

Corporate Governance and Directors' Duties in the Netherlands: Overview

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A Q&A guide to corporate governance law in the Netherlands.

The Q&A gives a high-level overview of the main forms of corporate entity used; the corporate governance legal framework; board composition and restrictions; directors' remuneration; management rules and authority; directors' duties and liabilities; transactions with directors and conflicts; and internal controls, accounts and audits.

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Corporate Entities

1. What are the main forms of corporate entity used?

Under Dutch corporate law, there are two main types of corporate entities used for commercial activities:

- Private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid*) (BV).
- Public company with limited liability (*naamloze vennootschap*) (NV).

Both BVs and NVs are entities with legal personality and capital divided into shares. Both can be privately held or publicly traded. The BV is the most frequently used corporate entity form in the Netherlands.

Other companies with a legal personality in the Netherlands include:

- Foundation (*stichting*).
- Co-operative (*coöperatie*).
- Mutual insurance association (*onderlinge waarborgmaatschappij*).
- Association (*vereniging*).

Companies without a legal personality include:

- General partnership (*vennootschap onder firma*).
- Limited partnership (*commanditaire vennootschap*).
- Partnership (*maatschap*).
- Sole trader (*eenmanszaak*).

This Q&A predominantly focuses on BVs and NVs, unless stated otherwise.

Legal Framework

2. What is the main corporate governance legislation? What are the authorities that enforce it?

Dutch corporate law is primarily regulated by Book 2 of the Dutch Civil Code (Civil Code) and applies to publicly listed and privately held Dutch corporate entities. Book 2 of the Civil Code sets out the duties and powers of the various corporate bodies, as well as rules on representation, conflicts of interest, the liability of management and supervisory board members, financial reporting and disclosure.

In addition, the rules on the supervision of the business conduct of listed companies are set out in Chapter 5 of the Financial Supervision Act (*Wet op het financieel toezicht*) (FSA). The FSA contains rules on the disclosure of major holdings, financial reporting, the prevention of market abuse and the obligations of institutional investors. Supervising compliance with these rules is carried out by the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*).

3. Has your jurisdiction adopted a corporate governance code?

The Dutch Corporate Governance Code (CG Code) applies to listed companies. The CG Code is used in case law as a standard for good governance for other companies.

The CG Code was first adopted in 2004 and last revised in 2022. The CG Code contains principles and best practice provisions relating to:

- The relationship between the management board, the supervisory board and the general meeting/shareholders of a company.
- Risk management, diversity, independence of the supervisory board, evaluation and remuneration.

The principles are complemented by best practice provisions which reflect the best practice standards on the general principles of good corporate governance.

On 22 December 2022, a revised CG Code was published. Outlines of the revised CG Code include:

- Stronger commitment to sustainability and ESG.
- The role of shareholders.
- Diversity and inclusion.
- Enhanced focus on behaviour and culture.

The revised CG Code has been effective from the fiscal year beginning on or after 1 January 2023. Dutch listed companies must comply with the revised CG Code from that date on. Listed companies were deemed to comply with the revised CG Code if they had implemented the regulations, procedures or other written commitments by 31 December 2023, as far as they need to be amended as a result of changes to principles or best practice provisions in the revised CG Code.

The first Dutch Stewardship Code came into effect in 2019. This code of conduct, prepared by institutional investors, expresses the increasing importance of engaged and responsible shareholders and the role that institutional investors play in the promotion of long-term value creation by the Dutch listed companies in which they invest.

Board Composition and Restrictions

4. What is the management/board structure of a private company?

Structure

Dutch corporate law is based on a two-tier system, in which a supervisory board exists alongside the management board. The supervisory board supervises the management board and the general course of affairs of the company and the enterprises connected with it. It also assists the management board by providing advice where necessary.

A supervisory board is mandatory when a company qualifies as a "structure company" (*structuurvennootschap*) under the statutory two-tier rules (*structuurregime*). A company is subject to this regime if, for three consecutive years:

- Its issued capital and reserves amount to not less than EUR16 million.
- It has a works council instituted under a statutory requirement.
- It regularly employs at least 100 employees in the Netherlands .

As an alternative to the two-tier system, Dutch companies can opt for a one-tier system. A one-tier system consists of a one-tier management board comprised of both executives and non-executive directors. One of the mandatory statutory duties of non-executive directors is to supervise the exercise of duties of the management board by all its members.

Management

In the two-tier board structure, the primary responsibility of the management board is to manage the company and its enterprise. In the performance of its duties, the board is collectively responsible for the policy, strategy and day-to-day management of the company.

