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The Netherlands **CORPORATE GOVERNANCE**

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This country-specific Q&A provides an overview of corporate governance laws and regulations applicable in The Netherlands.

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THE NETHERLANDS

CORPORATE GOVERNANCE



1. What are the most common types of corporate business entity and what are the main structural differences between them?

In general, both the Dutch public limited liability company (**NV**) and the Dutch private limited liability company (**BV**) are suitable legal forms for most purposes, albeit the NV is most often only used for companies of which the shares are admitted to listing and trading on a stock exchange (for which the NV is considered the golden standard).

The NV and BV do not differ in any significant way as regards (i) the minimum number of shareholders or directors, (ii) the possibility of written decision-making at a management board and shareholder level (save for publicly listed NVs), (iii) flexibility in organising the voting and dividend rights attached to the shares, or (iv) the responsibility/liability of board members. More stringent provisions as regards minimum capital requirement apply to an NV, e.g. when declaring distributions. The NV is also required to maintain a minimum issued share capital of EUR 45,000 and its articles of association need to include an authorized capital.

2. What are the current key topical legal issues, developments, trends and challenges in corporate governance in this jurisdiction?

Dutch corporate law has seen significant development and modernisation over the past decade. Of particular note are the introduction of the so-called 'Flex-BV', modernising legislation of the BV, and the Dutch Act on the Management and Supervision of Legal Entities, which (among others) unified the legislation applicable to the management board and supervisory board of all forms of legal entities.

More recently, the Dutch legislator has indicated that it intends to modernise Dutch company law as it pertains to the NV and, as a first step towards that goal, has

appointed an Expert Group comprised of legal scholars and practitioners to render advice on such modernisation. Among other things, the Expert Group has recently advised on the possibility of having a digital general meeting, loyalty shares and financial incentives for directors.

A current hot topic in the area of development and modernisation is that on 1 January 2024 the Act on the Online incorporation of private limited liability companies (*Wet Online oprichting besloten vennootschap*, "**DOBV**") came into force in the Netherlands, implementing the EU-Directive 2019/1151 (the use of digital tools and processes in company law). This act intends to modernise and simplify the incorporation of BVs. The implementation of the DOBV allows EU citizens to incorporate a BV online by means of an electronic notarial deed, executed in a secure digital environment during a video connection with the notary.

Similarly, a legislative proposal has been published that seeks to amend statutory dispute settlement proceedings and inquiry proceedings. Of particular note is the amendment of the – currently underutilised – dispute settlement proceedings, allowing shareholders disputes to be resolved through compulsory share transfers.

Finally, as is the case globally, ESG is a hot topic both in the board room and for the legislator. In addition to a number of national proposals and initiatives, the EU Corporate Sustainability Reporting Directive (**CSRD**) has since entered into force, The proposal for the Corporate Sustainability Due Diligence Directive (**CSDDD**) has recently been struck down, however, and at this time its future remains unclear.

3. Who are the key persons involved in the management of each type of entity?

The management board is the executive body of a BV or NV and is charged with the day-to-day management of the company, as well as determining the strategy and outlining its policy. In a one-tier board structure, with a

board consisting of executive and non-executive directors, the board as a whole is charged with determining the company's strategy and outlining its policy, but it is the executive directors that are primarily charged with the day-to-day management and the non-executive directors that are charged with supervising the performance of the executive directors.

4. How are responsibility and management power divided between the entity's management and its economic owners? How are decisions or approvals of the owners made or given (e.g. at a meeting or in writing)

The management board is charged with the management of the company and as such is responsible for the day-to-day management of the company. The management board is also responsible for determining the company's strategy and outlining its policy.

