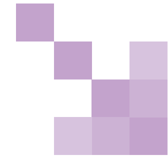
The Netherlands



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CORPORATE ENTITIES

The main corporate entities are the private limited company (*Besloten vennootschap met beperkte aansprakelijkheid*) (BV) (private company) and the public limited company (*Naamloze vennootschap*) (NV) (public company). Public companies can be listed on the stock exchange (listed companies).

The main difference between a private company and a public company is in the transferability of their shares. Public company shares can be in bearer form, which allows them to be freely negotiable. Private company shares must be registered and cannot generally be freely transferred.

European legislation has introduced the possibility of a European company (*Societas Europea*) (SE), which is also registrable in The Netherlands.

LEGAL FRAMEWORK

1. What is the regulatory framework for corporate governance and directors' duties?

Corporate governance and directors' duties are regulated by:

- Book 2 of the Dutch Civil Code (DCC), which imposes various mandatory rules for all companies.
- A company's articles of association (articles).
- The Works Council Act 1971 (*Wet op de ondernemingsraden*), which applies to companies with a works council. Companies that employ at least 50 people must set up a works council.
- A large company regime, set out in the DCC, which contains various mandatory rules relating, for example, to a two-tiered board structure. The large company regime applies to public companies and private companies which meet all the following criteria (large companies):
  - the issued share capital plus reserves is at least EUR16 million (about US$20.5 million);
  - the company or any subsidiary has established a works council under a statutory requirement;
  - the company, together with its subsidiaries, has 100 or more employees in The Netherlands.
- The Rules on Listed Securities (*Fondsenreglement*) of Euronext Amsterdam NV (Listing Rules), which apply to listed companies.
- The Act on Financial Supervision (*Wet op het Financieel Toezicht*). The Wft brings together most of the rules and conditions that apply to the financial markets and their supervision, such as the disclosure of substantial shareholdings and licence obligations.
- The Dutch Corporate Governance Code (CGC), which contains a non-binding list of proposals and principles for listed companies. Although the CGC is not mandatory, a breach of it may lead to a breach of the principle of reasonableness and fairness and there are plans to codify it.

BOARD COMPOSITION AND REMUNERATION OF DIRECTORS

2. What is the management/board structure of a company? In particular:

- **Is there a unitary or two-tiered board structure?**
- **Who manages a company and what name is given to these managers?**
- **Who sits on the board(s)?**
- **Do employees have a right to board representation?**
- **Is there a minimum or maximum number of directors or members of the managerial and supervisory bodies?**

- **Structure.** Dutch public and private companies must have a management board. The articles can provide for a two-tiered board structure with a management board and a supervisory board. A two-tiered board structure is mandatory for large companies (*see Question 1*). Although not expressly provided for in the DCC, it is possible to set up a one-tiered board under Dutch law. It is intended that the DCC will be amended so that the one-tier board will be expressly allowed under statute (*see Question 36*).
- **Management.** The day-to-day management of a company is carried out by the management board. The name that is given to members of the management board is managing director (*Bestuurder*).

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- **Board members.** The management board members sit on the management board and the supervisory board members sit on the supervisory board.

- **Employees' representation.** Employees can have, but are not entitled to, board representation. In large companies, the works council can recommend candidates for the supervisory board (*see Question 6, Appointment of directors*).

- **Number of directors or members.** The supervisory board must have at least one director (supervisory director), except for large companies, which must have at least three supervisory directors. The management board must have at least one director (managing director). References to directors in this chapter include management and supervisory directors, unless otherwise stated. There is no maximum number of directors.

3. Are there any age or nationality restrictions on the identity of directors?

Age restrictions

Dutch law imposes no restrictions on the age of directors.

Nationality restrictions

Dutch law imposes no restrictions on the identity of directors. However, restrictions can be set out in the articles.

For companies to qualify for certain tax exemptions, the Dutch tax authorities may require that one or more managing directors be Dutch residents.

In large companies, the supervisory board must set out criteria regulating its size and composition. Requirements relating to the identity of supervisory directors can be set out in these criteria.