In a one-tier board structure, the tasks within the management board are divided between the executive directors and the non-executive directors. The executive directors are responsible for the daily management of the company. The general affairs of the company are the responsibility of all board members, both executive and non-executive.

The management board must carry out its duties in line with the objects of the company, which are included in the company's articles of association (articles). Dutch law requires the management board members, when carrying out their duties, to be primarily guided by the interests of the company and the enterprise connected with it. This means that the management board must take into account the interests of all stakeholders, including shareholders, employees, creditors and others.

In addition, management board members have a duty to act in accordance with principles of reasonableness and fairness towards other corporate bodies and between each other.

Board Members

The management board is composed of natural or legal persons.

Employees' Representation

Companies and organisations with 50 or more employees must have a works council. In structure companies, the works council has, by law, an enhanced right to recommend a third of the members of the supervisory board, or of the non-executive directors in a one-tier board for nomination. A person appointed on this recommendation automatically sits on the remuneration committee, if established by the supervisory board from among its members. Persons employed by a structure company or a dependent company (*afhankelijke maatschappij*) cannot be supervisory directors or non-executive directors of that company.

Number of Directors or Members

The management board must consist of at least one member. In a one-tier board, the minimum number of executives is one and non-executive directors should be two. Usually the articles determine the number of board members.

Under the CG Code, the management board of a listed company must be of such a size that it has the expertise, background and skills to perform its duties properly, taking into account the nature and activities of the company's business.

5. Are there any general restrictions or requirements on the identity of directors?

General Restrictions

Book 2 of the Civil Code does not contain general restrictions on who can be a director.

The articles of an NV and BV can limit the circle of persons eligible for appointment by setting requirements with which directors must comply. The statutory quality requirements can be set aside by a resolution of the general meeting.

Age

Book 2 of the Civil Code does not set an age limit for management board members, but the articles may provide otherwise. In practice, however, this is not often the case.

The articles sometimes contain an age limit for supervisory board members, often 70 or 72 years. This is permissible, despite the abolition of the statutory age limit of 72 years in 2001.

Nationality

There are no legal requirements on the nationality of members of the management and supervisory board.

Corporate Directors

Both natural persons as well as legal entities can be management board members. Supervisory board members can only be natural persons.

Diversity

Under the EU Non-Financial Reporting Directive (2014/95/EU) (*NFRD*), large public interest entities (listed companies, banks and certain insurers) must have a diversity policy and provide information on it in the corporate governance statement of the management report. Under the NFRD, diversity is used in the broad sense of the word (nationality, age, gender, educational, professional background and so on).

Based on the CG Code, listed companies must prepare a diversity and inclusion policy for the composition of the management board, the supervisory board and, if applicable, the executive committee and categories of employees in senior management positions to be defined by the company. Here, too, diversity should be interpreted in the broad sense of the word.

From 1 January 2022, a statutory diversity quota of one-third men and one-third women has applied to the supervisory boards of Dutch companies listed on Euronext Amsterdam. This means that apart from two specified exemptions, any appointment that does not make the composition of the supervisory board more balanced is null and void. The same goes for the non-executive directors if a company listed on Euronext Amsterdam has a one-tier board.

In addition, large companies must set appropriate and ambitious gender diversity targets for the management board, supervisory board (not applicable to companies listed on Euronext Amsterdam) and categories of employees in senior management positions to be defined by the company.

A large company is one that exceeds at least two of the three following criteria on its balance sheet date for two consecutive years:

- Balance sheet total: EUR25 million.
- Net turnover: EUR50 million.
- Average number of employees during the financial year: 250.

Such companies must also prepare a plan to achieve the set diversity goals. They are required to report on this in the management report and to the Social and Economic Council of the Netherlands (SER) within ten months of the end of the financial year.

6. Are non-executive, supervisory, or independent directors recognised or required?

Recognition

An NV or BV can choose to establish a supervisory board. However, for structure companies the establishment of a supervisory board is mandatory.

Where an NV or a BV has a one-tier board, the board consists of executive directors and non-executive directors. In this one-tier board model, the non-executive directors must supervise the execution of duties by the directors. This task cannot be removed from the non-executive directors by a division of tasks (*taakverdeling*).

Board Composition

There is little on the composition, size and term of office of the supervisory board in Book 2 of the Civil Code.

There are a few mandatory provisions relating to the appointment of supervisory directors (and non-executive directors) including that a supervisory director or non-executive director can only be a natural person.

There are gender diversity rules for large companies (see [Question 5](#)) and limitations on the number of supervisory positions a person can hold with large companies (see [Question 7](#)).

