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Practical cross-border insights into business crime law

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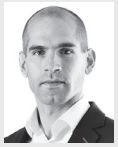
Netherlands



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1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

In principle, the Public Prosecution Service has a monopoly on criminal prosecution, containing both regional and national divisions. Business crimes are often dealt with by the *'Functioneel Parket'* or the *'Landelijk Parket'*, two specialised departments within the Public Prosecution Service that are tasked with, *inter alia*, (international) fraud and corruption as well as various economic offences. Certain other government authorities, however, can also impose sanctions in administrative proceedings that may qualify as a 'criminal charge'.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

Several government agencies have the authority to investigate potential violations which may lead to a criminal prosecution or administrative sanctions. A criminal prosecution is always carried out by the Public Prosecution Service. If administrative and criminal law coincide (e.g. in fiscal or environmental law), there are often directives, instructions or covenants that regulate by whom and in what manner the offence should be dealt with. In addition, it is customary that the various agencies confer on what approach best suits a particular case.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

Civil enforcement of criminal offences as such does not exist under Dutch law. Various investigative and regulatory authorities may, however, use administrative enforcement by, *inter alia*, setting administrative penalties. These authorities include the Financial Markets Authority, the Dutch Central Bank, Environmental Inspectorates, the Dutch Food and Wares Authority and the Inspection Services of Social Affairs and Employment.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

In July of 2021, ABN Amro Bank entered into a settlement agreement for €480 million with the Public Prosecution Service in connection with the failure to fulfil its obligations under the Dutch Anti-Money Laundering and Counter Terrorism Financing Act between 2014 and 2020. In December of 2020, the Court of Appeal of The Hague ordered the prosecution of Mr Ralph Hamers, the former head of ING Bank and current head of UBS Bank, regarding his role in a similar failure of ING Bank to fulfil its AML-CTF obligations, an allegation for which ING Bank itself had entered into a settlement agreement with the Public Prosecution Service in 2018. In April of 2021, five subsidiaries of SHV Holdings entered into a settlement agreement for USD 41.6 million regarding foreign bribery allegations.

2 Organisation of the Courts

2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

There are 11 geographical districts with their own courts where cases are tried at first instance. A court ruling can be appealed at one of the four Courts of Appeal according to their geographical jurisdiction. Both the Courts of First Instance and the Courts of Appeal have separate criminal divisions for economic and environmental crimes, which have the exclusive competence to review these cases. Against a judgment of the Court of Appeal, further appeal is possible to the Supreme Court.

2.2 Is there a right to a jury in business crime trials?

Dutch law does not provide for the possibility of a trial by jury for any type of offence.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in your jurisdiction to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

- **Securities fraud**

Securities fraud would often be prosecuted under general criminal law provisions; for example, by prosecution for forgery of documents (article 225 Criminal Code; henceforth: CC), deceit (article 326 CC), and embezzlement (article 321 CC, see below). Forgery in essence consists of the intentional creation, use, or possession with intent to use, of documents with any evidentiary purpose, containing material or intellectual falsehoods. Deceit in essence requires an intentional and unlawful

misrepresentation of facts leading to the misappropriation of funds or goods of another person. Furthermore, price manipulation with the intent to unlawfully benefit oneself or another is illegal when a person drives up or drives down the price of commodities, stocks or other securities by disseminating false information (article 334 CC).

In addition, the Financial Supervision Act regulates the financial sector and, *inter alia*, implements the Prospectus Regulation (EU) 2017/1129. Violation of various rules of the Financial Supervision Act are made punishable under the Economic Offences Act (article 1 under 2° and 3°). Under the Economic Offences Act, intentional commission of an act that constitutes an offence often leads to the offence qualifying as a felony, whilst the culpable commission of the act often leads to the offence qualifying as a misdemeanour.

• Accounting fraud

A director, officer or managing partner of a legal entity who intentionally publishes or allows the publishing of false financial reports or statements may be prosecuted under article 336 CC. In addition, prosecution may be based on conspiracy or complicity in general criminal law offences such as forgery of documents (article 225 CC) and tax fraud (see below). Auditors may be separately prosecuted for failure to notify the Financial Intelligence Unit of unusual transactions (article 16 AML-CTF Act in conjunction with article 1 under 2° Economic Offences Act).

• Insider trading

Pursuant to article 14 of the Market Abuse Regulation (Regulation (EU) 596/2014; henceforth: MAR), it is a criminal offence to (attempt to) engage in insider dealing, or to unlawfully disclose inside information. Inside information is information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments (article 7 MAR). Insider dealing consists of acquiring or disposing of, for one's own account or for the account of a third party, financial instruments to which that information relates (article 8 MAR). These provisions may be prosecuted under the Economic Offences Act (article 1 under 1°), where again the question of whether the act constituting the offence was intentionally or culpably committed will decide whether the offence qualifies as a felony or a misdemeanour.