4. In relation to non-executive, supervisory or independent directors:

- **Are they recognised?**
- **Does a part of the board have to consist of them? If so, what proportion?**
- **Do non-executive or supervisory directors have to be independent of the company? If so, what is the test for independence or what makes a director not independent?**
- **What is the scope of their duties and potential liability to the company, shareholders and third parties?**

- **Recognition.** In the DCC, the role of a non-executive director is recognised as a member of the supervisory board in a company with a two-tiered board structure. The DCC does not expressly provide for a one-tiered structure and therefore does not recognise a non-executive director as a member of the board in a one-tiered structure (*see Question 2*).

- **Board composition.** In a two-tiered structure, the supervisory board performs the role of non-executive directors. The CGC recommends that in a one-tiered structure, the majority of the members of the management board be non-executive directors.

- **Independence.** Supervisory directors must be guided by the interests of the company and its business when performing their duties (*DCC*). Large companies cannot appoint the following people as supervisory directors:
  - employees of the company;
  - employees of a subsidiary of the company; or
  - officers and employees of an employees' organisation usually involved in establishing the employment terms of employees of the company or its subsidiaries.

  The CGC recommends that the executive directors should be independent of management and free from any relationships (business or otherwise) that may interfere with their independence. The CGC sets out criteria for determining whether a non-executive director is independent and recommends that the annual report states whether these criteria have been met.

- **Duties and liabilities.** The supervisory board's duties consist of supervising management board policy and the company's general state of affairs. Generally, the liability of the management and supervisory boards is collective. This means that every managing director can be held jointly and severally liable for damages caused by the management board's failure (*see Question 14*) and every supervisory director can be held jointly and severally liable if it is determined that the supervisory board has failed to properly supervise the failing management board.

5. Are the roles of individual board members restricted? For example, can one person be the chairman and chief executive?

There are no restrictions imposed by law on the roles of directors. However, companies can set out, in the articles or in management regulations, the roles, tasks and duties of directors. The articles may provide special powers, for example, for a managing director to have a casting vote.

The CGC recommends that the chairman of the supervisory board should not be a former managing director of the company. In a one-tiered board, the CGC recommends that the chairman of the management board should not also be (or have been) an executive director.

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

Appointment of directors

The shareholders appoint managing directors in a general meeting of shareholders (general meeting). If a company has a works council, it must be given the chance to advise on a proposal

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to appoint or remove managing directors. In large companies, the supervisory board must inform a general meeting about its intended appointment of managing directors, but shareholder approval is not required.

A general meeting appoints supervisory directors from a list drawn up by the supervisory board. A general meeting can overrule the nomination of the supervisory board by a resolution passed by a majority of votes cast. The works council and a general meeting can make recommendations about candidates and the criteria used in the selection process. The works council can recommend candidates for at least one-third of the supervisory board.

The articles may set out different principles for appointing directors.

Removal of directors

The company body able to appoint directors, such as the supervisory board or a general meeting (*see above, Appointment of directors*), can also remove them at any time if certain requirements are met. A general meeting can remove the entire supervisory board by a vote of no confidence. In particular, based on the principle of reasonableness and fairness, a director must be given the opportunity to defend himself against the intended removal.

In large companies:

- The supervisory board removes managing directors after consulting a general meeting.
- A general meeting can dismiss the entire supervisory board by a vote of no confidence, after which the Company Division of the Amsterdam Court of Appeal appoints one or more supervisory directors, on a temporary basis, to ensure the new supervisory board is nominated.
- A general meeting cannot dismiss supervisory directors individually (but it can request the Company Division of the Amsterdam Court of Appeal to do so).

Under recent case law it was decided that the dismissal of a management board member automatically results in the termination of that member's employment relationship with the company (if any (*see Question 8*)), possibly giving rise to the company having to pay compensation through severance payments. Automatic termination of the employment relationship can only be prevented if the director being removed agrees with the continuation of his employment relationship.

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

There are no restrictions on the term of appointment of directors. In large companies, a supervisory board member must resign no later than four years after he is appointed. However, a supervisory board member can be reappointed and there is no limit on the number of times he can be reappointed.

The CGC recommends that a management board member be appointed for a maximum period of four years and that he should be reappointed for no more than four years at a time. The CGC recommends that a person should be appointed to the supervisory board for a maximum of three four-year terms.