The economic owners, or shareholders, together with any other persons with meeting rights constitute the general meeting. Under the Dutch Civil Code (**DCC**), certain specific decisions are exclusively at the discretion of the general meeting. These include resolutions to amend the articles of association and to adopt the company's annual accounts. There are several other matters which are generally at the discretion of the general meeting but may be attributed to another corporate body. These include the appointment, suspension and dismissal of management board members and the issuing of shares or granting of option rights. The general meeting also has a so-called residual power, meaning that all powers that are not vested in other corporate bodies by Dutch law or the articles of association are vested in the general meeting.

In principle, shareholders exercise their rights at a general meeting. Resolutions may be adopted by shareholders outside of a meeting, provided that all those entitled to attend the meeting have consented to this manner of decision-making and the members of the management board and, if installed, supervisory board have been granted the opportunity to advise beforehand.

5. What are the principal sources of corporate governance requirements and practices? Are entities required to comply with a specific code of corporate governance?

The principal sources are legislation and Dutch case law. The statutory framework that governs corporate entities (including NVs and BVs) is Book 2 of the DCC.

The Dutch Corporate Governance Code (**DCGC**) provides guidelines and best practices for corporate governance in the Netherlands, including principles related to transparency, accountability, responsibility, and the role of stakeholders. The DCGG applies to companies that have their official seat in the Netherlands and of which the (depository receipts) for shares are admitted to listing and trading on a regulated market or comparable system. The DCGC applies on a 'comply or explain' basis, meaning that the company either has to comply with the principles and best practice provisions of the DCGC or sufficiently explain any deviation in their board report. The Dutch Supreme Court has ruled that the DCGC reflects generally accepted views on corporate governance in the Netherlands.

6. How is the board or other governing body constituted? Does the entity have more than one? How is responsibility for day-to-day management or oversight allocated?

The BV and NV are required to have a management board that is responsible for the day-to-day management of the company, determining the strategy of the company and outlining its policy. The management board consists of at least one member.

In a two-tier board structure, whereby in addition to a management board a supervisory board is installed, the supervisory board is responsible for supervising the strategy and policies of the management board and the general course of affairs in the company and the enterprise connected with it and to provide advice to the management board.

In a one-tier board structure, the board consists of executive and non-executive director. The board as a whole is responsible for determining the strategy of the company and outlining its policy. The executive directors are primarily charged with the day-to-day management of the company and the non-executive directors have the duty of supervising the performance of the executive directors.

Unless the large company regime applies to the company, it is not required to install a supervisory board or a one-tier board and there is no requirement as to the minimum number of supervisory or non-executive directors.

7. How are the members of the board appointed and removed? What influence do the entity's owners have over this?

The first management board members of an NV or BV are appointed by means of the notarial deed of incorporation. Changes to the composition of the management board will usually be effected by a resolution adopted by the general meeting (or, if the full large company regime applies, by a resolution of the supervisory board (in a two-tier structure) or non-executive directors (in a one-tier structure)). The articles of association may provide for one or more management board members to be appointed by a meeting of holders of a class of shares, provided, however, that each shareholder with voting rights has the opportunity to participate in the decision-making on the appointment of at least one management board member.

Management board members are suspended and dismissed by the corporate body authorized to appoint them. The articles of association may provide for an additional corporate body to be authorized to dismiss management board members. Supervisory or non-executive directors, if appointed, are also authorized to suspend a management or executive director, as applicable.

8. Who typically serves on the board? Are there requirements that govern board composition or impose qualifications for board members regarding independence, diversity, tenure or succession?

The DCC does not contain any legal requirements regarding the expertise, diversity in terms of background and expertise, nationality, residence or succession of the management board or individual management board members of an NV or BV, nor does the DCC contain any general rules on the expertise of the supervisory board members, although it follows from the DCC that the supervisory board of a company subject to the large company regime must be 'properly constituted'. There may be exceptions to the freedom to organize the management or supervisory board under sectoral regulations.