Certain persons are not eligible to be a supervisory director of a structure company.

In addition, a supervisory board of a structure company must consist of at least three persons (or a one-tier board must have at least three non-executive directors) and must draw up a profile for its size and composition, taking into consideration the nature of its business, its activities and the desired expertise and background of its supervisory (or non-executive) directors.

Under the CG Code:

- The supervisory board of a listed company must be of an adequate size and composition to perform its duties properly.
- The supervisory board must create a profile that addresses the desired expertise, background and independence of the supervisory board members (or non-executives) as well as its desired size and composition in view of its diversity policy which must address gender diversity, age, education, background and nationality and set concrete targets.
- Each supervisory board member must have the specific expertise required for the performance of their duties and must be capable of assessing the broad outline of the overall policy.

Book 2 of the Civil Code does not set out how many members a supervisory board of an NV or BV must have. In structure companies, the supervisory board must consist of at least three members. However, a structure company can derogate from this in its articles.

The articles of an NV and BV can provide for further requirements or qualifications for a supervisory director or non-executive director.

Independence

Although there are no general provisions on the independence of the supervisory board and the individual supervisory board members of an NV and BV in Book 2 of the Civil Code, it is generally accepted that such a board should, in principle, be sufficiently independent in relation to the company and its stakeholders. In addition, the chairperson of the supervisory board of an NV and BV should, in principle, be independent. This may be different, for example, in family businesses.

Employees and trade union representatives cannot be supervisory board members or non-executive board members of a structure company.

The CG Code requires the members of a supervisory board to operate independently and critically towards one another, the management board, and any particular interests involved, based on the following:

- All supervisory directors, except for a maximum of one, must be independent in accordance with specified provisions.
- Less than half the total number of supervisory directors, can be "dependent" in the sense that they can own a block of shares in the company totaling at least 10%, or can be a director or supervisory director of a legal entity with that shareholding.

- The chairperson of the supervisory board cannot be a former director of the company and must be independent.

7. Are the roles of individual board members restricted?

A management board member cannot also be a member of the supervisory board.

The chairperson of the supervisory board of an NV or BV should not be a former director of the company. For listed companies this is set out in the CG Code, which also provides that the supervisory board chairperson must be independent within the meaning of best practice provision 2.1.8.

In the one-tier board structure, only a non-executive director can become chair. The functions of board chair and CEO (the latter being an executive director) cannot be combined in one person.

The maximum number of positions that each member of a management or supervisory board of a large company (see [Question 5](#)) is allowed to hold is governed by Book 2 of the Civil Code.

In principle, a management board member or executive director can hold up to two supervisory positions in large companies in addition to their management board or executive position.

A person cannot be chairperson of a supervisory board or one-tier board in addition to being a management board member or executive director.

For a supervisory board member or non-executive director, the limit is a total of five supervisory positions in large companies, with a position as a supervisory board or one-tier board chairperson counting as two positions.

Under the CG Code, the approval of the supervisory board or the non-executive directors is required for a management board member or executive director of the company intending to accept a supervisory position elsewhere.

8. How are directors appointed and removed? Is shareholder approval required?

Appointment of Directors

The first appointment of a managing or supervisory director of an NV and BV is made by deed of incorporation.

After incorporation, the managing directors of an NV and BV are appointed by the general meeting. BV directors can also be appointed by a meeting of holders of shares of a certain class or designation. Managing directors of structure companies must be appointed by the supervisory board.

The supervisory directors are appointed by the general meeting. In addition, the articles of the NV and BV may provide that a maximum of one-third of the supervisory board members are appointed by third parties. In a BV, the articles can provide that the appointment of a supervisory board member is made by a meeting of holders of shares of a certain class or designation. In a structure company, the appointment of a supervisory board member must be made by the general meeting, by a special procedure.

The articles of an NV or a BV can provide that the appointment of a management board or supervisory board member by the general meeting must be made from a binding nomination. In that case, only the nominated person can be appointed as director. The nomination can be deprived of its binding character by a qualified majority decision of the general meeting.

Removal of Directors

Each managing director of an NV or a BV can be suspended and dismissed at any time by the person authorised to appoint them. A BV's articles can also grant the power to dismiss a management board member to another body. Suspension and dismissal can also be subject to more stringent majority and quorum requirements in the articles. In addition, the supervisory board can suspend each managing director at any time, unless the articles provide otherwise. The managing directors of a structure company can only be suspended and dismissed by the supervisory board.