8. Do directors have to be employees of the company? Can shareholders inspect directors' service contracts?

Directors employed by the company

It is not necessary for managing directors to be employees of the company. A managing director who receives a salary and performs work regularly is considered to be an employee of the company. A supervisory director usually performs incidental work for the company and is therefore not considered an employee.

Shareholders' inspection

Shareholders can inspect directors' service contracts.

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

Directors can own shares in the company, but it is not mandatory.

The CGC recommends that shares held by directors in a listed company should be considered a long-term investment and that shares granted to a managing director should in principle be based on performance criteria, such as achieving an increase in turnover. The CGC recommends that supervisory directors are not granted shares or share options in listed companies as remuneration.

10. How is directors' remuneration determined? Is its disclosure necessary? Is shareholder approval required?

Determination of directors' remuneration

A general meeting determines directors' remuneration, although the articles can provide otherwise. The articles of listed companies usually provide for the determination of directors' remuneration by the supervisory board. A public company must produce a policy on the remuneration of managing directors, which must be approved by a general meeting.

Disclosure

Subject to the DCC, public companies, except for a company limited by shares whose articles exclusively provide for registered shares and contain transfer restrictions, must state in the explanatory notes to their annual accounts the amount of remuneration for:

- The supervisory board.
- Each managing director (including details of any shares and share options they hold in the company).

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For listed companies, the CGC:

- Recommends that the supervisory board prepares a remuneration report on the company's remuneration policy in the previous and the next financial year.
- Requires that the main elements of a managing director's service contract, such as the amount of fixed salary and variable remuneration components, be made public immediately after it is concluded.

Shareholder approval

See above, *Determination of directors' remuneration*.

MANAGEMENT RULES AND AUTHORITY

11. How is a company's internal management regulated? For example, what is the length of notice and quorum for board meetings, and the voting requirements to pass resolutions at them?

The management board adopts resolutions which are passed by a majority of votes cast by its directors, unless the articles state otherwise. The articles can provide that board resolutions can be adopted by a unanimous vote or by a qualified majority of votes. The articles can require a plenary meeting or a quorum for the management board to adopt resolutions and may also set a notice period for board meetings.

Each managing director has one vote. The articles can give more than one vote to a director who can be specified by either name or office. A single director cannot cast more votes than the other directors combined.

12. 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

Generally, the management board has full and unrestricted power to represent and bind the company. The powers of individual managing directors can be restricted by the articles, in that a system can be used requiring the signatures of two or all directors for a company to be bound.

The articles can make management board resolutions subject to the approval of a company body, such as the supervisory board or a general meeting. In large companies, a number of management board resolutions are subject to the approval of the supervisory board.

Generally, a share-related decision, such as the issue of shares, reduction of issued capital, acquisition of shares by the company or cancellation of shares, requires the approval of a resolution by a general meeting, or is subject to the previous approval of a general meeting.

For matters not covered by the articles or the DCC, the DCC contains a catch-all provision stating that these matters are decided by a general meeting.

Restrictions

A restriction of the powers of individual managing directors by the articles is enforceable against third parties, provided this restriction is registered with the Trade Registry of the Chamber of Commerce.

If a management board resolution requires approval by a company body and this approval has not been given, the managing directors still bind the company.

13. 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?

The management board or the supervisory board can delegate responsibility for specific issues to individual directors or a committee of directors, under the articles or board regulations. However, if a matter falls within the responsibility of two or more directors, each director remains jointly and severally liable for it (*see Question 14*).

For listed companies, the CGC recommends that the supervisory board appoints, from among its directors, committees to deal with audit, remuneration, and selection and appointment.

DUTIES AND LIABILITIES OF DIRECTORS

14. What is the scope of a director's duties and personal liability to the company, shareholders and third parties? Please distinguish between civil and criminal liability under each of the following (if relevant):

- **General duties.**
- **Theft and fraud.**
- **Securities law.**
- **Insolvency law.**
- **Health and safety.**
- **Environment.**
- **Anti-trust.**
- **Other.**

- **General duties.** The duties and liabilities of the management board and the supervisory board are, in general, collective. However, each director has his own duty of care for the proper performance of his tasks. A director can discharge himself from liability by showing that any mismanagement or lack of supervision is not attributable to him.

