The Netherlands

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Introduction

The Netherlands is a civil law jurisdiction, meaning that Dutch law is largely laid down in statutory provisions.[1] In Dutch corporate law, a division is made between companies with a separate legal personality and companies without a separate legal personality. Companies with a separate legal personality are the private limited-liability company (*besloten vennootschap*), public limited-liability company (*naamloze vennootschap*), foundation (*stichting*), cooperative (*coöperatie*), mutual insurance association (*onderlinge waarborgmaatschappij*), and association (*verenigingen*).

Companies without a separate legal personality are the general partnership (*vennootschap onder firma*), limited partnership (*commanditaire vennootschap*), partnership (*maatschap*), and sole trader (*eenmanszaak*). A sole trader or partner of a company without a separate legal personality is personally liable for the debts and obligations of the company. If there are two or more partners, each of them is jointly and severally liable for the debts and obligations of the company. If the assets of the company are insufficient, creditors can make a claim on the personal assets of the sole trader or the partners.

A separate legal personality makes it possible to shift the risks of the business to the investors who, in a limited-liability company, will be limited by their contribution on shares. In return, a director who is charged with the management of the legal entity owes fiduciary duties to the shareholders of the legal entity. In exceptional circumstances, the legal entity may hold managing directors liable for improper performance of their duties (*onbehoorlijke taakvervulling*).[2]

An important characteristic of companies with a separate legal personality is that they have their own rights and obligations, stipulated in Book 2 of the Civil Code (*Burgerlijk Wetboek*). The statutory provisions are mandatory, unless they explicitly provide for the possibility of deviation.[3] Deviation is often possible in the articles of association of the legal entity. When doing business, the legal entity in principle will be the contracting party, as a result of which claims of

1 Personal thanks to Tom van Duuren (civil law notary, CMS) for his valuable assistance.
2 Civil Code, section 2:9.
3 Civil Code, section 2:25.

third parties must be instituted against the legal entity. In exceptional circumstances, third parties may hold managing directors or *de facto* managing directors of the legal entity liable for a wrongful act (*onrechtmatige daad*).[4]

Pursuant to statutory law and case law, a managing director is liable towards the company if serious blame (*ernstig verwijt*) can be attributed to him, depending on the circumstances of the case.[5] The effect of this high threshold is to prevent managing directors from allowing their acts to be overly influenced by risk-adverse considerations. The Supreme Court has held that a similar threshold is applicable to other types of directors' liability, since directors' liability is a secondary liability, derived from the primary liability of the legal entity.

In cases of external liability for a wrongful act (*onrechtmatige daad*), a managing director is liable if he can be attributed a personal serious blame (*persoonlijk ernstig verwijt*).[6] Personal blame is not a requirement for establishing liability toward the company because managing directors, in principle, are jointly and severally liable toward the company for the proper performance of their duties.

A third concept of directors' liability is the liability of managing directors towards third parties in the event of bankruptcy.[7] Managing directors are jointly and severally liable with the company in the case of manifestly improper management (*kennelijk onbehoorlijk bestuur*) that probably caused the bankruptcy. The bankruptcy trustee has the exclusive right to institute such a claim, thereby representing the interests of the creditors collectively. Other, more specific types of statutory directors' liability that will be addressed in this chapter concern:

- Liability for distribution of profits out of a private limited-liability company;
- Liability for debts arisen at incorporation;
- Liability for misleading annual accounts;
- Liability for unpaid taxes, social security premiums, and pension premiums; and
- Financial liability.

Board of Directors

In General

In The Netherlands, each legal entity needs a board of directors, consisting of elected or appointed board members, who also are known as managing directors. There is no minimum or maximum number of managing directors; thus, the board of directors must consist of at least one managing director. Natural persons as well as legal entities can become a managing director.

4 Civil Code, section 6:162.
5 Supreme Court, 10 January 1997, *NJ* 1997/360 (*Staleman/Van de Ven*).
6 Supreme Court, 5 September 2014, *NJ* 2015/21 (*Hezemans Air*) and Supreme Court, 5 September 2014, *NJ* 2015/22 (*RCI Financial Services*).
7 Third Abuse Act; Civil Code, sections 2:138 and 2:248.

Liability of natural persons cannot be avoided by using a legal entity as a managing director.[8] On 17 February 2017, the Supreme Court confirmed that, in all cases of directors' liability of a legal entity, the natural person who, directly or indirectly, manages such legal entity might be held jointly and severally liable.[9]

According to Dutch law, the task of the board of directors is to manage the legal entity.[10] The articles of association may restrict this task. The exact meaning of "managing the legal entity" is different for each specific company. In general, the board of directors is involved in the day-to-day business, the policymaking, and the strategy of the company.

The board of directors can delegate tasks to individual directors in the articles of association, board regulations, board resolutions, and otherwise. Nevertheless, the board of directors is collectively responsible for the management of the company. Consequently, all managing directors have the obligation to monitor the delegated tasks.

