



INTERNATIONAL ASSOCIATION  
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# Who is not afraid of being a company director

Labour and corporate

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## National Report of The Netherlands

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## **1.1 The legal position/status of a director and/or managing director in the different jurisdictions**

The main type of legal entity in the Netherlands is the private company with limited liability (BV) and the public company with limited liability (NV). The management of a BV and its business is performed by a management board (bestuur) or by one managing director. The members of the board are appointed and dismissed by the general meeting of shareholders. The management represents the company and the articles of association may also vest this authority in one or more members of the management board (acting alone or jointly). The members of the board have a collective responsibility: they are individually responsible for a good course of business in the company. There is mostly a twofold relationship between the company and the managing director due to the fact that, besides the relationship under company law, there is also an employment contract between the company and the managing director.

The dismissal as member of the management board usually also brings about the termination of the employment contract. Employment protection for the managing director is limited. If the dismissed managing director however doesn't agree with the dismissal, he can start proceedings in the Court based on manifestly unreasonable dismissal and claim damages. Whether or not the dismissal was unreasonable depends on the circumstances of the case, one of which could be that there was no adequate severance package.

On 1 January 2013 the Management and Supervision Act has come into force. The main change is the introduction of explicit statutory basis for a one-tier board within Dutch companies. According to this Act the legal relationship between a managing director and a listed company can no longer be classified as an employment contract. As said, this specific provision is only applicable to listed companies. Furthermore, under the old law although allocation of duties among directors was possible, the scope of such an allocation and the exact consequences of an allocation on responsibility, liability and decision making was unclear. Under the new law it is possible to divide the duties of directors, duties that are not assigned to one or more individual directors are assigned to the management board as a whole.

The titular director is a regular employee and all rules of employment law, including statutory employee safeguards against dismissal, are applicable to him. A titular (non-statutory) director is not capable of representing the company without a proper power of attorney by the management board. Furthermore, there is no director's liability. Hereafter only the statutory director will be topic of investigation.

## **2.1 What is the impact of corporate governance legislation or soft-law (such as corporate governance codes) for the position of a director/managing director?**

The Dutch Corporate Governance Code holds a non-binding list of principles and best practices for listed companies. The Code holds provisions relating the management board (role and procedures, remuneration and conflicts of interest, appointment and dismissal). The best practice provisions of the Code determine that the appointment of members of the board of management of large companies shall be for a period for four years, which has its consequences for the duration of the employment contract. Furthermore, the Code aims at limiting the redundancy payments to dismissed directors (to one year's salary). The Code is applicable to all companies whose registered seat is in the Netherlands and whose shares or depositary receipts are listed on a stock exchange (listed companies).

This doesn't mean however that non listed companies do not have to take the provisions of the Code into account at all. According to established case law, the principles of the Code, which can be seen as modern and now widely supported general views on good corporate governance, have their effect on the application of the provisions of regular civil and employment law as generally accepted principles of law.

## **3.1 Liability of a company director/managing director?**

- **General**  
In general, managing directors are jointly and severally liable for damage arising from mismanagement by one or more other directors. A director will only escape liability if he can prove, partly in view of the duties assigned to the other directors, that he cannot be blamed and that he was not negligent in adopting measures to avert the consequences of mismanagement
- **Criminal**  
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 criminal behaviour can face criminal penalties. In addition, some provisions of Dutch (economical) criminal law are specifically aimed at the management board or its directors. Furthermore, a managing 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. 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.
- **Environmental**  
Managing 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 managing director can be criminally liable if it is proved that he contributed to the breach of such regulations by his consent or neglect.

- **Insolvency**  
Private and public companies with limited liability (BV and NV) have a limited responsibility, that is, that the company has its own, separate capital, which can be accessed in case of debts toward third parties. In the case of bankruptcy, however, the managing directors of a company can be held personally liable by the bankruptcy trustees, if maladministration can be demonstrated.

Generally, it is hard (for the bankruptcy trustees) to prove maladministration by the company's managing director(s). However, this burden of proof is shifted in specific cases. According to Dutch company law, a company director is deemed personally liable on the grounds of maladministration in two cases: if the respective company's books were not kept in compliance with the tax law in force and if the company's annual reports and accounts were not filed on time with the Chamber of Commerce. In such cases, in order to avoid being held personally liable, it is the director who has to bring the conclusive evidence, demonstrating that the bankruptcy was not caused by his maladministration, but that it has occurred due to external factors.