On gender diversity, the DCC requires for 'large' companies to set an appropriate and ambitious target figure (*streefcijfer*) to balance the male/female ratio within the supervisory board, management board and senior management. NVs with a listing on a regulated market in the Netherlands are subject to a diversity quota pursuant to which as long as the supervisory

board (or group of non-executive directors) does not consist of at least one-third male and female members, any appointment that does not contribute to a more balanced composition is null and void, whereby certain exceptions apply.

The DCGC includes principles and provisions dealing with diversity (which go beyond gender diversity) as well as independency requirements, both of which only apply to the supervisory board or non-executive directors.

9. What is the role of the board with respect to setting and changing strategy?

The management board of an NV or BV plays a crucial role, as it is responsible for the preparation of the company's strategy and policy, including in a longer-term perspective, policy formulation and implementation. The board is therefore primarily responsible for taking strategic decisions and setting/approving policies that are in line with the company's objectives and interests.

10. How are members of the board compensated? Is their remuneration regulated in any way?

The remuneration of board members is determined by the general meeting, unless the company's articles of association designate another corporate body (e.g., the supervisory board). An NV is required to have a remuneration policy which is determined by the general meeting. The remuneration of each individual management board member is determined in accordance with such remuneration policy.

The DCC includes two provisions on bonus payments. The corporate body authorized to determine the remuneration may adjust the amount of a bonus payment granted to an appropriate level if the payment would be unacceptable according to standards of reasonableness and fairness. The company is authorized to reclaim all or part of a bonus to the extent that the payment was made on the basis of inaccurate information about the achievement of the goals underlying the bonus or about the circumstances on which the bonus was contingent.

The DCGC has dedicated a chapter to remunerations, which *inter alia* includes requirements on the content of the remuneration policy and the remuneration report and limitations on remuneration granted to supervisory / non-executive directors.

The remuneration of management board members has

come under increasing scrutiny in recent years. This has manifested itself in a number of ways, including various pieces of sectoral legislation aimed at limiting the remuneration of management board members.

11. Do members of the board owe any fiduciary or special duties and, if so, to whom? What are the potential consequences of breaching any such duties?

Dutch law employs a stakeholder-oriented approach to corporate governance. In fulfilling their duties, board members have a duty to serve exclusively the interest of the company and the enterprise connected with it, in principle seeking to ensure the continuity of the company and its enterprise while creating long-term value. In determining what is in the interest of the company, all legitimate stakeholder interests need to be taken into account. Relevant stakeholders include employees, shareholders, creditors, customers, suppliers and group companies. Board members will generally have significant discretion in weighing such stakeholder interests.

Failure to duly observe stakeholder interests may expose the company and/or its directors to various sanctions, including (liability) claims, actions seeking to challenge resolutions and shareholders opting to withhold their consent from a customary discharge of board members from liability.

12. Are indemnities and/or insurance permitted to cover board members' potential personal liability? If permitted, are such protections typical or rare?

While Dutch company law does not regulate director indemnities and/or insurance, it is generally accepted that such protections are allowed to cover board members' potential personal liability. Companies will typically enter into D&O insurance benefitting their (current and former) board members. It is also relatively common for companies to grant contractual indemnities to their board members. Such indemnities are typically intended to complement D&O insurance.

13. How (and by whom) are board members typically overseen and evaluated?

See question 6 above. In a one-tier or two-tier board structure, the performance of the management board

members or executive directors is supervised by the supervisory board or non-executive directors. The board of directors can also be held accountable by the general meeting at a general meeting, e.g. on the preparation of the annual accounts of the company.

14. Is the board required to engage actively with the entity's economic owners? If so, how does it do this and report on its actions?

As a starting point, the board is not required to engage actively with the shareholders outside of the context of the general meeting. The board will report to shareholders through the annual accounts, which are generally discussed during the annual general meeting during which the general meeting will vote on the adoption thereof. During a general meeting, the board is held to account to the general meeting and will need to answer questions posed by shareholders, unless this would be contrary to an overriding interest of the company. The board will also engage with the shareholders by discussing and sharing its views on items that have been tabled for the agenda of such meeting.