A statutory obligation of the board of directors is to keep accounting records of the assets and liabilities of the legal entity and of everything regarding the activities of the legal entity in accordance with the requirements arising from these activities. In addition, it must store the books, documents, and other data storage media in such a way that at all times the rights and obligations of the legal entity can be known, for a period of at least seven years.[11] Furthermore, the board of directors must, within five months after the end of the accounting year, draw up the balance sheet and the profit and loss account (income statement) of the legal person.[12] These administrative tasks may not be restricted by the articles of association or otherwise.

There are no statutory rules regulating the meetings of the board of directors. However, the Supreme Court has held that board resolutions must be the result of mutual consultation between all managing directors.[13] Consequently, managing directors, in principle, may not be excluded from board meetings. In practice, rules and regulations with regard to board meetings are laid down in specific board regulations.

Pursuant to Dutch corporate law, the board of directors and each individual managing director is authorized to represent and bind the legal entity towards third parties. If the board of directors consists of two or more managing directors, the articles of association may restrict the authority of individual managing directors by providing for a system of joint representation or by providing that only one specific managing director be individually entitled to represent the legal entity. Such provisions have a binding effect towards third parties once

8 Civil Code, section 2:11.
9 Supreme Court, 17 February 2017, *JOR* 2017/121 (*X/Le Roux Fruit Exporters (Pty) Ltd*).
10 Civil Code, sections 2:44, 2:129, 2:239, and 2:291.
11 Civil Code, section 2:10.
12 Civil Code, section 2:210.
13 Supreme Court, 5 July 1968, *NJ* 1969, 101 (*Wijsmuller*).

published at the Commercial Register (*Handelsregister*) of the Dutch Chamber of Commerce (*Kamer van Koophandel*).

Furthermore, managing directors must perform their duties in the interests of the company and its business (*vennootschappelijk belang*). In The Netherlands, the interest of the company and its business is the result of the interest of all stakeholders involved in the company rather than the interest of the shareholders. Recently, the Supreme Court stipulated that the interest of the company is the lasting success of the business. In joint ventures, the nature and content of the underlying shareholder cooperation as laid down in the joint venture agreement should be taken into account as well when addressing the interest of the company and its business.[14]

Appointment and Dismissal of Members of Board of Directors

The first managing directors of the company are appointed in the notarial deed of incorporation. The succeeding managing directors must be appointed by resolution of the general meeting of shareholders or members (*algemene vergadering*), unless the company has a supervisory board. In that case, the supervisory board appoints the directors. Each member of the board of directors, at all times, may be suspended or dismissed by the body or person empowered to appoint him. The right of appointment and dismissal of members of the board of directors of a Dutch private limited-liability company may be granted to the meeting of holders of shares of a specific class or series.

The articles of association can provide that a resolution to suspend or dismiss a managing director may be passed only by an enhanced majority of the votes cast at a general meeting where a certain part of the capital is represented. However, this enhanced majority may not exceed two-thirds of the votes cast that represent more than 50 per cent of the share capital.[15]

If an appointed managing director also has an employment agreement with the legal entity, dismissal generally results in termination of the employment agreement.[16] Managing directors of listed companies are not allowed to have employment agreements with the company. In practice, listed companies often conclude a management services agreement (*overeenkomst van opdracht*) with managing directors.

Non-Appointed Directors

The Dutch rules and regulations on liability of corporate directors apply to managing directors who are appointed by the general meeting or supervisory board. A distinction should be made between appointed managing directors (*statutair bestuurders*) and directors who are not appointed but work for the

14 Supreme Court, 4 April 2014, *NJ* 2014, 286 (*Cancun Holding*).
15 Civil Code, section 2:243.
16 Supreme Court, 15 April 2005, *JAR* 2005, 117 (*Unidek*); Supreme Court, 15 April 2005, *JOR* 2005, 144 (*Bartelink*).

company solely on a contractual basis such as an employment or management services agreement (*titulaire directeuren*).

If there is a contractual relationship with the company, directors can be held liable by the company for breach of contract (*wanprestatie*),[17] wrongful act (*onrechtmatige daad*),[18] or on the grounds of not being a good employee (*goed werknemerschap*) if the director has an employment agreement.[19] If there is no contractual relationship, for example, if a creditor has a contractual relationship with the company, but directly holds a director personally liable, actions must be instituted on the basis of wrongful act. In general, the employer is the first to be held liable.[20] Only in exceptional circumstances, such as fraud, can the employee be held directly liable for a wrongful act.

Board Structure

A company is not required to have supervisory directors unless it is a public limited-liability company, private limited-liability company, cooperative, or mutual insurance association having an issued capital together with the reserves exceeding €16-million according to the balance sheet, having, or a dependent company having, instituted a works council by virtue of a statutory obligation, and having, together with any dependent companies, at least 100 employees (*structuurvennootschap*).[21] These calculations must be made based on the consolidated accounts if made up. For other companies, supervisory directors are optional.