In as far as the contractual relationship between a managing director and an NV or a BV can be regarded as an employment contract within the meaning of Book 7 of the Civil Code, the provisions of employment law will apply *mutatis mutandis*.

A supervisory director of an NV or a BV can be suspended and dismissed by the person authorised to appoint them. The general meeting of a BV not authorised to appoint can also be granted the power to dismiss by the articles.

A supervisory director of a structure company can be suspended by the supervisory board. On application by the company, the Netherlands Enterprise Court at the Amsterdam Court of Appeal (Enterprise Chamber) can remove supervisory board members of a structure company for dereliction of their duties, for other serious reasons, or on account of any substantial change of circumstances, as a result of which the company may not reasonably be required to maintain them as supervisory board members.

9. Are there any restrictions on a director's term of appointment?

Book 2 of the Civil Code does not provide general rules on the term of office of managing or supervisory directors of an NV or a BV.

A managing or supervisory director can be appointed for an indefinite period or for a fixed term. Under the CG Code, a managing director of a listed company is appointed for a maximum of four years and reappointment is possible each time for a maximum further four years.

A supervisory director of a structure company is appointed for four years (Book 2 Civil Code). After resignation, a supervisory director can be re-appointed.

Under the CG Code, a supervisory director of a listed company is appointed for four years and can then be re-appointed once more for a further four years. A supervisory director can once again be re-appointed for two years, which can be extended for a maximum of two more years. Re-appointment after eight years must be substantiated in the report of the supervisory board.

Directors' Remuneration

10. Must directors be employees of the company? Can shareholders inspect directors' service contracts?

Directors Employed by the Company

There is a dual legal relationship between the director and the NV or BV. This relationship is regulated by both company law as well as employment law.

The legal relationship between a management board member and a listed company is not regarded as an employment contract. This is a mandatory rule of law. Typically, there will be a contract of assignment. There is no restriction on agreements (employment or otherwise) between directors and subsidiaries of a listed company.

Shareholders' Inspection

Under the CG Code, the most important elements of a managing director's agreement with the listed company must be posted on the company's website after its conclusion in a transparent overview, no later than at the time of the notice convening the general meeting at which the appointment of the managing director is proposed.

11. Are directors allowed or required to own shares in the company?

In practice, managing directors of an NV or BV are often rewarded in shares. Proposals for remunerations to be paid in shares or rights to subscribe for shares require the approval of the general meeting.

Supervisory directors are rarely rewarded in shares. Supervisory board members of listed companies in principle cannot be awarded remuneration in the form of (rights to) shares. However, the CG Code leaves room for share ownership by a supervisory director. A supervisory director can therefore use its non-profit related remuneration to buy profit-related shares. The CG Code only provides that the shares held by a supervisory board member in the company in which they hold that position are for long-term investment purposes.

12. How is directors' remuneration determined, and must it be disclosed? Is shareholder approval required?

Determination of Directors' Remuneration

Unless the articles provide otherwise, the remuneration of individual directors of an NV and BV is determined by the general meeting. The articles of listed companies typically provide that this power is vested in the supervisory board.

In an NV, the remuneration of individual directors must be determined with due observance of the remuneration policy. The remuneration policy of listed companies must contain detailed information, including a description of the different components of fixed and variable remuneration (including all bonuses and other benefits and details on contracts with directors).

Disclosure

Each year, a listed company must draw up a detailed remuneration report providing a comprehensive overview of all remuneration awarded or due during the most recent financial year to individual directors. The remuneration report must be submitted to the general meeting on an annual basis for an advisory vote

Shareholder Approval

The remuneration policy of a listed company must be adopted by the general meeting at least every four years. Any amendments in the meantime must be adopted by the general meeting in the interim. The resolution of the general meeting to adopt the remuneration policy requires a 75% majority of the votes cast, unless the articles explicitly provide otherwise.

Management Rules and Authority

13. How is a company's internal management regulated?

Meetings of the Management Board

Neither Book 2 of the Civil Code nor the CG Code contain any regulations on the meetings of the management board. The articles or board regulations usually contain provisions about the board meeting.

There is no statutory requirement regarding the minimum number of meetings of the management board or supervisory board. The management board must meet frequently, at least as often as circumstances require.

The chairperson of the management board or any director can call a management board meeting on its own initiative. Notice must be given in writing or email and must be delivered in time before the date of the meeting, so that the management board members can properly prepare for the meeting.

All directors of an NV or BV have access to and are expected to be present at the board meetings. The articles often provide that a director can be represented at the meeting by a fellow director.