In certain cases, statutory law and/or the company's constitutional documents may effectively require engagement between the board and the shareholders. Examples include certain material board resolutions that are made subject to shareholder approval ('reserved matters'), certain shareholder resolutions that require board cooperation (e.g., if a general meeting resolution requires a proposal by the board) and dividend distributions, which are subject to management board approval. Moreover, in closely held companies, the company may be under a duty of care to inform its shareholders of certain relevant matters.

The DCGC requires a listed company to adopt a policy on bilateral contacts with shareholders and to facilitate such dialogue, unless this would not be in the interest of the company and its affiliated enterprise. The company should be prepared to enter into such dialogue if appropriate and at its discretion.

15. Are dual-class and multi-class capital structures permitted? If so, how common are they?

Dutch statutory law does not provide a statutory framework governing dual-class or multi-class capital structures. Such structures are generally understood to be permitted, provided that (i) there is an objectively

justified purpose/rationale for the relevant capital structure; (ii) that structure is adequate and necessary to fulfil such purpose; and (iii) that structure is proportionate to such purpose.

Dual-class and multi-class capital structures are most commonly used to implement high/low voting shares. Various listed Dutch companies have successfully introduced such capital structures, typically pre-IPO. In such cases, the ratio between the votes represented by each such class of shares will be the primary point of contention. An expert committee advising the Dutch legislator on the modernization of Dutch company law has announced that it will render a report on such voting ratios.

16. What financial and non-financial information must an entity disclose to the public? How does it do this?

The management board is required to prepare and approve the annual accounts which include a balance sheet, profit and loss statement and explanatory notes, which are subsequently adopted by the general meeting. The annual accounts are publicly filed, unless a certain exception applies.

A management report, which is not required for micro- or small-sized companies, contains non-financial information on the company. The management report shall, in accordance with the size and complexity of the legal entity and group companies, contain a balanced and comprehensive analysis of the situation on the balance sheet date, developments during the financial year and results, including information on remuneration granted. The management report also provides a description of the main risks and uncertainties the company is facing. The management report is filed together with the annual accounts.

Sectoral legislation can impose additional requirements as to the contents of the management report.

17. Can an entity's economic owners propose matters for a vote or call a special meeting? If so, what is the procedure?

One or more shareholders who, individually or collectively, represent at least 1% (BV) or 3% (NV) of the issued capital may propose that matters be put to a vote, provided that such matters fall within the remit of the general meeting. The request to put an item on the agenda of the meeting must be received by the company at least thirty days (BV) or sixty days (NV)

before the date of the meeting and, in the case of BV, must not conflict with a substantial interest of the company. The articles of association may provide for less stringent requirements.

One or more shareholders who, individually or collectively, represent at least 1% (BV) or 10% (NV) of the issued capital may submit a written request to convene a general meeting, setting out the relevant agenda items in their request. If such meeting is not held within four weeks (BV) or six weeks (NV) from receipt of the request, such shareholder(s) may lodge a petition to the court, seeking permission to convene the shareholders' meeting.

18. What rights do investors have to take enforcement action against an entity and/or the members of its board?

The enforcement actions by debt investors, such as bondholders, will primarily be governed by the contractual framework imposed by the relevant debt instrument. Bondholders are thus able to enforce the rights bestowed upon them through enforcement mechanics under the relevant bond documentation. Subject to contractual stipulations such as no-action clauses and choice of forum clauses, bond holders may also be able to bring actions directly against the company and/or its board members, including liability claims and actions seeking certain injunctive relief.

Equity investors, such as shareholders, will generally have a broader array of options to enforce their rights. While Dutch law does not provide for derivative suit mechanics, any shareholder may bring, for instance, litigation (i) seeking compensation of damages, (ii) seeking injunctive relief, for instance prohibiting the company from taking certain actions that may harm such shareholder; and/or (iii) challenging resolutions adopted by the general meeting, the board or other corporate bodies. If certain capital thresholds are met, shareholders may also (i) bring so-called 'inquiry proceedings', which are proceedings intended to resolve corporate governance disputes before a specialised business court; and/or (ii) request the competent court leave to call an extraordinary general meeting, provided that certain criteria are met.