For a long time, Dutch law provided only for the so-called two-tier board structure, in which the supervisory directors (*commissarissen*) are organized in a separate board (*raad van commissarissen*). Since 1 January 2013, Dutch law facilitates the creation of a one-tier board structure in public and private limited-liability companies, including companies subject to labor co-determination rules (*structuurregime*).[22] In order to create a one-tier board structure, the articles of association must provide that the tasks of the board be divided among one or more non-executive directors and one or more executive directors. A more detailed division of tasks may be provided in the articles of association, board regulations, board resolution, or otherwise. The executive directors may not be allocated the task of:

- Chairing the board of directors;

17 Civil Code, section 6:74.
18 Civil Code, section 6:162.
19 Civil Code, section 7:611.
20 Civil Code, section 6:170.
21 Civil Code, sections 2:63b, 2:153, and 2:263.
22 On 10 June 2016 the Dutch House of Representatives received a legislative proposal on the management and supervision of Dutch legal entities for discussion and adoption. The proposal aims to align the legislation for all legal entities under Dutch law and to codify rules developed in case law and doctrine. One element of the proposal is the expansion of the rules on one-tier board systems to all Dutch legal entities. When the act will enter into force has not been announced yet.

- Setting the remuneration of the executive directors;
- Supervising the board of directors' overall performance; or
- Nominating a member of the board.[23]

Executive directors may be suspended by the board of directors.[24] Hence, executives have a say in the suspension of their fellow executives. This is rather surprising, since the authority to suspend executives generally lies with the corporate body that supervises the executives, i.e., the supervisory board in a two-tier board structure, or with the general meeting in case there is no supervisory board.

An interesting development is the establishment of an executive committee (Exco) by a growing number of large Dutch companies. In general, an executive committee consists of senior managers and managing directors of the company. Dutch law does not provide for statutory rules governing the internal governance of executive committees. The legal basis is often laid down in the articles of association or board regulations of the company. Hence, the establishment of an executive committee may have consequences for the checks and balances within the company.

Senior managers, for instance, do not have to render account to the supervisory board. As a result, an executive committee can have a negative effect on the supervision of the management of the company. In that respect, the Corporate Governance Code 2016 introduced the best-practice rule that listed companies with an executive committee should take into account the same checks and balances as within a two-tier board structure.

In the management report, the board of directors of listed companies explains why it opted for an executive committee, the role and composition of the Exco, and how the interaction between the supervisory board and the executive committee has been structured.

De Facto Managing Directors

The Dutch liability regime is applicable to managing directors, elected or appointed by the shareholders' meeting or the supervisory board, and not to other managers or directors. However, other persons may fall within the scope of directors' liability if they determined the policy of a company or predominantly participated in determining this policy, *de facto* managing directors (*feitelijke beleidsbepalers*).[25] This is only for the purpose of external liability, *i.e.*, wrongful act and liability in case of bankruptcy. In most cases, *de facto* managing directors are the supervisory director, the sole shareholder, or the non-appointed member of the executive committee.

23 Civil Code, sections 2:129a and 2:239a.
24 Civil Code, sections 2:134 and 2:244.
25 Civil Code, sections 2:138 and 2:248.

In exceptional circumstances, a shareholder is liable for the debts and obligations of the subsidiary. This is particularly the case if the shareholder has knowledge and control over the subsidiary and predominantly interfered with the ordinary course of business or the policy of the subsidiary without taking into account the interests of the subsidiary, such as when the shareholder transfers assets from the subsidiary to itself or to an affiliated company, while the shareholder knew or should have known that the subsidiary would not be able to pay its debts after the distribution.[26]

Limitation of Board Membership

If the company is a public limited-liability company, private limited-liability company, or foundation qualified as a "large entity" on two subsequent balance sheet dates, the number of memberships of two-tier boards and one-tier boards are limited in the following ways:

- A person cannot be appointed as managing director or executive director if he is a supervisory director or non-executive director in more than two other large entities or is the chairman of the supervisory board or the one-tier board of another large entity; and
- A person cannot be appointed as supervisory director or non-executive director if he is a supervisory director or non-executive director in more than four other Large Entities, whereby the position of chairperson of the supervisory board or one-tier board counts twice.[27]

A company qualifies as a large entity if, according to its balance sheet, it meets at least two of the following three criteria:

- The asset value exceeds €20-million;
- The financial year's net turnover exceeds €40-million; or
- There is an average of at least 250 employees in the last financial year.
- These calculations must be made based on the consolidated accounts if made up.

As to foundations, the limitations on board membership only apply to those that have a statutory obligation to draw up annual accounts, so most charitable and cultural foundations are excluded. These limitations do not apply to advisory positions, nor to any positions with non-Dutch entities. Any number of supervisory and/or non-executive directorships within a group is counted as one. If an appointment leads to the maximum permitted number of directorships being

26 Supreme Court, 2 November 1984, *NJ* 1985, 446 (*Blok/De Haan*); Supreme Court, 8 November 1991, *NJ* 1992, 174 (*Nimox*).

27 Civil Code, sections 2:166, 2:276, 2:297a, and 2:297b. The limitations do not apply to appointments made before the rules entered into force on 1 January 2013. However, existing appointments must be taken into account when applying the rules to appointments made thereafter.

exceeded, such appointment is null and void. However, this does not affect the validity of the decisions taken by the board of directors.

