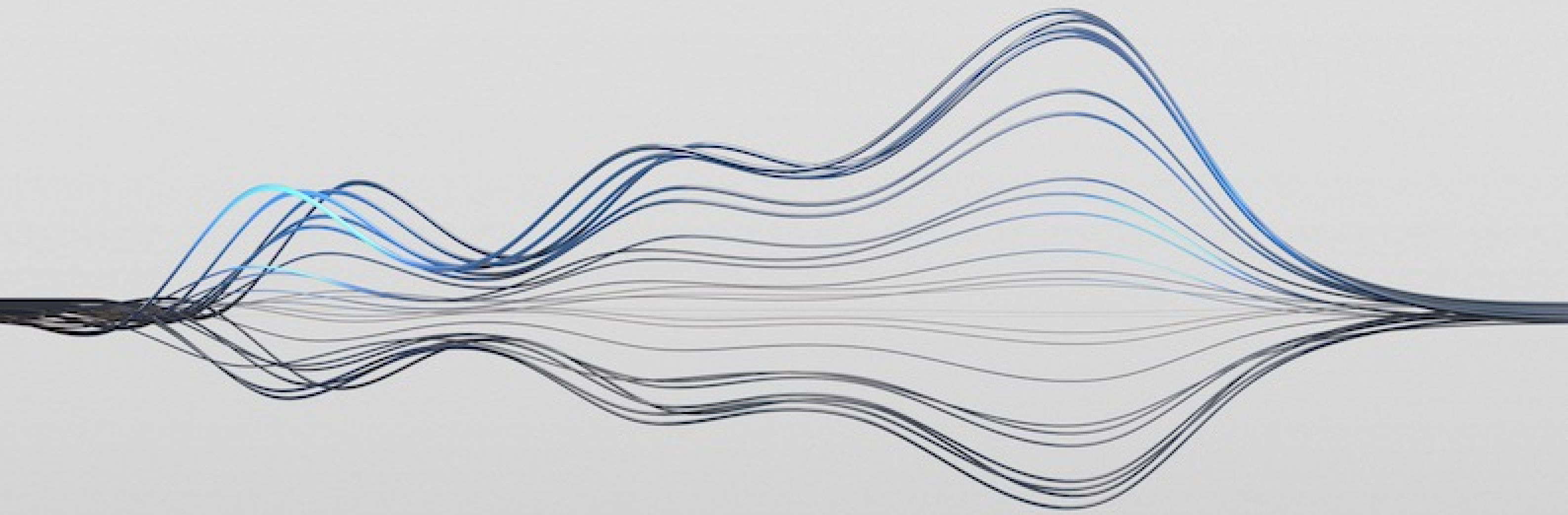
NETHERLANDS

Global Guide to Directors' Duties



Netherlands

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Corporate entities

What type of company is typically used in group structures?

In the Netherlands, the most common types of company used in group structures are public non-listed limited companies (*niet-beursgenoteerde naamloze vennootschappen*) (NV) and private non-listed companies with limited liability (*besloten vennootschappen*) (BV).

Types of director

What is a "director"?

Basically, the law regards as a director someone who is charged with the management of the company, subject to any restrictions under the articles of association.

What are the different types of director?

There are two types of directors: executive directors (*uitvoerende bestuurders*) and non-executive directors (*niet-uitvoerende bestuurders*). This is explained further under Typical management structure.

In addition, Dutch law also recognises an informal director, so-called "policy makers" (*feitelijk beleidsbepalers*). Such policy makers may be held liable as if they were directors.

Eligibility

Who can be a director?

Directors can be legal entities or natural persons, however, non-executive directors (in case of a one-tier board) and supervisory directors (*commissarissen*) (in case of a two-tier board) must be natural persons. The articles of association may restrict the scope of and requirements for persons eligible for appointment as a director. Such requirements may be waived by a resolution of the general meeting.

From a corporate law perspective, there are no residency requirements for directors. However, often tax substance rules require that at least 50% of the directors are actually Dutch (tax) resident.

In the event that a company, for two consecutive years, meets certain criteria under the Dutch law and accounting rules concerning its asset value, turnover and number of employees (Qualifying Company), restrictions with respect to the appointment of directors are applicable. These restrictions are applicable when a company, for two consecutive years, meets at least two of the three following criteria:

- An asset value exceeding EUR20 million.
- A net turnover exceeding EUR40 million.
- At least 250 employees.

In a Qualifying Company, a person cannot be appointed as a director (other than a non-executive director or a supervisory director) when such person is either:

- A supervisory director or a non-executive director for more than two other Qualifying Companies.
- In the case of a two-tier board structure, the chair of the supervisory board or, in the case of a one-tier board structure, the chair of the board of directors, of another Qualifying Company.