• Embezzlement

Intentionally and unlawfully misappropriating any property which belongs in whole or part to another party, which a (legal) person has in his possession other than as a result of a criminal offence, is punishable as embezzlement under article 321 CC. It is considered an aggravating circumstance to embezzle property that one has in possession due to personal employment or against monetary compensation (article 322 CC).

• Bribery of government officials

Under article 177 CC, it is prohibited to provide (or offer) a public official a gift, service or promise with the intention to induce him to act, or to refrain from certain acts, in the performance of his office. It is also prohibited to provide or offer such gifts, services or promises as a consequence of certain acts the public official has previously undertaken in the performance of his current or former office. It is further prohibited to provide such gifts, services or promises to a person who has the prospect of being appointed as a public official. Article 178 CC prohibits providing any judge with gifts, services or promises with the intention of influencing the decision in a case. The passive bribery counterparts of articles 177 and 178 CC are to be found in articles 363 and 364 CC, respectively.

Dutch law uses the term 'public official' rather than 'government official'. The term 'public official' is interpreted quite broadly in case law. It is not relevant whether the official is also considered a public official from a perspective of employment law or administrative law. The term 'judge' must also be understood in a broader sense, and includes disciplinary judges and arbiters who have been charged with the settlement of a legal dispute (but not binding advisors).

Dutch law explicitly stipulates, in article 178a CC, that public officials or judges of a foreign state, or of an organisation under international law, shall be considered equivalent to (Dutch) public officials or judges for the purpose of the application of articles 177 and 178 CC.

• Criminal anti-competition

Anti-competition is a criminal offence under article 328*bis* CC when a (legal) person intentionally misleads the general public (or a specific third party) with the intent to further (or preserve) his (or another person's) market position where such activity may lead to any disadvantage to his competitors (or that other person's competitors).

• Cartels and other competition offences

The Authority for Consumers & Markets enforces the Dutch Competition Act through administrative sanctions. For example, agreements between companies (or concerted actions) with the purpose of (or to effect) hindering, limiting or distorting competition on the Dutch markets (or a part thereof) are forbidden under article 6 section 1 of the Dutch Competition Act. It is also prohibited to abuse a market position (article 24 Dutch Competition Act). Due to the broad description of the offence of criminal anti-competition (see above), various specific competition infringements may be prosecuted criminally under article 328*bis* CC. In addition, other criminal acts committed in order to hide the hinderance of fair competition may be prosecuted under general criminal law provisions, e.g. forgery of documents (article 225 CC).

• Tax crimes

Tax crimes may be prosecuted through either general criminal law provisions or through specific tax law provisions. With regard to the first option, prosecution would often take place through the offences of forgery of documents (article 225 CC) or money laundering (article 420*bis* CC and further). With regard to the second option, prosecution takes place in accordance with the State Taxes Act, which contains criminal provisions in its articles 68 to 88c. Whether intent or culpability suffices depends on the description of the criminal provision applied.

• Government-contracting fraud

Government-contracting fraud would usually be prosecuted under general criminal law provisions, such as forgery of documents (article 225 CC), deceit (article 326 CC) or embezzlement (article 321 CC). In addition, under article 323a CC, it is a specific criminal offence to intentionally and unlawfully use subsidies for a purpose other than the one for which they were granted.

• Environmental crimes

Article 161*quater* and 161*quinquies* CC respectively criminalise the intentional and culpable contamination of the environment by way of radiation. Articles 171 through 173b criminalise the culpable and intentional pollution of water (supplies), air and soil through other means (where anyone's health is endangered). If the offence causes fatalities, this is an aggravating circumstance. Violations of a great deal of other (EU) environmental regulations are made punishable through the Economic Offences Act. As stated previously, under the Economic Offences Act, intentional commission of an act would often qualify the resulting

offence as a felony, and culpable commission of an act would often qualify the resulting offence as a misdemeanour.

• Campaign-finance/election law

Dutch campaign-finance law may be seen as somewhat lax by international standards. The Political Parties Financing Act does not set maximum contribution amounts that national political parties or candidates may receive, and only stipulates that contributions to a political party of more than €4,500 must be registered and reported by the party to the government (articles 21 and 25). A similar reporting obligation exists for individual parliamentary candidates (article 29). The government then makes contributions of over €4,500 public (articles 28 and 29). A political party's failure to report such contributions may result in fines imposed by the Minister of the Interior of up to €25,000 (article 37). *Inter alia*, due to continuing criticism from the Group of States against Corruption, new campaign-finance regulations are currently being discussed in parliament.

Election fraud can be prosecuted under general criminal law provisions pursuant to articles 126 to 129 CC. According to these provisions, it is illegal to bribe another person (or to be bribed) with the intent to influence his vote, to employ any form of deception resulting in invalidation of a vote, or to intentionally invalidate or cause a false outcome of an election. The Dutch Election Act contains various similar criminal provisions under articles Z1 through Z11, but also contains additional criminalisation of forged documents (such as ballots) where the intent exists to fraudulently employ these forgeries in an election.