Remuneration

The general meeting of shareholders determines the remuneration of the managing directors.[28] The articles of association of a company may deviate from this provision, as a result of which the authority to determine the remuneration of the managing directors can be allocated to the supervisory board.

The Corporate Governance Code 2016, which is applicable to listed companies, recommends that the supervisory board should determine the remuneration of the individual members of the board of directors, within the limits of the remuneration policy adopted by the general meeting.[29] If the company has a one-tier board structure, the non-executives determine the remuneration of the executives and the general meeting of shareholders determines the remuneration of the non-executives.[30]

Since 1 January 2015, the remuneration of managing directors of public and semi-public companies, such as hospitals, schools, and public broadcasters, may not exceed the salaries of government ministers.[31] The maximum salary for senior officials is €181,000 in 2017. This includes holiday allowance, end-of-year allowance, pension contributions, and expenses.

Redundancy payments may not exceed a one year's salary, up to a maximum of €75,000. Bonuses, profit sharing, and other forms of variable remuneration are not permitted. This also applies to institutions that get a substantial amount of their income from government grants. Separate standards and arrangements exist for healthcare insurers, care institutions, educational institutions, cultural funds, and housing associations.

The statutory provisions on directors' remuneration apply to companies that are incorporated in The Netherlands. The companies mentioned above must report the remuneration amount of each managing director in the annual accounts. This amount must be divided into periodically paid remuneration, long-term remuneration, payments for termination of employment agreement, and profit and bonus payments, which have been charged to the company in the financial year.[32]

Gender Diversity

Management and supervisory boards of large entities must consist of at least 30 per cent women and at least 30 per cent men to the extent that the board members are natural persons. The same applies to public limited-liability companies and

28 Civil Code, sections 2:135 and 2:245.
29 Corporate Governance Code 2016, Principle 3.2, at p. 31.
30 Civil Code, sections 2:129a and 2:239a.
31 Public and Semi-public Sector Senior Officials (Standard Remuneration) Act (WNT).
32 Civil Code, section 2:383c.

private limited-liability companies that have instituted the board structure of a large entity.[33]

Internal Liability of Managing Directors

Improper Performance

Pursuant to section 2:9 of the Civil Code, a managing director must properly perform the duties assigned to him by the legal entity. The duty to manage the legal entity is assigned to the board of directors and therefore to the managing directors collectively in case there is more than one managing director. In principle, this results in joint and several liability of the managing directors towards the company in the event of improper performance of the duties concerned.

In practice, most legal entities delegate tasks to individual managing directors. In that case, the managing director assigned with the delegated task is responsible for the actual performance of such task and the responsibility of the other managing directors shift towards the duty to monitor the performance of such delegated tasks. If a matter is assigned to two or more managing directors, each of them, in principle, will be jointly and severally liable for improper performance. Duties that are not specifically allocated to managing directors fall within the scope of responsibility of all managing directors. In addition, there are certain matters that fall within the scope of responsibility of all managing directors, irrespective of a delegation of tasks. In Dutch legal literature, it is argued that all managing directors are responsible for the ordinary course of business, the general policy and financial policy, including the drawing up and publishing of the annual accounts.

Section 2:9 of the Civil Code makes no distinction between executive and non-executive directors. Hence, non-executive directors may be responsible for the performance of daily management tasks, if such tasks are not explicitly delegated to one or more executive managing directors. Tasks may be delegated pursuant to the law or the articles of association. Consequently, the articles of association may provide for a delegation of tasks in board regulations, board resolutions, or otherwise.

The Supreme Court has held that a managing director at least must have the skills and expertise required to manage the particular legal entity and must perform his duties to the best of his abilities. Subsequently, a managing director is liable for improper performance if he can be attributed serious blame (*ernstig verwijt*), depending on all circumstances of the case. The circumstances to be considered include the nature of the activities of the legal entity, the risks generally resulting from these activities, the division of tasks within the board of directors, the rules and regulations applicable to the board of directors, the information available to the managing director at the time of

33 Civil Code, sections 2:166 and 2:276.

the alleged decision or act, and the understanding and accuracy that may be expected of a managing director who is calculated for his tasks and fulfils them carefully.[34]

Generally, it is a serious fault of a legal entity if a (*de facto*) managing director is acting contrary to the interests of the legal entity (*handelt in strijd met het belang van de vennootschap*). Furthermore, actions in contravention with a provision in the articles of association that aims to protect the legal entity are usually considered improper performance of the management duties. Other examples of improper performance are:

- Diverting the legal entity's funds for personal use;
- Acting in the own private interest, or to the interest of a third party;
- Mixing private business with the business affairs of the legal entity;
- Representing the legal entity without having the authority to do so;
- Taking unnecessary large financial risks;
- Failing to properly prepare important decisions; and
- Failure to arrange for customary insurance coverage.