  When adopting the annual accounts, a general meeting usually discharges the managing directors from their responsibilities for the preceding accounting year. This discharge only extends to activities and facts made known

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to the shareholders by the annual accounts or before they are adopted. A decision by a general meeting to grant this discharge is void if it is made in breach of the law, the articles or principles of good faith. The discharge is only valid in terms of the company's internal affairs.

- **Theft and fraud.** A legal entity can commit a crime under Dutch law. When a legal entity is found guilty of a crime, the managing directors and the individuals directly responsible for the company's criminal behaviour can face criminal penalties. In addition, many provisions of Dutch (economic) criminal law are specifically aimed at the management board or its directors.

  A company can also commit an offence under tort law. The managing directors can be liable for damages incurred by third parties, depending on the circumstances of the case.

- **Securities law.** A person who has insider knowledge cannot enter into transactions, in or from The Netherlands, in securities which are listed or are likely to be listed on an authorised securities exchange in or outside The Netherlands. Breach of this is an economic offence and The Netherlands Authority for the Financial Markets can complain to the Public Prosecutor, or impose an administrative fine or a cease and desist order.

  In certain circumstances, directors can be liable under tort law to investors if they produce a misleading prospectus in relation to an issue of securities.

- **Insolvency law.** If the company is insolvent and the company's insolvency is found to have been caused by apparent negligence in the performance of the duties of the management board over the three years before the date of the insolvency, the managing directors are personally liable for the company's debts.

  Apparent negligence is presumed if either (*DCC*):

  - the company has not kept sufficient accounts for all assets and liabilities to be determined at any time; or
  - the annual accounts have not been filed with the Trade Registry in a proper and timely manner.

  A managing director can only be discharged from liability by showing that he was not negligent and did not fail to meet his duty to take action to avoid or to prevent the consequences of mismanagement. If a failure of the duty to keep accounts is only insignificant, it is generally not taken into account and the director is usually discharged from liability.

- **Health and safety.** No specific regulations exist in relation to liability for health and safety issues. However a director can be criminally liable if it is proved that he contributed to the cause of health and safety issues by his consent or neglect.

- **Environment.** Directors can be held personally liable by the authorities or third parties for environmental damage resulting from misconduct or serious mismanagement by a director. In addition, a director can be criminally liable if it is proved that he contributed to the breach of such regulations by his consent or neglect.

- **Anti-trust.** Dutch competition law does not impose personal liability on directors for anti-trust offences.

- **Other.** Non-compliance with rules regarding the maintenance of the company's capital can impose personal liability on managing directors.

  Failure to notify the tax authorities of a company's future inability to pay tax (including social security benefits) will, if that non-payment occurs, result in the managing directors being personally liable for the tax owed by the company.

15. Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

Liability for the issues identified in *Question 14* cannot be restricted or limited.

A company sometimes indemnifies its managing directors for civil liability claims against them. This has not yet been recognised by law. It can be argued that the purpose of civil liability is defeated by such an indemnity and so it can be declared void.

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

Some insurance companies provide insurance for civil liability claims against directors (*see Question 15*). The company typically pays the insurance premium.

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

In relation to the insolvency of a company, a person who has determined, or jointly determined, the policy of the business of a company as if he were a director is liable in the same way as a director (*see Question 14*).

TRANSACTIONS WITH DIRECTORS AND CONFLICTS

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

Company law does not provide specific rules on when a conflict of interest between a director and the company occurs. However, there are rules on who can represent a company if there is a conflict of interest between a director and the company (*see Question 19*). In addition to restrictions on transactions in the DCC (*see Question 19*), the CGC has a general principle that a conflict of interest between a listed company and its managing directors should be avoided, and states that a managing director must:

- Not compete with the company.
- Not demand or accept substantial gifts from the company for himself or for, among others, his wife, registered partner or child.

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- Not provide unjustified advantages to third parties to the detriment of the company.
- Not take advantage of business opportunities to which the company is entitled for himself or for, among others, his wife, registered partner or child.
- Immediately report a potential conflict of interest to the company, the supervisory board chairman and managing directors.
- Not take part in discussions or decision making involving a subject or transaction in relation to which the managing director has a conflict of interest.