• Market manipulation in connection with the sale of derivatives

The MAR and Directive 2014/57/EU (Directive on market abuse) apply to this subject matter in the Netherlands. Article 15 MAR states that it is illegal to manipulate or attempt to manipulate the market. Article 12 MAR defines what constitutes market manipulation. Article 13 MAR lists the acts that are regarded as accepted market practices and which therefore do not fall under the prohibition of article 15 MAR. Market manipulation may be prosecuted through article 1, subsection 1° Economic Offences Act. As stated previously, price and rate manipulation with the intent to unlawfully benefit oneself or another is punishable under article 334 CC, if a person drives up or drives down the price of commodities, stocks or other securities by disseminating false information.

• Money laundering or wire fraud

Under Dutch law, the acquiring, holding, transferring, converting or use of objects, funds or property rights whilst knowing that these derive – partially or wholly, and directly or indirectly – from any felony, is punishable as money laundering under article 420*bis* CC. When such intentional money laundering is deemed habitual, or has been committed in the course of a business or profession, this is punishable as habitual money laundering under article 420*ter* CC. The acquiring, etc., of objects, funds or property rights whilst the (direct or indirect) felonious origin thereof should have been reasonably assumed, is punishable as culpable money laundering under article 420*quater* CC. Where the money laundering goes no further than the obtaining or possessing of objects, funds or property rights that directly derive from one's own felony, this is punishable as simple money laundering under article 420*bis* 1 CC.

• Cybersecurity and data protection law

Article 138ab CC penalises the intentional and unlawful entering of another's computer system (i.e. hacking). The copying or changing of information accessed through such hacking constitutes an aggravated circumstance. Article 138b CC penalises the intentional and unlawful hindering of access to, or use of, a computerised system by sending that system an overload of data (i.e. a DDoS attack). Possessing any technical aids or login codes for the purposes of committing the offences of articles 138ab or 138b is punishable under article 139d CC.

Possession or dissemination of computer data that one knows to be, or one must reasonably assume to be, derived from any crime, is punishable as data fencing under article 139g CC. Article 138c CC penalises as the intentional and unlawful copying of computer data for oneself (or another person) where the access to the computer data itself was not illegal (i.e. data embezzlement).

Violations of data protection law are mostly dealt with through administrative enforcement by the Personal Data Protection Authority. If an entity is the victim of a cybercrime where the perpetrators have managed to acquire data that relates to any identifiable natural person (or if a breach of such data has occurred in any other manner), the entity must in principle report this breach to the Data Protection Authority within 72 hours of becoming aware of the breach (article 33 of the General Data Protection Regulation; henceforth: GDPR). Failure to do so may result in steep fines based on article 83 GDPR.

• Trade sanctions and export control violations

Violations of trade sanctions and export control are enforced under the Dutch Sanctions Act 1977, both through administrative sanctions and criminal prosecution. Under this framework act, intentional commission of a violation of any trade sanctions or export controls is a felony, whilst culpable violation is considered a misdemeanour (article 14c). We note that EU sanctions regulations that have been published in the EU Journal do not need a separate national Dutch publication to enter into force.

• Any other crime of particular interest in your jurisdiction

Dutch law possesses a rather broad definition of bribery of non-government officials under article 328*ter* CC, where it is prohibited to (offer to) provide (future) employees or agents of other entities gifts, promises, or services in connection to certain acts (to be) undertaken or refrained from by that agent or employee, when the offeror or provider must reasonably assume the employee or agent is acting *in violation of his duties*. The law explicitly states that such a violation of duty already exists when the employee or agent does not mention his acceptance of a gift, promise or service to his employer in violation of good faith.

3.2 Is there liability for inchoate crimes in your jurisdiction? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

An attempt to commit a felony is punishable if the intention of the offender has revealed itself by a commencement of the execution of the offence (article 45 CC). In addition, preparation to commit a felony which carries a term of imprisonment of eight years or more is punishable if the offender intentionally obtains, manufactures, transports, or has possession of objects, information carriers or locations intended for the commission of that felony (article 46 CC). Neither punishable preparation or attempt exists if the felony has not been completed due to circumstances dependent on the will of the offender (article 46b CC).

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

An entity can be held liable for a criminal offence through article 51 CC when the commission of that criminal offence can 'reasonably be attributed' to the legal entity. Such reasonable attribution may take place when the criminal conduct took place

within the 'realm' of the entity. The following circumstances may be taken into account for this assessment:

- whether the criminal offence was committed by someone who works for the entity (a formal employment contract is not necessary);
- whether the conduct constituting the criminal offence was part of the entity's ordinary business operations;
- whether the criminal offence served the business objectives of the entity;
- whether the entity could exert influence on whether or not the offence was committed; and
- whether the entity accepted the criminal offence being committed. Failure to take appropriate care to prevent criminal offences could under certain circumstances suffice to establish acceptance.