Exculpation

To escape joint and several liability, an individual managing director must prove that the improper management is not attributable to him and that he was not negligent in taking measures to avoid the consequences thereof. No distinction is made between executive and non-executive directors. Proof of delegation of the improperly performed task to another director often leads to the conclusion that the improper management is not attributable to the individuals that were not involved. Relevant questions in this regard are whether:

- The tasks and responsibilities of the managing directors were clearly defined;
- The issue has been discussed in a board meeting or with the other managing directors outside a board meeting;
- The relevant information has been provided to the other managing directors;
- There was any reason to doubt about the information provided to the other managing directors; and
- The issue was of major importance to the company.

It is not completely clear to what extent individual managing directors must take measures to avoid the consequences of the improper management. According to the explanatory memorandum of section 2:9 of the Civil Code, an individual managing director must take over the improperly performed task, even if the specific task is delegated to another managing director.

34 Supreme Court, 10 January 1997, *NJ* 1997, 360 (*Staleman / Van der Ven*).

This is not different for directors operating in a one-tier board structure, as a result of which a non-executive director may have to perform the tasks of an executive director. This seems undesirable. It is, therefore, recommended to give the board of directors the lead in revoking such delegated tasks, so that it can allocate the task to the right person.

Access to Corporate Information

In a one-tier board structure, non-executive directors are subject to the same liability regime as executive directors. Consequently, they can be held liable for improper management of the executives as well as for failed supervision. Hence, it is argued that non-executive directors in a one-tier board structure will sooner be held liable than supervisory directors in a two-tier board structure.

Such an extended liability is justified because non-executive directors are involved in the decision-making process and have direct access to information since they actually have a seat in the board of directors. The counter argument usually advanced is that non-executives often are not involved on a daily basis, but attend meetings approximately eight to 10 times a year.[35] In practice, the supply of information largely depends on the way the management of a particular company is organized and operates. Furthermore, Dutch case law shows that, when managing directors operating in a two-tier board structure are held liable, the supervisory directors often also are held liable.[36]

Distribution of Profits out of Private Limited-Liability Company

In principle, the general meeting is empowered with the allocation of the profits that have been determined by adoption of the annual accounts, as well as to resolve to distribute other assets such as dividends, repayment of share premium or profit reserves, a reduction of capital or share buy backs. As a result of abolishing the capital maintenance rules for private limited-liability companies, distributions from private limited-liability companies to shareholders are only allowed if the company upon distribution will be able to continue paying its debts when they become due and to the extent that the company's assets exceed its mandatory reserves.

In order to ensure this, all distributions and repayments by private limited-liability companies are subjected to approval of the board of directors. The board of directors must refuse approval if the company will not be able to continue to pay its debts after such distribution. If, after distribution, the company cannot pay its

35 Schuit, "Verslag van de discussie", *Bestuur en toezicht* (2009), at pp. 152 and 153; Timmerman, "Naar geïntegreerde bestuurdersaansprakelijkheid?", *Met Recht, Opstellen over privaat- en fiscaalrechtelijk ondernemingsrecht aangeboden aan Theo Raaijmakers* (2009), at p. 26; Van Schilfgaarde and Winter, *Van de BV en de NV* (2009), at p. 171.

36 Supreme Court, 10 January 1990, *NJ* 1990, 446 (*Ogem*); Supreme Court, 28 June 1996, *NJ* 1997, at p. 58 (*Bodam Jachtservice*); District Court Breda, 1 May 1990, *NJ* 1990, at p. 740 (*Tilburgsche Hypotheekbank*); District Court Utrecht, 12 December 2007, *JOR* 2008, 10 (*Ceteco*).

due and payable debts, the managing directors who were or should be aware of this will be jointly and severally liable towards the company.[37] The liability extents to the shortfall that has arisen due to the distribution, raised with the statutory interest running as of the day of distribution. To avoid liability, a managing director must prove that the decision is not attributable to him and that he took measures to avoid the consequences thereof.

External Liability of Managing Directors

Another type of liability of managing directors is external liability towards third parties, such as creditors, but also individual shareholders. External liability is not based on specific company law, but on the more general civil law provisions of wrongful act (*onrechtmatige daad*).[38] If a managing director acts in its capacity of managing director of the company, he can only be held liable for a wrongful act if the act concerned qualifies as serious fault for which the managing director is personally to blame (*persoonlijk ernstig verwijt*).[39]

Whether there is a personal serious blame will depend on the nature and gravity of the act and on the actual facts and circumstances of each case. Usually, personal serious blame will be considered if the prejudicing of one or more creditors was foreseeable, taking into account "willful blindness", *i.e.*, intentionally keeping unaware of facts that would render a managing director liable.