In practice, the management board often meets with the supervisory board, although the supervisory board must meet separately about certain matters concerning the management board.

Decision-Making of the Management Board

Where there is a multi-member management board, each managing director has only one vote. The company's articles can provide that a managing director has multiple voting rights, provided that one managing director cannot cast more votes than all the other managing directors collectively.

At a management board meeting, resolutions can be adopted by a majority of votes cast at the meeting, unless the articles set a higher majority or quorum. A decision must be reached as a result of mutual consultation (*vrucht van onderling overleg*) between all management board members who wish to take part in the consultation.

Where a vote is tied, the basic rule is that no resolution will be deemed to have been adopted. A possible solution to a tie is that the resolution will be adopted by a corporate body designated to do so in the articles (for example, the supervisory board or the general meeting). Resolutions can, in principle, be adopted outside a meeting, provided that all managing directors have agreed to this way of meeting, sometimes with the added requirement that the resolution is passed in writing and by unanimous vote.

14. Can directors exercise all the powers of the company or are some powers reserved to the supervisory board (if any) or a general meeting? Can the powers of directors be restricted and are such restrictions enforceable against third parties?

Directors' Powers

A management board is largely autonomous when performing its duties. Managing directors must be guided by the company's interests and its business or organisation. If shareholders' interests differ from the company's interests, managing directors must be guided by the company's interests, even if they risk being dismissed by the general meeting for doing so.

Restrictions

Within the framework of the company's interest, a management board's autonomy can be restricted by the right of approval or right to issue instructions of the general meeting and/or the supervisory board and/or another corporate body, based on the articles.

If a company is an NV, board resolutions on important changes to the identity of the company require the general meeting's approval. Although this provision does not apply to BVs, the due care required of directors of BVs may also require them to consult the general meeting about far-reaching resolutions.

In addition, certain board resolutions are always subject to the supervisory board's approval in the case of a structure company.

15. Can the board delegate responsibility for specific issues to individual directors or a committee of directors? Is the board required to delegate some responsibilities, for example for audit, appointment or directors' remuneration?

Division of Tasks

In principle, the policy and the day-to-day management of the company is a collective responsibility for the entire management board, but general duties of the members of the management board may be allocated as separate tasks to one or more members. This does not mean that responsibility for the actions of each of the managing directors is limited to the duties conferred on an individual managing director. The management board continues to have joint responsibility for the policy pursued.

A division of tasks can be laid down in the articles, in board regulations or both.

Where there is a one-tier board, one or more managing directors can be given the authority to take certain board resolutions under the articles, in addition to making a division of duties (Book 2 of the Civil Code). Resolutions adopted on the basis of this authority are then attributed to the management board as a whole. Here too, the principle of joint responsibility applies.

Executive Committee

In practice, an executive committee will include management board members and members of senior management, not being directors under the articles. An executive committee can be defined as a management layer responsible for the preparation and adoption of resolutions by the management board. It usually has an advisory and supporting function, but it can also have a more managerial function.

Supervisory Board Commissions

Under the CG Code, if the supervisory board consists of more than four members, it must appoint from among its members an:

- Audit committee.
- Remuneration committee.
- Selection and appointment committee.

Without prejudice to the collegiate responsibility of the supervisory board, the duty of these committees is to prepare the decision-making of the supervisory board. If the supervisory board decides not to establish the above committees, the relevant committee best practice provisions of the CG Code apply to the entire supervisory board.

Directors' Duties and Liabilities

16. What is the scope of a director's general duties and liability to the company, shareholders and third parties?

Duties

The entire management board of the company is collectively responsible for the policy and the day-to-day management of the company. Policy and day-to-day management include:

- The management of the company (subject to any limitations in the company's articles of association).
- Keeping proper company books and records.
- Preparing financial reports and publishing annual accounts in time.
- Acting in the corporate interest of the company.
- Management control (leading the company and its business, determining its general policy and co-ordinating its organisation, including that of the group).
- Financial control (managing the company's assets, controlling the flow of funds, administering the company's financial condition).
- Control of the company's legal acts (to ensure regulatory compliance and compliance with the company's articles, as well as to fulfil the duty of care towards third parties, by ensuring that the company observes the legal relationships entered into with the third parties).

Under Book 2 of the Civil Code, management board members must properly perform their management tasks (duty of care).