Please note that the above criteria are not cumulative. The existence of one or more circumstances may be sufficient to establish that the criminal offence took place within the 'realm' of the entity and that the entity can therefore be held liable for that criminal offence.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime? Under what circumstances?

If and when an entity may be held liable for the commission of a criminal offence under the criteria set out in question 4.1, certain leadership of that entity may (through article 51, section 2, subsection 2 CC) be held liable as so-called *de facto managers*.

A *de facto* manager does not need to be a formal manager, officer or director, or even be employed by the entity to be held responsible for the commission of an offence. It is also not necessary for such a *de facto* manager to be involved in the factual commission of the offence. A *de facto* manager can be held liable if the following cumulative conditions have been met:

- the entity for which the *de facto* manager works can be held criminally liable; and
- the *de facto* manager had the (conditional) intent that the criminal offence be committed; and
- the *de facto* manager was actually managing the criminal offence. This 'management' may consist of the following:
  - A. behaviour that falls within the ordinary meaning of 'management';
  - B. general policies implemented by the *de facto* manager of which the criminal offence is an immediate consequence;
  - C. a contribution to a series of acts leading to the criminal offence and taking such initiative, that the *de facto* manager should be considered to have managed those criminal offences; and
  - D. a passive *de facto* manager can also have furthered a criminal offence and thus be criminally liable, if:
    - he or she was obliged to take reasonable care to prevent the criminal offence (as a result of both formal position and corporate practice); and
    - he or she was authorised to do so; and
    - he or she refrained from taking preventative measures.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

The Public Prosecution Service has discretion on whom to prosecute. Article 51 CC explicitly states that the legal entity as well as the natural persons responsible may be prosecuted for the same facts. When prosecution takes place, often both are prosecuted. When a settlement agreement is entered into, often neither are prosecuted. In November of 2018, the Dutch Parliament upheld a motion stating that, where possible, the natural persons responsible for an offence should be prosecuted even when the entity has entered into a settlement agreement for that offence. As of the time of writing, this motion has not been implemented into any formal regulation or instruction for the Public Prosecution Service. We note, however, that the considerations of the Hague Court of Appeal in its judgment upholding the complaint against the non-prosecution of the former CEO of ING Bank (see question 1.4) pronounced strong support for the prosecution of the natural persons who had actually managed an offence, even after the company itself had settled out of court. This may influence the Public Prosecution Service in its future policies.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

If a prosecution has been started before the acquisition or merger has been made public, the Public Prosecution Service may continue with the prosecution of the succeeded entity as if no merger or acquisition had occurred. If the merger or acquisition has been made public before a prosecution is started, criminal successor liability only exists if the new entity can be materially identified as a continuation of the old entity. Elements of this material identification are whether the same trading name is used, if employees or directors stay unchanged and whether the actual control of the entity stays with the same parties.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

Prosecution is barred under the statute of limitations after the lapse of:

(i) three years for all misdemeanours;
(ii) six years for felonies punishable by a fine, detention or imprisonment not exceeding three years;
(iii) twelve years for felonies punishable by a term of imprisonment of more than three years; and
(iv) twenty years for felonies punishable by a term of imprisonment of more than 10 years.

There is no period of limitation for felonies punishable by 12 years or more and some specifically enumerated offences. The period of limitation commences on the day following the day on which the offence was committed (article 71 CC).

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

In the case of an ongoing offence, such as, for example, the possession of funds derived from any felony, the period of limitation will start to run only after the offence has ended. However, if the act has been ongoing longer than the period of limitation, prosecution may be barred for the years prior to the period of limitation. Dutch law has no specific exception to the limitation period for patterns or practices, but conspiracy to

commit felonies may be prosecuted as the separate offence of participation in a criminal organisation (article 140 CC), which may be seen as an ongoing offence until the person leaves the organisation or the organisation is ended.

5.3 Can the limitations period be tolled? If so, how?

The period of limitation will be tolled by any act of prosecution (article 72 CC), where 'act of prosecution' means any involvement of a judge in the case at the behest of the Prosecutor. After any such act of prosecution, the period of limitation shall commence anew, but the total period of limitation shall not exceed 10 years for misdemeanours, or double the period of limitation applicable to the specific felony.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Dutch authorities may assert a rather broad extraterritorial adjudicative jurisdiction for (business) crimes committed abroad based on articles 2 to 8c CC and various treaty obligations, which are summarised in the Decree on international obligations of extraterritorial jurisdiction. In practice, extraterritorial adjudicative jurisdiction is often based on the active personality principle enshrined in article 7 CC, which grants jurisdiction to the Netherlands if a Dutch (legal) person commits a felony under Dutch law outside of the Netherlands, insofar as that offence is punishable by law in the country where it has been committed. In addition, the Dutch authorities may assert jurisdiction over offences (largely) committed abroad by using the following extensive interpretation of the *locus delicti* doctrine, to place (part of) the acts constituting the offence within the territory of the Netherlands:

- the doctrine of physical behaviour: the *locus delicti* under this doctrine is the place where physical behaviour fulfilling any requirements of the legal description of the criminal offence took place;
- the doctrine of the instrument: the *locus delicti* under this doctrine is the place where the instrument used in a criminal offence (such as a letter, e-mail or phone call) has had its influence;
- the doctrine of the constitutive effect: this doctrine makes the *locus delicti* of a criminal act dependent on where the offence was completed by the occurrence of a constitutive effect; and
- the ubiquity doctrine: this doctrine states that several different places can be classified as *locus delicti* on the basis of the aforementioned doctrines.