The CGC states that a transaction in which there are conflicts of interest between a listed company and its managing directors must:

- Only be entered into on terms that are customary in the sector concerned.
- Be approved by the supervisory board.
- Be published in the company's annual report.

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

There are certain restrictions on transactions between a company and its directors when a conflict of interest arises (*see Question 20*). If there is any conflict of interest between a company and one or more of its managing directors, in relation to a transaction or generally, the company is represented by its supervisory board, unless the articles state otherwise or if a general meeting appoints one or more other persons to represent the company (if this happens, the supervisory board can no longer represent the company).

Although not confirmed by case law, it is generally assumed that if the articles do not specify otherwise and a company has no supervisory board, when there is a conflict of interest, a company can be represented by its managing directors who have no conflict of interest or, if no such managing directors are available, by a person appointed by a general meeting to represent the company.

If there is a conflict of interest relating to a transaction between a company and one of its directors, in addition to the requirement that the director with an interest cannot represent the company, the corporate bodies involved should also act carefully in the company's decision-making process about the transaction, based on the principle of reasonableness and fairness. According to case law, it is essential to separate the different interests with due care and to exercise as much openness as possible. The advantages and disadvantages of a transaction should be discussed exhaustively by the corporate bodies concerned (*DCC*).

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

For unlisted companies, there are no general restrictions on the purchase or sale by a director of a company's shares and other securities.

For listed companies, there are restrictions on transactions in shares and securities by a director, to prevent insider trading and to ensure transparency of major shareholdings in Euronext Amsterdam listed companies. The restrictions are set out in the Act on Disclosure of Substantial Shareholdings 1996 and the Securities Market Supervision Act 1995.

DISCLOSURE OF INFORMATION

21. Do directors have to disclose information about the company to shareholders, the public or regulatory bodies?

The management board and the supervisory board must provide information about the company at the request of a general meeting, unless such disclosure conflicts with the company's material interest (*DCC*).

It is not clear whether an individual shareholder can request information directly from the management board and supervisory board. However, it can be argued that a request by an individual shareholder, submitted during a general meeting with the general approval of the other shareholders, will have to be addressed by the directors.

There are many circumstances in which the management board must disclose information about the company to shareholders and third parties (including authorities), such as the works council, the Trade Registry, regulatory bodies and the supervisory board. This is mainly in specific situations, such as the offer and issue of shares to the public, mergers, takeover bids (listed companies) and when directors are removed and appointed.

Managing directors of listed companies must disclose additional information based on, among other things, the Listing Rules. For example, the Listing Rules state that a listed company must publicise a fact or event that may have a significant influence on the price of its shares.

COMPANY MEETINGS

22. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved?

A general meeting must be held once a year, within six months from the end of a company's financial year, unless the articles provide for it to be held within a shorter period after the end of the financial year.

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The general meeting usually adopts the annual accounts in this meeting, but it is not obliged to do so.

23. Can shareholders call a meeting or propose a specific resolution for a meeting? If so, what level of shareholding is required to do this?

The management board and the supervisory board can call general meetings, but the articles may also authorise others, such as individual managing directors or holders of a specific kind of shares (for example preference shares), to call a meeting.

One or more shareholders together holding at least 10% of the issued share capital (or a lower percentage if stated by the articles) can, on application, be authorised by the interim provisions judge (*voorzieningenrechter*) of a court to convene a general meeting.

If the management board or supervisory board have failed to call a meeting within six months from the end of the company's financial year (*see Question 22*), a shareholder can apply to the interim provisions judge of a court for authorisation to call a general meeting.

One or more shareholders together holding at least 1% of the issued share capital (or, for listed companies, shareholders that individually or jointly own shares with a market value of at least EUR50 million (about US$64.1 million)) can propose specific resolutions, if the proposal does not conflict with the company's material interests and due notice is given to the other shareholders. The articles may differ and can grant more rights to shareholders on this issue.

MINORITY SHAREHOLDER ACTION

24. What action, if any, can a minority shareholder take if it believes the company is being mismanaged and what level of shareholding is required to do this?

One or more shareholders together holding at least 10% of the issued capital, or shareholders that hold shares with a nominal value of at least EUR225,000 (about US$228,382) (or a lower percentage or amount if the articles state otherwise), can request the Company Division of the Amsterdam Court of Appeal to appoint a person(s) to inquire into the policy and conduct of the company's business (*enquete procedure*). If this investigation concludes that mismanagement is apparent, the court can be requested to take measures such as to suspend or dismiss directors or temporarily transfer shares to a nominee.