Case law broadly shows three categories of external liability. The first category is based on the *Beklamel* case, in which the Supreme Court held that a managing director who, on behalf of the company, accepts an obligation, while he knows or should have known that the company will not be able to fulfil that obligation timely or be able to offer sufficient recourse, is personally liable for the damages or losses of such creditor.[40] Second, managing directors are held liable in the event of non-payment of the outstanding amounts (and diminishment of assets) as effectuated or allowed by the managing director *(verhaalsfrustratie*).[41] Third, individual creditors may hold managing directors liable if they have been excluded from payment (*selectieve wanbetaling*).[42] A distinction is made between managing directors who act on behalf of a company that is truly unable to pay (*betalingsonmacht*), such as when insolvency is imminent, and managing directors who are unwilling to pay (*betalingsonwil*). In principle, only the latter will qualify as incurring personal serious blame.[43]

37 Civil Code, section 2:216.
38 Civil Code, section 6:162.
39 Supreme Court, 20 June 2008, *NJ* 2009, 21 (*Willemsen/NOM*); Supreme Court, 5 September 2014, *NJ* 2015/21 (*Hezemans Air*); Supreme Court, 5 September 2014, *NJ* 2015/22 (*RCI Financial Services*).
40 Supreme Court, 6 October 1989, *NJ* 1990, 286 (*Beklamel*).
41 Supreme Court, 8 December 2006, *NJ* 2006, 659 (*Ontvanger/Roelofsen*).
42 Supreme Court, 12 June 1998, *NJ* 1998, 727 (*Coral/Stalt*) and Supreme Court, 8 December 2006, NJ 2006, 659 (*Ontvanger/Roelofsen*).
43 Supreme Court, 3 April 1992, *NJ* 1992, 411 (*Waning/Van der Vliet*).

Furthermore, managing directors usually are liable towards individual shareholders for actions that contravene provisions in the articles of association that aim to protect the individual shareholders.[44] In order to succeed, actions instituted against a managing director based on a wrongful act (*onrechtmatige daad*) must meet the following five requirements:

- The act must be an unlawful act (*onrechtmatige gedraging*);[45]
- The unlawful act must be attributable to the managing director in question (*toerekenbaarheid*);[46]
- There must be losses or damages (*schade*) resulting from the wrongful act;[47]
- There must be a causal link between the unlawful act and the losses (*causaliteit*); and
- The norm infringed by the managing director must aim to protect the interest that has been harmed (*relativiteit*).[48]

Liability for Debts Arisen at Incorporation

Before a company is incorporated, a director can perform acts on behalf of the company. However, the directors of a company in formation (*vennootschap in oprichting*) are jointly and severally liable for individual creditors for debts arisen during the period before incorporation, if they knew or could have known that the legal entity would not fulfil its obligations.[49] It is assumed that the director knew that the company would not fulfil its obligations if the company goes bankrupt within one year after incorporation. In that case, the director must prove the contrary.

Liability for Misleading Annual Accounts

Pursuant to the European Union (EU) Fourth European Council Directive and the Seventh European Council Directive, members of the managing board and the supervisory board are responsible towards the company for the preparation and publication of the annual accounts and the annual report, respectively the consolidated annual accounts.[50]

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44 Supreme Court, 20 June 2008, *NJ* 2009, 21 (*Willemsen/NOM*).
45 Unlawful acts are the infringement of a right, an action, or neglect in contravention of a statutory duty and an action or neglect in contravention of generally accepted norms. The three categories of external liability as mentioned above are considered to be unlawful acts.
46 This will be the case if the unlawful act is the managing director's fault or responsibility.
47 Civil Code, sections 6:96 and 6:106. Eligible for compensation are financial losses, *i.e.*, losses suffered and lost profits, and immaterial losses such as reputational damages.
48 Civil Code, section 6:163.
49 Civil Code, sections 2:93 and 2:203.
50 Directive 2006/46/EC of 14 June 2016, amending Fourth Council Directive 78/660/EEC of 25 July 1978 and Seventh council Directive 83/349/EEC of 13 June 1983.

Dutch statutory company law states that managing directors and supervisory directors are jointly and severally liable towards third parties for any losses suffered from a misrepresentation of the condition of the company in the annual accounts.[51] Managing directors are also jointly and severally liable towards third parties for any losses suffered from a misrepresentation of the financial condition of the company in the annual report or interim figures.

It is not required that the misrepresentation results from culpable conduct of the managing director or supervisory director. However, a managing or supervisory director can avoid liability by proving that the misrepresentation is not attributable to him, given all circumstances of the case and that he was not negligent in taking measures to avoid the consequences thereof. Unlike with internal liability, managing directors cannot avoid liability by arguing that the task was delegated to other managing directors because the financial policy and, more specifically, publishing the annual accounts is a duty of the board of directors and cannot be delegated to individual managing directors.

Liability for Unpaid Taxes, Social Security Premiums, and Pension Premiums

According to statutory law, a managing director is personally liable for unpaid taxes, social security premiums, and pension premiums of the legal entity, if the non-payment of the legal entity is the result of manifestly improper management (*kennelijk onbehoorlijk bestuur*) by the managing director. If the legal entity reports the financial deficit to the relevant authorities within 14 days after the incapacity of payment arose, such authority must prove the manifestly improper management.

If not, it is presumed that the non-payment is a consequence of manifestly improper management. Once the authorities have declared a managing director liable for overdue taxes or premiums imposed on the legal entity, it is up to the managing director to prove that the debt was left unpaid for reasons that were out of his sphere of control. Fiscal liability often occurs after bankruptcy, as the legal entity is then no longer able to pay its own tax and social security debts and the Dutch authorities consequently shift their focus on the persons behind the legal entity. Actions may be brought against managing directors for a period of three years after the legal entity defaulted.