A person cannot be appointed as a non-executive director or supervisory director when such person is non-executive director or a supervisory director for five or more other Qualifying Companies. An appointment as chair counts as two appointments.

Furthermore, a Qualifying Company is obliged to adopt a plan on how to achieve an improved balance between the number of women and men appointed as executive directors, non-executive directors or supervisory directors. A Qualifying Company shall inform the Dutch Social and Economic Council (*Sociaal-Economische Raad*) annually about the effects of such plan so far.

Minimum / maximum number of directors

The board consists of one or more directors, as decided by the general meeting. There is no maximum for the number of directors.

In general there is also no minimum for the number of directors, although Dutch law does stipulate that a company that qualifies under the Large Company Regime (as defined in the next paragraph) should have at least three non-executive directors or supervisory directors.

The Large Company Regime (*structuurregime*) applies if a company, for three consecutive years, meets the following three criteria:

- Its issued share capital, reserves and retained earnings according to the balance sheet amount to at least EUR16 million.
- The company, or any other company in which it has a controlling interest, has appointed a works council (*ondernemingsraad*) pursuant to a legal obligation.
- The company, alone or together with any company in which it has a controlling interest, normally has at least 100 employees in the Netherlands.

Appointment and removal

How are directors appointed?

At incorporation of the company, directors are appointed in the notarial deed of incorporation.

After incorporation, the general meeting is authorised to appoint new directors, unless the company qualifies as a Large Company, in which case the authority to appoint directors can shift from the general meeting to either the supervisory board in case of a two-tier board structure or the non-executive directors in case of a one-tier board structure.

For a BV, the articles of association may provide that a director may also be appointed by another corporate body of holders of a certain class of shares.

How are directors removed?

A director can be dismissed by the corporate body competent to appoint. Generally, this is the general meeting or the supervisory board (if one is in place). For a BV, the articles of association may provide that a director may also be dismissed by another corporate body, unless the Large Company Regime applies.

When a NV has established a works council (*ondernemingsraad*) by virtue of statutory provisions, the proposal for the appointment, suspension, dismissal or discharge of a director must not be presented to the general meeting before the works council has been given the opportunity to determine its point of view on it.

Board / management structure

Typical management structure

There are three possible management structures:

- The company has one corporate management body, being the board, which consists of executive directors (*uitvoerende bestuurders*) only.
- The company has a one-tier board structure, whereby the board consists of both executive (*uitvoerende bestuurders*) and non-executive directors (*niet-uitvoerende bestuurders*) operating from within one corporate body.
- The company has a two-tier board structure. The board consists of executive directors and the supervisory board, as a separate corporate body, consists of non-executives called supervisory directors (*commissarissen*).

The main reasons for a company to opt for a one-tier board structure including non-executive directors are either:

- The Large Company Regime applies and hence it is mandatory to appoint either a one-tier board including non-executive directors or a two-tier board.
- The supervision of the executive directors by the non-executives is more practical (in terms of information sharing etc.) if the non-executives and executives are positioned within the same corporate body.

Furthermore, the non-executives may be more inclined to perform well, as they are considered part of the board and therefore subject to a lower threshold for directors' liability.

The main reasons for a company to opt for a two-tier board structure are either:

- The Large Company Regime applies and hence it is mandatory to appoint either a one-tier board including non-executive directors or a two-tier board.
- The separation of supervisory directors and executives in two separate corporate bodies may provide for a more independent and objective view of the supervisory directors.

How are decisions made by directors?

The law assumes that in general the management of the board is the result of a collective deliberation and decision-making process.

The law and the articles of association set requirements for the adoption of board decisions. For some matters the involvement of the general meeting, the works council or the supervisory board or another corporate body of holders of a certain class of shares is prescribed. A resolution must be reasonable and fair and must be passed as a "result of mutual consultation". This means that no directors may be excluded from the meeting. At the board meeting, unless the articles of association provide otherwise, each director has one vote. If these rules are not complied with, the resolution is void (*nietig*) or voidable (*vernietigbaar*) at a later date. (The difference between a void decision and a voidable decision is that a void decision is deemed never to have existed, whereas a voidable decision is valid until it has been nullified by the court.)

If a certain decision has important (material) consequences for the company, it is advisable to make a formal resolution recorded in writing.

Under the Dutch Civil Code (DCC), a resolution of the board is void if it is in breach of the law or the articles of association . However, sometimes a resolution of the board is only void if it:

- Is contrary to provisions laid down by law or in the articles of association governing the adoption of decisions.
- Contravenes reasonableness and fairness (*redelijkheid en billijkheid*).
- Contravenes internal regulations.

