable to a taxpayer, that taxpayer is also deemed to be resident in the Netherlands according to the Agreement or that treaty.
- d. the parent is an NV, a BV, a cooperative or a mutual insurance company, or a company that is incorporated under the laws of the Netherlands Antilles, Aruba, a member state of the European Union or a state in relation to which a treaty for the prevention of double taxation concluded with the Netherlands is applicable in which a clause is included preventing discrimination on the basis of nationality for entities which otherwise are in similar circumstances as entities incorporated under Dutch law, which entity is furthermore similar to the previously mentioned entities incorporated under Dutch law with regard to its nature and set up;
- e. the subsidiary is an NV, a BV or an entity which is similar thereto in terms of its nature and set up, which is incorporated under the laws of a country or state meant under letter d;
- f. the parent does not hold the shares in the subsidiary, directly or indirectly as stock in trade.

Paragraph 4: Conditions can be set by Ministerial Decree according to which taxpayers for whom different measures are applicable for the determination of their profits can form a tax consolidated group, contrary to the third paragraph, letter b. Furthermore, contrary to paragraph 3, letter c, a taxpayer which is not resident in the Netherlands according to national law, or under the Tax Agreement for the Kingdom of the Netherlands or a treaty for the prevention of double taxation, but which does run an enterprise through a permanent establishment in the Netherlands, may, and under conditions set by general decree of government, form part of a tax consolidated group to the extent that the right to taxation on profits from this enterprise is allocated to the Netherlands under the Tax Agreement for the Kingdom of the Netherlands or a treaty for the prevention of double taxation, if:

- a. the place of actual management of this taxpayer is situated in the Netherlands Antilles, Aruba, a member state of the European Union or a state in relation to which a treaty for the prevention of double taxation concluded with the Netherlands is applicable in which a clause is included preventing the discrimination of permanent establishments;

- b. the taxpayer, meant under letter a, is an NV, a BV or an entity of similar nature and set up; and
- c. - in case the taxpayer, meant under letter a, forms part of a tax consolidated group as parent - the shares held in the subsidiary, meant in the first paragraph, form part of the assets of the permanent establishment situated in the Netherlands of this parent.

Contrary to the first paragraph, the conditions meant in the previous sentence can also concern the question which part of the activities and the equity of the subsidiary forms part of the activities and the equity of the parent.

Paragraph 5: The tax consolidated group is formed at the time indicated by the taxpayers in the request meant in the first paragraph, but not earlier than three months before the time that the request is made.

Paragraph 6: The tax consolidated group ends:

- a. if the conditions set by or through this article are no longer fulfilled;
- b. if the taxpayer, meant in the fourth paragraph, second sentence, moves the place of actual management to the Netherlands;
- c. if the taxpayer moves the place of actual management to outside the Netherlands whilst leaving a permanent establishment in the Netherlands;
- d. at the joint request of the parent and subsidiary at the time mentioned in the request, but not earlier than the date of filing the request;

provided that if the tax consolidated group is ended with regard to one or more subsidiaries, the tax consolidated group does not also end with regard to other taxpayers.

Paragraph 7: If a subsidiary joins a tax consolidated group during the financial year and if this tax consolidated group is ended with this subsidiary during the same financial year, then no tax consolidated group is deemed to have been formed in the meantime with regard to this subsidiary. The previous sentence is also applicable to an existing tax consolidated group which joins another tax consolidated group during its financial year and leaves the last consolidated group in the same year.

Paragraph 8: The request meant in the first paragraph and sixth paragraph, letter d, is made with the tax inspector dealing with the assessment of the parent. The inspector takes a decision against which a notice of objection can be filed.

Paragraph 9: If the taxpayer making the request meant in the first paragraph is already a parent in a consolidated tax group, then this request is deemed

to also be made on behalf of the other taxpayers which form part of that tax consolidated group.

Paragraph 10: Further conditions can be set by or through general decree of government to safeguard the levying and collection of taxes in view of the fact that the taxpayers meant in the first paragraph form a tax consolidated group for purposes of this law. These conditions also include conditions for:

- a. the determination if an entity incorporated under foreign law is similar to an entity incorporated under Dutch law as meant in letters d and e of the third paragraph;
- b. the fact that the parent does not hold all the shares in the subsidiary;
- c. the continuation of the tax consolidated group with regard to a taxpayer in case of a condition as meant in the sixth paragraph, letter b or c;
- d. the application of article 13d, eighth paragraph, and articles 15ab through 15af;
- e. the calculation of exemptions for the prevention of double taxation with regard to foreign results;
- f. the application of the royalty box; and
- g. the application of the participation credit.

Paragraph 11, Conditions set to general decree of government

A general decree of government issued under the fourth paragraph, first sentence and tenth paragraph does not enter into force earlier than eight weeks after the date of issue of the Government Gazette in which it is placed. Both chambers of are immediately informed of the placement.”