Board Members' Liability

Dutch civil and corporate law specifically imposes personal liability on management board members in a certain situations where the person fails to fulfil their duties:

- Liability in relation to the company on account of improper performance of duties (that is, mismanagement).
- Liability for providing misleading (interim) accounts or annual accounts.
- Liability for damages suffered by a third party (including the shareholders) under tort law.
- Liability against creditors.
- Other civil liabilities, for example, a management board member could be liable for any due and payable company debts if the company is unable to continue paying these debts after a dividend distribution has been made. Management board members will only be liable if they are aware or should have been aware of this inability.

Supervisory board members can also be liable to the company or to third parties.

17. Can a director's liability be restricted or limited? Can the company indemnify a director against liabilities?

Indemnification

In principle, management or supervisory board members can be indemnified for damage suffered as a result of claims made by third parties against them personally. However, where a management or supervisory board member is seriously accused in relation to the company, an indemnity will not apply, but can be sought in relation to the costs of defence against the claims.

Indemnification can be provided for in the company's articles or by contractual arrangement. The company typically pays the insurance premium.

Discharge

Management board members can be discharged by the company for their management, and supervisory board members can be discharged by the company for their supervision.

The discharge will be discussed as a separate agenda item, usually at the annual general meeting in which the annual accounts are discussed and established.

Discharge can also be granted to a management or supervisory board member when they resign as a board member (final discharge). In this case, the scope of the discharge extends in principle to all operations that are known to the general meeting during its administrative term.

18. Can a director obtain insurance against personal liability? If so, can the company pay the insurance premium?

Directors and officers (D&O) liability insurance is common in the Netherlands. Typically, the company is the policyholder and pays the insurance premiums, while managing directors and supervisory directors are the insured parties. D&O insurance covers all acts undertaken by managing directors and supervisory directors, with the exception of wilful misconduct and fraud.

19. Can a third party (such as a parent company or controlling shareholder) be liable as a de facto director (even though they have not been formally appointed as a director)?

The Dutch liability regime applies to management board members but not to other managers or directors. However, other parties can fall within the scope of directors' liability if they determined the policy of a company or predominantly participated in determining the policy (so called de facto directors) (*feitelijk beleidsbepalers*).

In principle, shareholders are not liable for facts or omissions of a corporate entity. However, if a shareholder acts as de facto director of a company, they may be liable. In general, involvement as a shareholder in the day-to-day management of the company and the internal decision-making process must be substantial before liability can arise.

Under Dutch case law, a shareholder can also be liable for the debts of its subsidiaries. This liability will depend on specific circumstances including how "inter-woven" (*vereenzelviging*) the group companies are, combined with the subsidiaries' risk management of operations that lead to a duty of care of the parent towards the creditors of its subsidiaries.

A parent company can also be liable for the debts of its subsidiaries if the difference between the parent and its subsidiary is minimal and that difference can be eliminated.

Transactions with Directors and Conflicts of Interest

20. Are there general rules relating to conflicts of interest between a director and the company?

A management board or supervisory board member cannot participate in the deliberation and adoption of resolutions if they have a direct or indirect personal interest in it which is in conflict with the company's interests. The managing or supervisory director must temporarily leave the management board or supervisory board meeting when the item concerned is on the agenda.

If a managing or supervisory director fails to leave and proceeds to take part in deliberations and/or the decision-making process, the board resolution will become voidable.

Any conflict of interest will only impact the internal decision-making process. Management board members with a conflicting interest remain authorised to represent the company.

If, as a result, no management resolution can be adopted, the resolution can be adopted by the supervisory board. Where there is no supervisory board, the resolution can be adopted by the general meeting, unless the articles provide otherwise. If all supervisory directors have a conflict of interest, the resolution will be adopted by the general meeting, except where the company's articles provide otherwise.

Under case law, a management board member has a duty to:

- Be fully transparent about possible conflicts.
- Keep conflicting interests separate from the interests of the company.
- Ensure that the company enters into transactions on customary and arm's-length terms, if necessary by involving external experts.

The CG Code stipulates that any form of conflict of interest between the company and the management board or supervisory board members should be prevented.

21. Are there restrictions on particular transactions between a company and its directors?

When a listed company grants a loan to a management board member, this may lead to a conflict of interest. Therefore, the CG Code provides that a listed company can only grant its management board members personal loans, guarantees and the like if:

- It is done in the normal course of business.
- On terms applicable to the entire staff.
- After approval from the supervisory board.
- Subject to the condition that the loans are not remitted.

A management or supervisory board member of a listed company cannot profit, as a related party, from a transaction with the company (related party transaction) (Book 2 Civil Code).

A related party transaction is a material transaction that is conducted by a listed company, other than in the ordinary course of business or under other conditions than normal market conditions, with a related party.