Financial Liability of Managing Directors

In general, the financial supervision rules apply to the financial company. However, it also sets norms and standards for day-to-day policymakers (*dagelijks beleidsbepalers*), including managing directors, and co-policymakers such as supervisory directors and non-executive directors, working for a financial institution with its registered seat in The Netherlands, irrespective of their nationality. According to the Financial Supervision Act (*Wet financieel toezicht*), policymakers and co-policymakers must be suitable for the job and their reliability

51 Civil Code, sections 2:139, 2:150, 2:249, and 2:260.

and integrity must be beyond doubt (*geschiktheid, betrouwbaarheid en integriteit*).[52] Each nominated policymaker must be tested as such by the Dutch competent authorities, i.e., the Central Bank or the Authority for the Financial Markets, before being appointed or employed.

The relevant authorities may conduct a reassessment if the reliability of a policymaker is no longer beyond any doubt. In exceptional circumstances, the authorities may demand the removal of a managing or supervisory director, or disqualify a managing director for a maximum period of one year with a possible extension of one year. A decision like this must be highly motivated, failing which the decision can be nullified by the court, as has happened with the decision of the Central Bank to demand removal of a managing director and supervisory director of Delta Lloyd.[53]

Furthermore, the Financial Supervision Act and the Market Abuse Regulation[54] contain standards of conduct applicable to all persons working in the financial sector. The most prominent provision is the prohibition to make misleading statements to the public. The Authority for the Financial Markets recently imposed two administrative fines of €750,000 and €500,000 to two managing directors of Imtech for giving press releases about the half-year report while concealing financing problems.

A managing director who made a misleading statement can be held personally liable towards investors. The District Court Rotterdam held that, in such case, the increased threshold of a personal serious blame does not apply because the standard of conduct is addressed to the individual policymakers and not to the company.[55] However, critics argue that the increased threshold of personal serious blame should be taken into account every time a managing director acts in his capacity of managing director.

Public financial companies must disclose price-sensitive information. Although this rule is exclusively addressed to the financial company, practice shows that managing directors or *de facto* managing directors can be fined for not complying with the disclosure requirements. In this case, the increased threshold of personal serious blame must be applied. Actions can be instituted by investors based on wrongful act (*onrechtmatige daad*) and by the company based on improper performance (*onbehoorlijke taakvervulling*). The company, for instance, may claim damages incurred because of the fine for non-compliance with the disclosure requirements.

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52 Financial Supervision Act, sections 3:8, 4:9, and 4:10.

53 District Court of Rotterdam, 31 July 2015 (*Delta Lloyd & Roozen/DNB*) and District Court of Rotterdam, 31 July 2015 (*Delta Lloyd & Hoek/DNB*).

54 EU Regulation 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC, and 2004/72/EC.

55 District Court of Utrecht, 15 February 2012, *JOR* 2012/234 (*Kortekaas/Votron c.s.*).

Individuals who have access to non-public information are prohibited from trading in the company's stock or other securities until the price-sensitive information is disclosed. If a managing director trades in the company's securities on the basis of non-public information, he is not acting in the capacity of managing director, but as an individual for personal gain (insider trading). Therefore, such insider trading falls outside the scope of directors' liability and will be dealt with by criminal law enforcement or actions instituted based on wrongful act.

Finally, a director may be held liable for professional misconduct. Every person working with clients in the financial industry has the duty to know the client, provide clients with sufficient and relevant information, and warn them in due time if necessary.[56] The Supreme Court held that professional misconduct is not made in the capacity of managing director and therefore not subject to the increased threshold of a personal serious blame.[57] As with external liability based on wrongful act, the legal obligation that has been breached must aim to protect the interest of the person that claims the breach of it (*relativiteit*). All provisions of the financial supervision act aim to protect the financial interests of clients of the financial institutions.

Liability in Case of Bankruptcy

If a legal entity becomes bankrupt, each managing director will be jointly and severally liable for the liabilities of the legal entity to the extent that these cannot be satisfied out of the liquidation assets of the legal entity, provided that the board of directors has manifestly performed its duties improperly and it is plausible that this has been an important cause of the bankruptcy.[58] Improper performance is assumed an important cause of the bankruptcy of the legal entity in the following circumstances:

- The managing directors have not filed the legal entity's accounts with the Dutch Chamber of Commerce within the prescribed time after the end of the financial year; or
- The accounts of the legal entity have not been kept in accordance with good accounting practices and do not provide a true insight into the financial position of the legal entity.

In such case, the burden of proof is shifted to the managing directors, who must then prove that these circumstances did not cause the bankruptcy. Consequently, it can be extremely difficult for the managing directors to avoid liability. An action on the grounds of manifestly improper management (*kennelijk onbehoorlijk bestuur*) may be instituted in respect of duties performed, or not performed, during the period of three years preceding the bankruptcy. Pursuant to sections 138 and 248 of Book 2 of the Civil Code, the bankruptcy trustee may

56 Financial Supervision Act, sections 4:23 and 4:24.
57 Supreme Court, 18 September 2015, *JOR* 2015/289 (*Breewijk/Wijnkamp*).
58 Civil Code, sections 2:50a, 2:138, 2:248, and 2:300a.

institute the same actions against *de facto* managing directors and natural persons that indirectly managed the company that went bankrupt. Note that the bankruptcy trustee also has the power to institute an action on the grounds of improper performance under section 9 of Book 2 of the Civil Code, although he then holds the burden of proof that there has been improper performance of management duties.