Minority shareholders can also, for example:

- Request information from the supervisory or management board during a general meeting (*see Question 21*).
- Apply to court to convene a general meeting (*see Question 23*).
- Propose specific resolutions (*see Question 23*).

INTERNAL CONTROLS, ACCOUNTS AND AUDIT

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

For both listed and unlisted companies with a supervisory board, the management board must issue an in-control statement at least once a year. This statement must reflect the general principles of strategic policy, general and financial risks, and the risk monitoring and reporting systems of the relevant entity.

For unlisted companies, there are no other formal requirements relating to the internal control of business risks.

For listed companies, the CGC has a general principle that the management board is responsible for managing the risks associated with the company's activities, and states that a company should have an internal risk management and control system that should at least include:

- Risk analyses of the operational and financial objectives of the company.
- A corporate governance code of conduct (published on its website).
- Guidelines for the layout of the accounts and the procedure for drawing up the accounts.
- A system for monitoring and reporting.

The management board must also declare and show in the company's annual report that the internal risk management and control systems are adequate and effective, and identify these systems. Significant changes and planned improvements must be discussed with the supervisory board and the audit committee.

A BV or NV with a supervisory board requires the management board to report on most of the above mentioned items on an annual basis.

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

If the annual accounts, the annual report or any interim figures that the company publishes are misleading or inaccurate in relation to the company's state of affairs, each managing director can be held jointly and severally liable for damage incurred by third parties. Individual managing directors are not liable if they can prove that any misrepresentation or errors are not attributable to them.

Not filing the accounts in a timely manner may also cause the directors to be liable in the event of insolvency (*see Question 14*).

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

A company must have its accounts audited and published by filing the accounts with the Trade Registry, unless it is either a:

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- Small company, that is, a company that on two consecutive balance sheet dates and, without interruption, on two consecutive balance sheet dates after this, satisfies two of the following requirements:
  - the value of the assets according to the balance sheet and notes, on the basis of acquisition and production cost, is no more than EUR4.4 million (about US$5.6 million);
  - the net turnover for the financial year is no more than EUR8.8 million (about US$11.3 million);
  - the average number of employees during the financial year is fewer than 50.
- Subsidiary company that has its accounts consolidated in the published audited accounts of a direct or indirect parent company and, among other things, the parent company has declared itself jointly and severally liable for debt resulting from the subsidiary's legal acts.

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

The general meeting typically appoints the company's auditor. If the general meeting fails to do so on time, the supervisory board (or, if the supervisory board is absent or also fails to appoint the auditor on time, the management board) can appoint the auditor. The appointment of an auditor cannot be restricted to a limited list of candidates and the appointment can be withdrawn at any time by a general meeting or the company body that appointed the auditor. An appointment of an auditor by the management board can also be withdrawn by the supervisory board.

There is no formal limit on the duration of the appointment of a company's auditor. This is expected to change for certain companies (*see Question 30*).

For listed companies, the CGC recommends that the auditor should be appointed by a general meeting and the supervisory board should nominate a candidate for this appointment after consulting with the audit committee and the management board. The CGC states that the supervisory board and the audit committee should conduct a thorough assessment of the auditor at least once every four years.

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

Auditors must be registered as chartered accountants or accountant-administrative consultants under the Accountants-Administrative Consultants Act (*Wet op de Accountants-Administratieconsulenten*) and must be independent of the company they audit accounts for.

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

For unlisted companies, there are no restrictions on non-audit work that can be done by auditors for the company.

For listed companies, instructions to the auditor to provide non-audit services must be approved by the supervisory board, on the recommendation of the audit committee and after consulting the management board (*CGC*).

As yet, there are no formal rules on the type of work that auditors can and cannot do. However, as a general principle, an auditor linked to an organisation that provides consulting and auditing services to the same company must show that he is in a position to independently form an opinion on the accounts.

An auditor cannot audit the accounts of any organisations of public significance (including listed companies) if either:

- The accounting firm that is linked to the auditor was involved in compiling and/or administrating the financial information that the audit relates to in the two years before the period that the audit relates to.
- A significant part of the financial information that the audit relates to has been compiled and/or administrated by the accounting firm the auditor is linked to.