22. Are there restrictions on the purchase or sale by a company director of the shares and other securities of the company?

Under Regulation (EU) 596/2014 on market abuse (*Market Abuse Regulation*) and the Financial Supervision Act, a management or supervisory board member of a listed company must notify the Financial Markets Authority without delay of the changes in their shareholdings and/or voting rights in the listed company as well as in affiliated issuing institutions. The Financial Markets Authority makes this information publicly available in a register for manager transactions.

Internal Controls, Accounts and Audit

23. Are there any formal requirements or guidelines relating to the internal control of business risks?

The management board is responsible for identifying and managing the risks associated with the company's strategy and activities.

The supervisory board supervises the general and financial risks and the management and control system of the company. To enable the supervisory board to perform its supervisory duties, the management board must provide the supervisory board with information about the company's strategic policy, its general and financial risks and its internal control system at least once a year (Book 2 Civil Code).

In addition, the CG Code contains several best practice rules to further strengthen risk management and disclosure related to risk.

A listed company must have adequate internal risk management and control systems in place.

At least once a year, the management board must monitor the operation of the internal risk management and control systems and carry out a systematic assessment of their design and effectiveness. This monitoring will cover all material control measures relating to strategic, operational, compliance and reporting risks. In executing their duties, the supervisory directors take into account the effectiveness of the internal risk and control systems and the integrity and quality of the financial reports.

The duty of the internal audit function is to assess the design and the operation of the internal risk management and control systems. The management board is responsible for the internal audit function. The supervisory board oversees the internal audit function and maintains regular contact with the person fulfilling this function.

In the management report, the management board describes the main risks and uncertainties to which the NV or BV is exposed. If necessary, to properly understand the results or position of the company and its group companies, the management report must also contain an analysis of both financial and non-financial performance indicators, including environmental and employment-related issues.

24. What are the responsibilities and potential liabilities of directors in relation to the company's accounts?

Responsibilities

The management board is responsible for drawing up the annual financial statements (annual accounts, the management report and additional information) within five months of the end of the financial year and making them available for inspection by the shareholders at the office. This period can be extended once for up to five months. For listed companies a period of four months applies. This period cannot be extended.

The managing and supervisory directors must sign the annual accounts. If one or more of the signatures is missing, this must be stated, including the reason for it.

Subsequently, the general meeting adopts the annual accounts. If all the shareholders of a BV are also its directors, the signing of the annual accounts by all managing and supervisory directors will be deemed to be adoption by the general meeting, provided that all persons entitled to attend the meeting have been given the opportunity to inspect the annual accounts and have consented to the adoption.

The annual financial statements must be filed by the management board with the Trade Register of the Chamber of Commerce within eight days of their adoption by the general meeting. If the annual financial statements have not been adopted by the general meeting within two months after their preparation by the management board, the management board must file the non-adopted (audited) annual financial statements with the Trade Register. On the filed annual financial statements, this fact must be noted.

The annual financial statements must be filed by the management board with the Trade Register within 12 months after the end of each relevant fiscal year, whether or not the annual financial statements have been adopted by the general meeting.

Listed companies must submit their prepared annual financial statements to the Financial Markets Authority. The documentation must be kept publicly available for at least ten years.

Following the implementation of the NFRD, large public interest entities (with more than 500 employees), must set out certain items in a non-financial statement within the management report.

On 5 January 2023, the Corporate Sustainability Reporting Directive ((EU) 2022/2464) (CSRD) came into force. The CSRD replaces the NFRD. Under the CSRD certain large undertakings will have to draw up an extensive sustainability report on the basis of the European Sustainability Reporting Standards (ESRS). The CSRD will enter into force gradually, and the first group of companies that must comply with the CSRD are the large public interest entities as of financial years beginning on or after 1 January 2024.

See also: *Practice Note, EU sustainability reporting requirements under the Non-Financial Reporting Directive* and *Practice Note, EU sustainability reporting requirements under the Corporate Sustainability Reporting Directive: financial years starting on or after 1 January 2024*.

Potential Liabilities

Shortcomings in financial reporting or failure to comply with the obligation to publish the annual accounts can be grounds for a judgment of maladministration (*wanbeleid*) in inquiry proceedings at the Enterprise Chamber.

Non-compliance with the obligation to publish the annual accounts can also lead to liability of the directors towards the company and (with the burden of proof reversed) towards the bankrupt estate.

If the annual accounts, interim figures or the management report give a misleading impression of the company's situation, the directors are jointly and severally liable in relation to third parties for any loss they suffer as a result.