Finally, Dutch law provides various options for collective redress, for instance to classes of investors that are allegedly harmed due to false or misleading disclosures by a company.

19. Is shareholder activism common? If so, what are the recent trends? How can shareholders exert influence on a corporate entity's management?

Shareholder activism is relatively common in the Netherlands. Activist campaigns often revolve around M&A and other strategic or operational topics, governance (including board composition and director remuneration) and capital returns and financial targets. The activist landscape in the Netherlands is largely dominated by US and UK-based hedge funds. A notable recent trend is an increasing emphasis on ESG activism, often pertaining to climate change or human rights. Activist shareholders have, for instance, urged boards to report on, discuss or present for approval by their shareholders their strategies on mitigating climate change.

Activist shareholders will typically try to exert influence on a company's management by means of private or public engagement. Strategies include stakebuilding, participating at general meetings, submitting shareholder proposals and/or bringing media campaigns. In a number of cases, litigation has been brought by activist shareholders. Historically, Dutch law has allowed listed companies to implement strong protective measures. Dutch listed companies commonly implement mechanics (i) allowing for dilutive share issuances, neutralizing hostile shareholders; and (ii) repeating binding nomination mechanics, lending significant influence to the board in terms of board composition, among other such measures. Moreover, in case of hostile activity, the board may invoke a 180-day 'response time' and/or a 250-day 'cooling-off period' during which certain shareholder rights are suspended. Hence, successful activist campaigns often end in a settlement between the company and the activist shareholders involved.

20. Are shareholder meetings required to be held annually, or at any other specified time? What information needs to be presented at a shareholder meeting?

An NV is required to hold an annual general meeting, within six months from the start of the financial year. There is no requirement for a BV to hold a physical general meeting.

The agenda, explanatory notes and supporting documents (if any) should provide sufficient information to enable shareholders to come to an informed position as to the items tabled. In certain cases, certain

information or documents are required by law or the company's constitutional documents to be provided to the shareholders prior to the meeting. Shareholders have a right to pose questions during a general meeting, which need to be answered unless this would be contrary to an overriding interest of the company.

21. Are there any organisations that provide voting recommendations, or otherwise advise or influence investors on whether and how to vote (whether generally in the market or with respect to a particular entity)?

Proxy advisory firms, such as ISS and Glass Lewis, provide voting recommendations and other advice regarding Dutch listed companies to (mostly institutional) investors. Such firms are generally active in the market. Investors may also be influenced through media campaigns and other such public engagement (see question 19 above).

22. What role do other stakeholders, including debt-holders, employees and other workers, suppliers, customers, regulators, the government and communities typically play in the corporate governance of a corporate entity?

Non-shareholder stakeholders will not be directly involved in the company's governance, although the board will take into account such stakeholder interests when fulfilling their duties. Notable exceptions include the following:

- i. In certain cases, Dutch companies may be required to install a 'works council' representing employee interests, which by law are granted certain information and advisory rights.
- ii. A number of Dutch companies have voluntarily installed a 'stakeholder committee', in which various stakeholders (such as suppliers, customers and creditors) are represented. Through these committees, companies engage with external stakeholders and experts to receive their independent views and advice on various matters, including ESG topics.
- iii. As a condition for receiving financial support during the COVID19 pandemic, the Dutch state appointed a so-called 'state agent' at KLM to monitor, among other things, the use

of such aid.

23. How are the interests of non-shareholder stakeholders factored into the decisions of the governing body of a corporate entity?

See question 11 above. In fulfilling their duties, board members will need to take into account the legitimate interests of all of the company's stakeholders, including employees, creditors, customers and suppliers.