Directors' Disqualification

As from July 2016, bankruptcy trustees and the public prosecutor may request the court to prohibit a managing director of an insolvent legal entity from becoming, or continuing to be, a managing director or supervisory director of another Dutch legal entity for a maximum period of five years.

The Court may disqualify a managing director if he has manifestly improperly performed his management duties within a period of three years before the insolvency took place. Manifestly improper management will be assumed, subject to proof to the contrary, if one of the following facts has occurred:

- The managing director has been held liable on the basis of section 138 or 248 of Book 2 of the Civil Code by a court decision that is no longer subject to appeal;
- The managing director has consciously and purposely been involved on behalf of the legal entity in actions of fraudulent conveyance (section 42 or 47 of the Bankruptcy Act) as a result of which creditors have suffered considerable damages and those acts have been nullified by a court decision that is no longer subject to appeal;
- Notwithstanding a request of the bankruptcy trustee, the managing director to a serious degree fails to fulfill his obligations towards the bankruptcy trustee to provide information and to cooperate with him;
- The managing director was, either as a managing director or as an individual operating his own business, at least on two occasions involved in the bankruptcy of a Dutch legal entity and can be found culpable personally for such involvement; or
- A tax penalty based upon section 67d, 67e, or 67f of the General Act on National Taxes (*Algemene wet inzake Rijksbelastingen*) has been imposed on the legal entity or the managing director in that capacity and such penalty is no longer subject to appeal.

The disqualification rules also apply to indirect directors, *de facto* directors, shadow directors, and individuals who acted on behalf of their own business. If the insolvent legal entity has a one-tier board structure, only the executive directors may be disqualified. A disqualification becomes effective when the right to appeal the decision to the Court of Appeal or the Supreme Court has expired. The Court may suspend a (former) managing director as managing director or supervisory director of other Dutch legal entities during the process. Disqualified managing directors will be removed from the Commercial Register of the Chamber of Commerce and disqualification orders will be registered in a public central register.

Directors' and Officers' Insurance

In practice, legal entities, especially large companies, take out directors' and officers' (D&O) insurance. Most D&O insurers provide coverage for internal and external liability claims, up to a certain amount. The majority of the insurance policies does not cover all sorts of claims and generally exclude the following circumstances:

- Known claims and circumstances;
- Fraudulent and dishonest conduct;
- Risks covered by other insurances;
- Claims by the company against its managing directors;
- Claims within one management board;
- Litigation against the legal entity;
- Catastrophic events for the insurer; and
- Criminal fines and penalties.

Most D&O insurance policies contain a so-called severability provision, stating that knowledge of material, false statements in the application by one insured managing director will not be imputed to other insured managing directors. For instance, if an insured managing director was aware that a coverage application contained false financial data, he will not be covered under the insurance policy, while the coverage of the other managing directors who had no knowledge that the financial statements were false will remain.

If a non-domestic insurer wants to provide insurance policies to Dutch legal entities, the insurer must obtain approval of the Central Bank. In general, supervisory authorities of other EU member states contact the Central Bank if an insurer domiciled and licensed within its EU member state intends to provide insurance in The Netherlands. Subsequently, the Central Bank will contact the foreign insurer to notify under which terms and conditions the insurer is required to conduct its business in The Netherlands.[59] If the insurer does not have a license in another EU member state, or is domiciled in a non-EU member state, it must apply for a license with the Central Bank to conduct business in The Netherlands.

Indemnification and Discharge

A managing director may be indemnified by the legal entity for claims brought against him by third parties. In practice, this includes the legal costs of defending himself against alleged acts or omissions. For example, the articles of

59 Dutch Financial Supervision Act, section 2:34, 2:35 and 2:36.

association of Dutch-listed companies as Unilever, Philips, ASML, and AKZO Nobel contain specific provisions entitling managing directors and supervisory directors to claim compensation of damages, fines, and legal costs, incurred in the course of performing their duties, to the extent not covered by D&O insurance.

If a claim is awarded, the managing director must bear the costs and claim repayment by the legal entity. It is prevailing doctrine that an indemnification, given in advance, is not possible for acts that contravene compulsory statutory law on duties of managing directors towards the legal entity.

The general meeting of shareholders or members may discharge a managing director of his responsibility towards the legal entity in retrospective (*décharge*). In general, such discharges are granted based on specific documents like the annual accounts and do not cover facts that do not appear from these documents.

Furthermore, the court can declare a discharge null and void if it appears to be in violation with the principles of reasonableness and fairness. Consequently, a discharge does not always affect liability of the managing directors towards the legal entity based on improper performance, nor does it affect external liability or liability in case of bankruptcy.