In certain cases, directors could be subject to criminal liability in relation to (the preparation of) the company's accounts. A director of a legal entity or company who intentionally publishes or allows the publication of an untrue statement or an untrue balance sheet, profit and loss account, statement of income and expenditure or notes to those documents could be held criminally liable (Article 336 of the Dutch Criminal Code). Within this context, certain acts could also constitute forgery of documents.

A director can also be criminally liable under the Economic Offences Act for failure to comply with some specific formal requirements of Title 9 of Book 2 of the Civil Code.

25. Do a company's accounts have to be audited?

Dutch corporate law requires an audit of the financial statements for all large and medium-sized companies. The external auditor must examine whether the annual accounts provide the requisite legal disclosures and whether the annual accounts, the director's report and other information comply with the statutory requirements (Book 2 Civil Code).

It must also be verified that the management report does not conflict with the annual accounts. The external auditor reports on it to the management and supervisory board and reports the result of the audit in a public statement on the fairness of the annual accounts.

26. How are the company's auditors appointed? Is there a limit on the length of their appointment?

An external auditor is appointed by the general meeting (Book 2 Civil Code). If the general meeting fails to do so, the supervisory board is authorised to. In the absence of a supervisory board, the management board is authorised. If an NV or a BV is a public interest entity the appointment must be notified to the Financial Markets Authority.

Further rules on the selection and appointment of auditors of public interest entities (such as listed companies) are included in:

- Regulation (EU) 537/2014 on specific requirements regarding statutory audit of public interest entities (*Audit Regulation*).
- The Decree Establishing an Audit Committee (*Besluit instelling auditcommissie*).
- The CG Code.

The audit committee has an important role in preparing the appointment.

Public interest entities must regularly change audit firms. By law, an audit firm cannot audit the same company for more than ten years and cannot carry out the statutory audit for four years after that period. Within the relevant audit firm, the auditor responsible for the audit is not allowed to be responsible for the audit report for more than five years.

27. Are there restrictions on who can be the company's auditors?

Only two types of auditors are allowed to perform statutory audits:

- Accounting consultants (*accountant-administratieconsulent*).
- Registered consultants (*registeraccountant*).

Both must be registered with the Royal Netherlands Institute of Chartered Accountants (*Nederlandse Beroepsorganisatie van Accountants*).

28. Are there restrictions on non-audit work that auditors can do for the company that they audit accounts for?

In addition to the Audit Regulation, the Act on the Supervision of Accounting Firms (*Wet toezicht accountantsorganisaties* (Wta) prohibits an audit firm that provides statutory audit services from carrying out any other activities for that organisation in addition to these audit services (separation of audit and advice).

The Audit Regulation lists the activities that are not permitted, while the Wta provides a list of what is permitted.

29. What is the potential liability of auditors to the company, its shareholders, and third parties if the audited accounts are inaccurate? Can their liability be limited or excluded?

Under Dutch law, civil proceedings can be instituted against auditors, for example, if damage is suffered as a result of wrongful conduct on the part of the auditor. In addition, a disciplinary complaint can be lodged. The complaint can be made about a professional service that an auditor has carried out. The auditor must comply with legislation and rules of conduct and professional practice and act in the interest of the proper practice of the audit profession.

In principle, it is possible for audit firms to limit or exclude liability towards the company by adding an exoneration clause to the general terms and conditions. However, if, given the circumstances of the case, the exoneration clause is unacceptable in terms of reasonableness and fairness, the clause will be excluded from application. In addition, liability cannot be excluded with respect to intent or deliberate recklessness (*opzet of bewuste roekeloosheid*).

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Recent Transactions

- Advising Knab on the proposed sale by ASR Nederland to the Austrian Bawag Group.
- Advising Ten Cate Investeringsmaatschappij on its intended recommended public cash or share offer for all issued and outstanding shares of Hydratec Industries.
- Advising Vereniging Aegon on the EUR4.9 billion combination of Aegon's Dutch operations with a.s.r.
- Advising Eneco on the EUR4.1 billion sale of all shares in Eneco to a consortium led by Mitsubishi Corporation.
- Advising 3G Capital on the EUR6.097 billion acquisition of a controlling interest in Hunter Douglas, the global market leader in window coverings (a.o. Luxaflex and Luxalon).

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- Supervisory board member of Wolters Kluwer.
- Supervisory board member of STMicroelectronics.
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END OF DOCUMENT

RESOURCE HISTORY

Law stated date updated following periodic maintenance.

This document has been reviewed by the author as part of its periodic maintenance to ensure it reflects the current law and market practice on 01 March 2024.

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