It is also accepted in Dutch case law that when the *locus delicti* of a criminal act can be partially placed in the Netherlands, the Netherlands also has jurisdiction regarding to the behaviours that formed part of that criminal offence which took place outside of the Netherlands.

Extraterritorial adjudicative jurisdiction is asserted relatively often by the Dutch authorities over entities operating in the Netherlands, especially in cases of foreign bribery, cybercrimes and environmental crimes.

6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

The Public Prosecution Service is responsible for the investigation of criminal offences (article 148 Criminal Procedure Code, henceforth: CPC). Investigations can be initiated based on any indication of wrongdoing, such as notifications by regulatory authorities, criminal complaints or (anonymous) tips. However, to further an investigation with more intrusive investigative measures, a stronger suspicion that a crime has been committed is usually required.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

The Netherlands is known to be very cooperative with foreign authorities. Various treaties, conventions and EU regulations regulate international cooperation in criminal cases, in addition to the provisions of the CPC (Book 5). Requests for international legal assistance based on treaties or conventions may normally only be refused for reasons enumerated in those treaties or conventions or if the execution thereof may contribute to a violation of fundamental rights. In addition, the police and other investigative authorities may informally cooperate with foreign investigative authorities and process requests for information that is already in their possession. The Netherlands also cooperates in various international investigative initiatives such as Interpol.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

The government possesses a large scope of powers it may use for the purposes of investigating (business) crime. Under general criminal law, the powers of demand, search and seizure are described in articles 94 to 123 CPC, and the special investigative powers, including the various types of production orders and wiretapping, are listed in Title IV of Book 1 CPC. Additional powers for investigating economic offences are described in articles 17 to 25 of the Economic Offences Act.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

Under general criminal law, demands to produce documents may not be directed at the company under investigation. For offences punishable under the Economic Offences Act, investigators are allowed to demand that anyone, including the company under investigation, turn over any existing documents which are reasonably necessary for the investigator to fulfil his tasks (article 18). According to article 26 of the Economic Offences Act, it is an economic offence to intentionally refuse

to comply. Similarly broad obligations to comply exist under various administrative laws. The Prosecutor may raid any location – including offices or workplaces – for the purpose of seizure of documents if there is a suspicion of an offence for which pre-trial detention is allowed. Note that pre-trial detention is allowed under Dutch law for many business crimes.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Persons who have a legal duty of secrecy by reason of their position, profession or office (articles 218 and 218a CPC), such as attorneys, may assert their legal privilege with regard to documents or communications the authorities wish to seize. In practice, if during a search the company asserts that certain documents or communications the authorities wish to seize fall under legal privilege, the documents and/or data carriers are sealed in envelopes and provided to an investigative judge. The attorney in question will then be requested to inform the judge whether he asserts his legal privilege over the communications and/or documents. In-house attorneys in principle only enjoy full legal privilege in the Netherlands if they are admitted to the bar *and* they have signed a professional statute with the company that guarantees their independence.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) that may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

Under the GDPR, companies may only process personal data if the data subject, in this case the employee, has given consent to the processing for one or more specific purposes, or if processing is necessary for one of the reasons enumerated in article 6 GDPR. Company files are in principle not exempt. Under the GDPR, it is arguable that the sharing of employees' personal data with government authorities is only allowed if there is a legal obligation to do so, i.e. when a valid production order is served. Where such a production order would entail a cross-border transfer of personal data, the production would have to adhere to articles 44 to 50 GDPR.

7.5 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

Whether employees of a suspected company may exercise a suspected company's right not to incriminate itself under criminal law is still not fully crystallised under Dutch law. Under specific spheres of administrative enforcement of regulatory violations, the company's right not to incriminate itself may only be invoked by the leadership of the company and not by other employees. It is most likely that with regard to the demand to produce documents under criminal law, employees may invoke the company's right not to incriminate itself and refuse to produce documents. Otherwise, a company's right not to incriminate itself could be rendered meaningless by ordering employees to produce the documents that the company cannot be ordered to provide. However, it cannot be fully ruled out that such a production order will be given.

For the raiding of employee offices, see question 7.2. A home of an employee may be raided for the purpose of seizure when there is a suspicion of an offence for which pre-trial detention is allowed and leave has been granted by the investigative judge.

7.6 Under what circumstances can the government demand that a third person or entity produce documents to the government, or raid the home or office of a third person or entity and seize documents?