In addition, audits cannot be conducted by individual auditors for a continuous period longer than seven years, after which the auditor is not allowed to audit the annual accounts for the same company for a two-year period.

31. 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?

Failure to properly audit the accounts can result in the auditor being liable to:

- The company for a breach of contract.
- Third parties for a wrongful act (*onrechtmatige daad*).
- An exclusion or limitation of liability agreed by the company with the auditor does not affect the auditor's liability to third parties. Any limitation of liability is not accepted by the courts if the auditor has been grossly negligent.

CORPORATE SOCIAL RESPONSIBILITY

32. Is it common for companies to report on social, environmental and ethical issues? Please highlight, where relevant, any legal requirements or non-binding guidance/best practice on corporate social responsibility.

The DCC does not require companies (listed or unlisted) to report on social, environmental or ethical issues. Although not required and not based on general guidelines or best practice recommendations, many listed companies publish a so-called social report that addresses these issues. Collective labour agreements sometimes impose an obligation to publish annual social reports on certain companies in certain sectors, mostly semi-governmental or care institutions.

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ROLE OF COMPANY SECRETARY

33. What is the role of the company' secretary in corporate governance?

The post of company secretary is not recognised under Dutch corporate law. Tasks normally associated with a company secretary are the responsibility of the management board.

ROLE OF INSTITUTIONAL INVESTORS AND SHAREHOLDER GROUPS

34. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? Please list any such groups with significant influence in this area.

Institutional investors and other shareholder groups monitor corporate governance, but, due to the fact that they have limited legal tools to enforce good corporate governance, their influence is limited.

Special interest groups that assert influence and monitor on behalf of shareholders are more active in monitoring corporate governance than institutional investors and shareholder groups. Examples of these special interest groups are:

- Deminor, a shareholder advocacy firm owned by Institutional Shareholder Services.
- The Dutch Investors Association (*Vereninging van Effectenbezitters*) (VEB), which represents shareholders in The Netherlands.

WHISTLEBLOWING

35. Is there statutory protection for whistleblowers (persons who disclose criminal activity or other serious malpractice within a company)?

Dutch company law does not provide statutory protection for whistleblowers.

For listed companies, the CGC recommends that the management board ensures that employees can report alleged irregularities in the company to the chairman of the management board or to an official appointed by him, without jeopardising their legal rights. The CGC also recommends that arrangements for whistleblowers are put on the company's website.

REFORM

36. Please summarise any impending developments or proposals for reform.

Legislation for a more flexible private company is (still) pending. This legislation aims to simplify the regulations for the most common legal form of Dutch businesses, the BV. No exact time for implementation can be given. The bill was expected to enter into force in 2008; however, there is still correspondence on certain matters between the government and parliament which has delayed implementation until probably sometime in 2009.

The main features of current draft bill are as follows:

- Greater structural freedom for shareholders, with the following safeguards:
  - a balanced system of protection for creditors;
  - a more effective exit right for minority shareholders who lack manoeuvrability.
- Founders of a BV decide themselves on the extent of its financing, if any. This means that companies will no longer be required to have EUR18,000 (about US$23,071).
- Scrapping capital protection rules.
- Creditors will be protected by means of a payment test in which the management board must assess whether, following a proposed payment to shareholders, the company will still be able to keep paying its due debts. If insufficient care is taken in making these payments, then the managing directors can be held liable, the shareholders being required to return the payments received.
- Aside from depositary receipts a BV may also issue shares without voting rights.
- The articles may determine that certain shares are excluded from profit distribution schemes.
- Simplification of the dispute settlement procedure.

Legislation is also pending to:

- Provide a more modern company law that should allow company owners to choose a legal form better suited to their needs. Certain foreign legal forms should also become available.
- Make the one-tier board available for all Dutch companies. Currently, only the SE can have the one-tier board system. The system will become available for Dutch companies as well.

In addition, increased supervision measures are planned for January 2010. In the future companies will be continually and retrospectively supervised, whereas at the moment supervision is only performed in advance. In particular, the works council will be granted rights to advise about the remuneration of directors.

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