Authority and powers

In general, the board is authorised to make binding decisions and thus represent the company. The scope of these powers are determined by Dutch law and the articles of association. A legal act by the company is voidable if it exceeds the scope of the company's corporate objective (*doeloverschrijding*). Therefore, directors are limited in their authority and capacity to act because their actions should be in line with the legitimate purpose of the company.

Furthermore, the board may be restricted in its decision-making by the articles of association to the extent these provide that certain resolutions are subject to the prior approval of another corporate body of the company, such as the general meeting or, when installed by the company, the supervisory board or another corporate body of holders of a certain class of shares.

In principle, the power of representation accrues to each director individually and is unrestricted and unconditional. The articles of association may deviate from this, for example by stipulating that directors must act jointly. Such restriction applies to all matters and not to certain matters only. This restriction must have been registered with the Dutch Chamber of Commerce in order to invoke it against third parties.

In the event of a breach of the power of representation arising from the law or the articles of association, the company shall in general not be bound by the contract.

Delegation

The board can grant a power of attorney to represent the company, for instance to a single director or another person who would generally not have the necessary representative powers based on the articles of association. Such a power of attorney is normally limited in scope (such as amount and/or nature of the acts). Such a (corporate) power of attorney is generally registered with the trade register of the Dutch Chamber of Commerce (*Kamer van Koophandel)* as proxy-holder (*gevolmachtigde*) in order to have external effect towards third parties.

Furthermore, a single director can grant a power of attorney to carry out certain specific acts in its name. In practice, these kinds of powers of attorney are limited to a specific legal act for a specific period of time (for example, the signing of a share purchase agreement in respect of a particular transaction).

Duties and obligations of directors

What are the key general duties of directors?

The basic principle under Dutch law is that the board is collectively responsible for the day-to-day management of the company. Its duties also include making plans for the future and determining the strategy and policies of the company. The board has a central role with respect to preparing, determining and executing the policies of the company.

The key duties of a director are set out in the DCC:

- The task of the board is to serve the corporate interest of the company, meaning the interests of the company and the enterprises affiliated with it, i.e. the interests of all stakeholders of the company. When the board acts contrary to the corporate interest, the relevant director(s) can be held liable.
- The company and the persons who by virtue of law and the articles of associations are concerned with its organisation must conduct themselves in relation to each other in accordance with the requirements of reasonableness and fairness. The board should act reasonably and fairly in relation to other persons who are concerned with the company and its organisation. The company must furthermore treat its shareholders equally. A resolution of the board may be voidable if it is contrary to the principles of reasonableness and fairness.
- The duty of each director towards the company is to properly perform the individual tasks allocated to them. When a director breaches their duty of proper performance, they may be held personally liable.

What are directors' other key obligations?

The following duties, in general, can be regarded as other key obligations of the board:

- Managing the day-to-day operations of the company, subject to possible limitations in the articles of association.
- Setting out and executing company strategy and policies.
- Achieving company aims.

- Responsibility for drawing up and publishing annual report and accounts.
- Keeping the company's books and accounts.
- Monitoring the risks, solvency and liquidity of the company.
- Ensuring the company's compliance with relevant legislation and regulations.
- Responsibility for the company's financing.
- Ensuring that other company bodies function well.
- Representing the company.

Duties of the board can be expanded or limited through the articles of association.

Transactions with the company

When directors enter into a transaction with the company, a conflict of interest might arise. Pursuant to Dutch law directors cannot take part in the deliberation and decision-making process of the board if they have a personal direct or indirect conflict of interest (*tegenstrijdig belang*). A director has a conflict of interest when their personal interest (*persoonlijk belang*) is not aligned with the corporate interest (*vennootschappelijk belang*) of the company and as a result of which it can be reasonably questioned whether such director solely has acted in the interests of the company. If a director does not comply with the provisions on conflicts of interest, the resolution concerned is subject to voidability or nullification (in case of a decisive vote) and this member may be held personally liable towards the company. The voidability or nullification does not have an external effect towards third parties.

When a shareholder enters into a transaction with the company, Dutch law prescribes that such transaction is always recorded in writing unless the transaction is conducted within the ordinary course of business.

Liabilities of directors

Breach of general duties

As a starting point, directors are not liable for acts performed in their capacity as directors on behalf of the company. However, there are specific principles under Dutch law pursuant to which a director could be held personally liable. A distinction should be made between internal and external liability:

- **Internal liability** is liability towards the company and is based on the relationship between the director(s) on the one hand and the company on the other hand. Generally, a director can only be held liable internally for improper performance of duties in the event of serious negligence (*ernstig verwijt*). Whether serious negligence can be established should be assessed on the basis of all particular circumstances.
- **External liability** is liability towards third parties, such as creditors of the company or the Dutch tax authorities. A director is generally at fault when they have procured the performance of a legal act on behalf of the legal entity in circumstances where they knew, or reasonably should have known, that the legal entity concerned would not be able to meet its obligations. The liability can also be based on an omission.