#### **4.1 Are there any recent changes in remuneration legislation/policies for company directors/managing directors?**

In the past years many attempts have been made for legislation on the remuneration system for managing directors in public, private and finance sector. Even though many sectors (healthcare sector, banking sector, housing corporations, educational sector) have their own, non-binding Codes, which contain provisions for remuneration, there is still the desire to come to binding legislation on this subject. So far, of all the initiatives, only the Act for Standardization of publicly and semi publicly financed remuneration of top managers (WNT) has come into force (on 1 January 2013). The Act contains provisions on the maximum salary of top managers and the maximum redundancy payments. It does not apply to companies in the private sector. A legislative proposal with similar objectives for the private sector has recently been withdrawn by the Government..

#### **5. Has it occurred in your jurisdiction that management decisions were revised after being challenged by stakeholders (e.g. consumers)?**

Under Dutch law, the works council has the right to advise and the right of consent as to specific management decisions. If the company does not respect the rights of the works council or if the company decides not to act in accordance with the advice of the works council, the works council has the possibility to contest the management decision in court. In case law many examples can be found of management decisions that have been revised by the courts upon request of the works council.

Furthermore, customers or employees can influence management decisions by collective action, such as a boycotts or strikes or by creating negative perception in the media.

**6. Has your jurisdiction issued specific legislation on female presence in the board of directors?**

The Management and Supervision Act, which came into force as from 1 January 2013, has provided for a temporary measure to increase female presence in the boards of directors and the supervisory boards of large private companies (BV's) and large public companies (NV's).

The measure has been implemented in article 2:166 and article 2:276 of the Dutch Civil Code. According to these article, at least 30% of the positions in the boards of directors and the supervisory boards of large public and private companies must be held by women and at least 30% by men.

A private or public company will be considered large if the company meets at least two of the following criteria:

- The value of the assets according to the balance sheet with explanatory notes exceeds EUR 17.5 million.
- The net turnover exceeds EUR 35 million.
- The average number of employees equals or exceeds 250.

The legislations does not contain any sanctions in case the company does not comply with the measure. Non-compliance must be explained in the company's annual report.

The measure has been implemented on a temporary basis, as from 1 January 2013 until 1 January 2016, such with the possibility of extension.

**7. Is there in your jurisdiction an obligation to have a minimum of independent and/or non-executive directors in the board?**

Based on the Management and Supervision Act, as from 1 January 2013, private and public companies can opt for a one-tier board in the Netherlands. In a one-tier board the tasks and responsibilities of the board members are dived between directors (executive members of the board) and supervisors (non-executive members of the board).

The one-tier board system has been implemented in addition to the existing two-tier board system. In the two-tier board system, the directors (executives) and supervisors (non-

executives) operate in two separate bodies of the company, namely the board of directors and the supervisory board.

The supervisory board or one-tier board must contain at least three non-executive members, unless otherwise provided for in the articles of association. The Dutch Civil Code does not contain any obligation to have a minimum of independent directors in the board.

In large private and public companies (so-called structured companies) the works council has a right to recommend candidates for the supervisory board up to a maximum of one third of the members of the board.

**8. Are there in your jurisdiction certain obligations that are different for private and for publicly owned companies and which are not yet covered by the above topics?**

As from 1 January 2013, the Senior Officials in the Public and Semi-Public Sector (Standards for Remuneration) Act has come into force. This Act includes, among other things, mandatory provisions based on which:

- remuneration arrangements for Top Executives are maximized;
- severance arrangements for Top Executives may not exceed EUR 75,000 gross;
- bonus payments or other forms of variable remuneration are not allowed for Top Executives;
- remunerations arrangements and severance arrangements of Top Executives must be disclosed.

**9.1 Position of directors/managing directors in the event of disposal and/or merger of the company?**

It all depends on the nature of the merger, take over or disposal, and on the size, nature and structure of the company that is being disposed, taken over or merged. As this question seems to make no distinctions and is thus very broad, it is impossible to give a satisfactory answer that does cover all the related topics without being too lengthy for the scope of this questionnaire. In general: it is very common to make provisions in transfer agreements for the position of the management, for possible liabilities (and in relation to those: for discharge) and to provide restrictive covenants.

**10.1 Are there in your jurisdiction minimum requirements to become accompany director?**

No.

**11. Does a company director have specific obligations with regards to non-competition and the revelation of corporate opportunities?**

Under Dutch law there is no specific legal obligation to reveal a corporate opportunity or to refrain from competition. The Dutch Corporate Governance Code does contain a best practice provision prohibiting the appropriation of a corporate opportunity. It also states that the managing director must not compete with the company. The managing director has a general duty of care and a general duty to act according to standards of reasonableness and fairness. If the managing director does not make proper use of a corporate opportunity for the company, an infringement of these duties can be established and the managing director can, under circumstances, be held liable on these grounds.