In the case of suspicion of an offence for which pre-trial detention is allowed, investigators have broad powers to demand the production of existing physical documents from any third parties in the interest of the investigation (article 96a CC). The Prosecutor may further serve production orders for most types of (digital) documents held by third parties under article 126nd CPC. Specific regulations may apply to personal or sensitive data or (e-)mail, where leave from the investigative judge may be required.

Third-party offices, or homes with leave of the investigative judge, may be searched by the Prosecutor if there is a suspicion of an offence for which pre-trial detention is allowed. Usually, however, where there is no risk of endangering the interests of the investigation and no reason for the Prosecutor to believe that the third party may fail to provide the relevant documents, a production order will be used instead of a raid.

Questioning of Individuals:

7.7 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

Any person called upon to testify before an (investigative) judge as a witness is required to appear and submit to questioning. This may be enforced through arrest and police custody if necessary. Whether a statement can be coerced depends on whether the employee, officer or director is a witness, a suspect or both. A witness in principle is obliged to truthfully answer all relevant questions posed. If the witness is also a (potential) suspect (or close family relation thereof), he or she has the right to decline answering questions. As stated under question 7.5, it is not yet fully crystallised under Dutch law if all employees of an investigated company may invoke that company's right to decline answering questions under criminal law. Without an order issued by a judge, the police or Prosecutor cannot coerce witnesses to appear for questioning and/or answer questions.

7.8 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

See the rules applicable to witnesses under question 7.7.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Persons questioned as suspects have the right not to answer any questions. Persons questioned as witnesses are in principle

obliged to answer questions truthfully but may refrain from answering questions when such answers may incriminate themselves or close family relations, or if they are bound to professional secrecy under articles 218 or 218a CPC. Suspects and witnesses are required to be informed about their rights and obligations prior to questioning. Suspects also need to be informed that they have a right to an attorney prior to and during questioning. Although there exists no explicit right to an attorney for witnesses, requests from witnesses to have their attorney present during questioning will often be granted.

A suspect's refusal to answer questions may under Dutch law not result in any formal inference of guilt, nor may his refusal to answer be used as evidence against him. However, if a suspect refuses to provide a reasonable exculpatory explanation for *prima facie* evidence against him, this refusal may be taken into consideration by the court when evaluating the available evidence.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

The Public Prosecution Service may issue a penalty order (a penalty which is imposed by the Public Prosecution Service itself, and which may be appealed to the court) or serve an indictment with a summons to appear in court.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

The Public Prosecution Service has broad discretionary powers in deciding who will be brought to trial, and for which offences. The Prosecutor in the course of that decision must always take into account whether a conviction is feasible and whether prosecution is opportune, taking into consideration the circumstances of the case, the interests of society, the interests of possible victims and the interest of the suspect. In addition, various *Instructions* exist for Prosecutors regarding specific offences that contain factors that the Prosecutor should take into account when deciding whether to bring a case to trial.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution agreements are available to dispose of criminal investigations.

A Prosecutor may agree not to prosecute if specific requirements are fulfilled by means of a conditional dismissal of the case or an out-of-court settlement agreement. A settlement agreement may only be entered into by the Prosecutor regarding offences with a maximum penalty of six years' imprisonment, and often consist of a fine, the repayment of profits received from the offence and a press release. As when deciding on bringing a case to trial (see question 8.2), the Prosecutor should take all facts and circumstances of the case into account when offering a settlement agreement. Where settlement agreements contain a fine of more than €200,000 or have a total value of more than €1,000,000, a Prosecutor also has to adhere by the *Instruction on large settlement agreements*, which, *inter alia*, prescribes that such an agreement must contain a statement of facts and a press release.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

A bill concerning the judicial approval of settlement agreements is currently in consultation and is expected to enter into law before 2023. At the current time, proposed settlement agreements that contain a fine of more than €200,000 or have a total value of more than €1,000,000 first have to be approved by the Chief Prosecutor, who will then relay the proposed settlement to the College of Procurators General (who are at the head of the Public Prosecution Service). The College will then request advice from a review committee who will study the proposed settlement agreement and hear (the lawyers of) the suspect and (the representative of) the Chief Prosecutor. After receiving positive advice from the review committee, the College of Procurators General must decide, taking the advice into consideration, whether the settlement agreement will be offered to the suspect. After receiving negative advice from the committee, the Chief Prosecutor has to make a new decision on prosecution (which may consist of an amended settlement proposal).

8.5 In addition to, or instead of, any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies may apply.

Civil penalties as such do not exist under Dutch law, nor do punitive damages. Actual damages caused by a criminal act may be recovered from the defendant in separate civil proceedings. An injured party may also join the criminal proceedings to claim material and immaterial damages suffered as a result of the criminal offence. The Prosecutor will often include compensation of the damages of an injured party as a condition of a settlement agreement. We note that, under certain circumstances, administrative sanctions may be applied in addition to criminal law sanctions, as long as this does not result in the infringement of the *ne bis in idem* principle.