Under Dutch law, it is not possible for shareholders to bring an action for breach of duty on behalf of the company (a derivative action).

Note that in the event that the relevant director is a Dutch legal entity, the person(s) managing the legal entity director shall also be jointly and severally liable in accordance with the DCC if the legal entity director is successfully held liable.

Liabilities on insolvency

As a general principle, directors will not be held liable for the (inevitable) risks of entrepreneurship (*ondernemersrisico*). However, if a company is declared bankrupt, the directors are personally liable for the deficit in bankruptcy if the bankruptcy is caused by their apparent negligence (*kennelijke onbehoorlijke taakvervulling*) to a significant extent during a period of three years prior to the date of bankruptcy. The burden to prove that the decisions which lead to the miscalculation, financial setback or disappointing investments were taken with proper caution lies with the respective director(s).

Under Dutch law the board is obliged to keep financial records in such a way that all assets and liabilities of the company can be determined at any time and that the annual accounts and other financial information are duly filed with the trade register of the Dutch Chamber of Commerce. If one of these obligations has not been fulfilled, two statutory presumptions apply:

- An irrebuttable presumption (*niet weerlegbaar vermoeden*) that there has been apparent negligence.
- A rebuttable presumption (*weerlegbaar vermoeden*) that the apparent negligence is a significant cause of the bankruptcy.

In the event that a director will be considered to have evidently improperly performed their duties which will be regarded as a significant cause of the bankruptcy, each director can consequently be held jointly and severally liable for the shortfalls in the estate of a bankrupt company.

An individual director can only avoid liability if they are able to prove that:

- They have not been negligent (*nalatig*) as far as the improper management is concerned.
- They have not been negligent in taking measures to prevent the consequences of improper management.

A claim on this basis can solely be instituted against the director(s) by the trustee in the bankruptcy (curator) on behalf of the collective creditors. Only improper management in the three year period prior to bankruptcy can serve as a basis for such a claim. The Dutch court has the authority to reduce the amount for which directors are liable on a collective or individual basis.

Dutch law imposes liability in the event of bankruptcy of the company not only on directors, but also on policy-makers (*feitelijke beleidsbepaler*). Such a policy-maker may be held personally liable for the deficit in bankruptcy as if they were a director of the company.

Other key risks

Tax debts, social security and pension premiums

Each individual director is responsible for adequate notification to the Dutch tax authorities, social security authorities and pension funds when the company is no longer able to pay certain taxes (including wage tax and VAT), social security and/or pension premiums. Notification must be made forthwith when it appears that the company is or will no longer be able to fulfil its payment obligations, and in any event within 14 days after the date on which the sums were due.

If the notification is not sent in time or not sent at all, the individual directors are jointly and severally liable based on the assumption that the non-payment is caused by mismanagement. An individual director who is able to prove that they are not responsible for the late notification will not be liable, however, such exculpation is subject to a high threshold.

Misleading accounts

If the (annual) accounts published by the company contain a misleading presentation of the financial situation of the company, the directors can be held jointly and severally liable towards third parties for damages suffered as a result.

Protection against liability

How can directors be protected from liability?

Internal liability: discharge

The general meeting can grant discharge (*décharge* or *kwijting*) from liability to the directors for their management conducted during a specific period. Generally, discharge is granted at either:

- The annual general meeting in which the annual accounts for a financial year are adopted.
- The end of the director's position as a member of the board by way of a shareholders' resolution.

Discharge can only be granted for management conducted in the period prior to the resolution granting the discharge was taken, i.e. discharge cannot be forward looking. Discharge can only release a director from liability for management activities to the extent that these appear or may appear from the company's annual accounts or were made known to the general meeting. A director may not invoke discharge as a ground of release from liability if this is in breach of the principle of reasonableness and fairness (*redelijkheid en billijkheid*), which is assessed on the basis of all relevant circumstances. Discharge is limited to prevention of a director's contractual internal liability towards the company, i.e. it cannot prevent external liability to third parties.

External liability: indemnity

External liability of a director can be covered by an indemnity from the company and may include costs for legal assistance. Furthermore, the general meeting or the company may contractually waive its rights to claim damages from a director (i.e. in relation to liabilities not covered by discharge). Such indemnity will have no have effect if the company is in a state of bankruptcy.

D&O insurance

It is customary in the Netherlands for a company to take out directors and officers liability insurance for its directors, covering both internal and external liability risks.

What practical steps can directors take to avoid liability?

Directors should:

- Remain up to date on and keep each other informed about the affairs of the company, particularly its financial position. Directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that. In addition, directors should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, anti-bribery/corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- Also in a group situation, keep in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (e.g. when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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