24. What consideration is typically given to ESG issues by corporate entities? What are the key legal obligations with respect to ESG matters?

ESG is an important topic on the agenda of boards. At this time, concrete legal obligations largely center around reporting and disclosure. In certain cases, Dutch entities are required to prepare a non-financial report as part of their annual accounts. Such non-financial report will address, among other things, the policies and risks related to certain ESG matters, including the environmental and employee matters, due observance of human rights and the prevention of corruption.

In addition, the Dutch stakeholder-oriented approach to corporate governance requires that boards take into account broad stakeholder interests, including ESG matters. This is explicitly set out in the DCGC, which requires that the board takes into account the impact the actions of the company and the enterprise connected with it have on people and the environment, and to that end weighs the stakeholder interests that are relevant in this context. The DCGC requires that the board seeks a balance between the social, environmental and economic aspects of doing business.

The above is further supported by European developments. On 5 January 2023, the CSRD entered into force, further strengthening reporting requirements with respect to ESG. As from financial year 2024, the first large companies will need to observe reporting requirements under the CSRD. On 14 December 2023, the Council of the European Union and the European Parliament agreed on a text for the CSDDD, which would impose additional due diligence obligations on large companies with regard to their actual and potential adverse impacts on human rights and the environment. However, this has proven to be a contentious topic among EU Member States and on 28 February 2024 a vote by the European Council on the endorsement of the proposal for the CSDDD was struck down.

25. What stewardship, disclosure and other responsibilities do investors have with regard to the corporate governance of an entity in which they are invested or their level of investment or interest in the entity?

Dutch law does not generally impose any stewardship obligations on investors. Shareholders are in principle free to exercise their rights at their discretion and solely in their own interest. However, in doing so, shareholders need to observe the principle of reasonableness and fairness vis-à-vis the company, its board members and their fellow shareholders. This effectively means that shareholders may not exercise their rights in such a way that this would disproportionately harm such other interests and, in certain cases, may even be under a duty of care to protect such interests. Generally speaking, the larger the control and influence of a shareholder, the more weight it should give to such other interests.

The DCGC requires institutional investors to, *inter alia*, publish an engagement policy on their website, thereby recognizing the importance of a strategy focused on sustainable long-term value creation for the company and its enterprise, and to report on the implementation of such policy.

Disclosure obligations

Investors in Dutch companies that are listed on regulated markets may also be required to publicly disclose their stake in the company. If an investor's substantial shareholding or short position reaches, exceeds or goes below certain thresholds, it is required to notify the Dutch Authority for the Financial Markets without delay. The thresholds are: 3%, 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75% and 95%. Such disclosure is entered into a public register available on the AFM's website.

Moreover, pursuant to the DCGC, shareholders engaging with the company outside of the context of a general meeting may be required to disclose their holdings to the company if so requested.

26. What are the current perspectives in this jurisdiction regarding short-term investment objectives in contrast with the promotion of sustainable longer-term value creation?

As set out under question 11 above, the board will

generally seek to promote long-term value creation. Moreover, the Dutch stakeholder-oriented approach to corporate governance also allows – and, in fact, requires – board members to take into account non-shareholder stakeholder interests. This, combined with the strong autonomy generally imposed upon the board, helps promote longer-term value creation as it allows the board to push back against proposals by shareholders aimed at the shorter-term. In cases pertaining to activist shareholders pursuing short-term gains (e.g., by divesting certain assets), Dutch courts have recognised

the need to protect board autonomy to allow it to pursue such long-term goals.

Moreover, for companies falling within its scope, the DCGC puts a large emphasis on sustainable long-term value creation. Among other things, the DCGC requires that the board develops a view on sustainable long-term value creation by the company and the enterprise connected with it, formulates a strategy to achieve such goals and helps foster a company culture that promotes the same.

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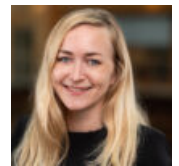
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