8.6 Can an individual or corporate commence a private prosecution? If so, can they privately prosecute business crime offences?

The possibility of private prosecution does not exist under Dutch law. However, a directly interested party, such as a (legal) person that has suffered direct losses due to a suspect's alleged criminal offence, may appeal a decision of the Prosecutor not to (further) prosecute the suspect before the Court of Appeal (article 12 CPC). Such an appeal can also concern the non-prosecution of a suspect due to a settlement agreement having been reached. A directly interested party may also be an entity that, by virtue of its statutory goals and actual activities, represents an interest that is directly affected by the decision not to further prosecute the suspect, such as an environmental NGO. If the appeal is found to have grounds, the Court of Appeal will order the (further) prosecution of the suspect.

9 Burden of Proof

9.1 For each element of the business crimes identified above in section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

A defendant does not have to prove that he is innocent, and therefore in principle the burden of proof for any offence lies with the Public Prosecution Service. However, the court is only bound by the indictment provided by the Prosecutor, and not the conclusions of the Prosecutor about the available evidence. Under Dutch law, a court may find a suspect guilty on the basis of the indictment and its evaluation of the available evidence, even when the Prosecutor, for example due to arguments offered in court by the defence, considers that an acquittal should follow. Moreover, after the Prosecutor has instigated court proceedings, the court may of its own accord instigate additional investigatory measures, such as summoning witnesses it deems necessary for the completeness of the investigation.

If the defendant wants to present certain affirmative defences, those defences have to be clear, supported by arguments and provided with an unambiguous conclusion.

9.2 What is the standard of proof that the party with the burden must satisfy?

The court must be convinced of the suspect's guilt and that conviction must be based on legal evidence (article 338 CPC). That evidence must further cover all components of the legal description of the offence.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

The court ascertains the facts according to the evidence and decides whether there is sufficient legal and convincing evidence that the suspect has committed the indicted offence.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a business crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

Dutch law provides for a relatively wide variety of punishable types of participation in criminal offences under articles 47 and 48 CC. An overview of these types of participation is presented below (the participation of *de facto* managers has already been set out under question 4.2):

- liable as a causal perpetrator is the (legal) person who makes another (legal) person fulfil the requirements of a criminal offence, when the other (legal) person does not have the requisite criminal intent or culpability;
- liable as a co-perpetrator is the (legal) person who fulfils part of the requirements of a criminal offence in close and conscious cooperation with another (legal) person;
- liable as a functional perpetrator is the (legal) person to whom the criminal offence of another can be reasonable attributed. Such reasonable attribution can (under circumstances) take place when the functional perpetrator (often a company or person in charge of others) could decide upon whether or not a criminal offence would take place and accepted or normally would have accepted the commission of that criminal offence;
- liable as elicitor is the (legal) person who deliberately elicits the commission of a criminal offence through gifts, promises, abuse of authority, violence, threats, or deception or by providing the opportunity, means or information; and
- liable as accessory to a felony is the (legal) person who intentionally aids the commission of a felony by another (legal) person during that commission, or who intentionally provides opportunity, means or information for the commission of that felony preceding that commission.

Moreover, under Dutch law one can not only be held liable for direct participation in the committed criminal offence. In principle, all forms of participation in the participation of others can be penalised. This far-reaching criminal liability for compound participation structures is only limited by the requirements of intent, as to prove participation in another's participation, one must prove (conditional) intent to commit the relevant participatory acts.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Not all business crimes require intent. For many economic crimes, especially misdemeanours, culpability suffices. If the description of the offence requires intent, the defence may argue that the act was not carried out intentionally, deliberately and/or knowingly. The Public Prosecution Service has to prove at least *conditional* intent existed. Conditional intent under Dutch law exists when the suspect consciously accepted the considerable chance that a certain consequence would occur.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law, i.e., that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

Under Dutch law, most (business) crimes only require intent with regard to the act, not intent with regard to the unlawfulness thereof. The Prosecutor only has to prove that the act was committed intentionally, not that the defendant had knowledge of any unlawfulness while committing the act. In literature, it is often argued that this low requirement of *mens rea* leads to inequitable outcomes within the ever-more complex framework of layered and opaque (EU) regulations governing nearly all fields of economic activity, to the extent where even a company with a dedicated legal team may sometimes be unfamiliar with some obscure sub-regulation which is nonetheless criminalised as a potential felony through the Economic Offences Act. However, under current Dutch law, unfamiliarity with law is not accepted as an affirmative defence, however understandable the unfamiliarity may be. Nonetheless, if the defendant took efforts to have himself adequately informed on the law, but was misinformed by a regulatory authority or a recognised specialist in the field, the defence may argue an excusable misunderstanding of the law. The burden of proof of such an excusable misunderstanding lies with the defence.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts, i.e., that he did not know that he had engaged in conduct that was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

Offences under Dutch law always require an (implicit) element of either intent or culpability. If a defendant is not aware of his conduct, and the offence requires intent, a lack of awareness about his conduct would often also bring with it a lack of intent towards that conduct. Although the Prosecutor is in principle burdened with proving intent, if special circumstances exist that would bring with them that the defendant was not aware of his conduct, it would be for the defence to argue those circumstances. If the offence requires only culpability, a defence of 'absence of fault' may be mounted, in which a defendant may argue that he took maximal precautions to prevent the unlawful conduct from occurring. The burden of proof for the absence of fault lies with the defence. With regard to companies, intent or culpability only needs to be proven where this is required in the legal description of the offence, not when it is an implicit element.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

Under article 160 CPC, and articles 135 and 136 CC, any person who has knowledge of certain enumerated serious offences against the state, life, freedom, or the general safety of persons or property, is in principle obliged to report those offences. Intentional failure to report is, however, only punishable if one was aware of these offences at a time when they still could have been prevented, and one could have reported them without exposing oneself to criminal prosecution. Disclosure is voluntary for all other offences (except if one is a government body or civil servant).

Voluntary disclosure may positively affect a decision on whether to prosecute or offer an out-of-court settlement and reduce the penalty imposed. There are, as of yet, no formal guidelines in the Netherlands regulating if and in what manner voluntary self-disclosure would lead to leniency. This oversight has led to criticism from the OECD, who state that the lack of clear guidelines may dissuade Dutch companies from voluntarily disclosing violations of which they have become aware. Also due to this criticism, the academic branch of the Public Prosecution Service is currently carrying out comparative law research on behalf of the Minister into the consequences of self-disclosure in other jurisdictions, which research is intended to assist in drafting future Dutch regulations.

The lack of formal regulations notwithstanding, it seems that the Public Prosecution Service is using statements of facts in large, public out-of-court settlements to discreetly show the ways in which voluntary disclosure and cooperation may affect the outcome of a case. From the statement of facts published in the large SHV settlement this year (see question 1.4), one may carefully deduce that the Public Prosecution Service is prepared to provide a maximum 25% penalty reduction for timely self-reporting in cases of foreign corruption.

13 Cooperation Provisions / Leniency

13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency or "credit" from the government? If so, what rules or guidelines govern the government's ability to offer leniency or "credit" in exchange for voluntary disclosures or cooperation?

As with the voluntary self-disclosure discussed above under question 12.1, there are no guidelines in place that govern the reduction of penalties or leniency measures with regard to cooperation in a criminal investigation, but cooperation with the authorities would usually positively affect the decision whether to prosecute or offer an out-of-court settlement and reduce the penalty imposed. As stated in question 12.1, from the statement of facts published in the large SHV out-of-court settlement this year (see question 1.4), one may carefully deduce that the Public Prosecution Service is prepared to provide a maximum 25% penalty reduction for cooperation in cases of foreign corruption.

For full cooperation that may lead to a 25% reduction of penalties, a company would, according to the SHV statement of facts, in principle be required to produce all requested documents, and to also provide relevant documents that have not (yet) been requested by the authorities. In addition, it is explicitly mentioned that cooperation is possible even where there was no preceding self-disclosure.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, and describe the favourable treatment generally received.

See question 13.1.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed-upon sentence?

Although Dutch law has no formal plea-bargaining provisions, such agreements can be made in the course of negotiating a conditional dismissal, an out-of-court settlement agreement or penalty order with the Prosecutor, but this is only possible for offences that carry a maximum sentence of no more than six years, and where the Prosecutor does not wish to impose any term of imprisonment. Under Dutch law, only courts may impose a prison sentence. If the case is brought before a court, it is possible that the defence and the Prosecutor present a mutual trial position and sentencing consensus to the judge. However, the judge is not bound to honour these positions and may reach an entirely different verdict.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

See questions 8.3, 8.4 and 8.6.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of a sentence on the defendant? Please describe the sentencing process.

The maximum penalties, types of penalties and additional measures that may be imposed are prescribed by law. The principal punishments for legal persons are a fine and forfeiture of illegal proceeds. Some statutes also allow for the temporary freezing of business activities. Within the legal framework, judges have a broad discretion to decide on all aspects of the sentence, taking into account all circumstances of the case and the identity of the defendant. In addition, they will generally take into consideration sentences given in similar cases. Courts have agreed upon national sentencing guidelines for certain offences, but the courts are allowed to deviate from these guidelines if they see reason to. Insofar as it is relevant to business crime, the sentencing guidelines for various fraud offences are connected to the financial losses those fraudulent acts caused to others, and range from community service for losses of up to €10,000, to the maximum prison sentence allowed for the specific offence for losses of over €1,000,000.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

Dutch law does not require such determination of elements.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

A guilty verdict can be appealed by both the defendant and Prosecutor. Under certain circumstances, permission by the Court of Appeal is required to appeal fines equivalent to or below €500.

Only the Prosecutor can appeal a non-guilty verdict at the first instance. Both the defence and Prosecutor may appeal a guilty or non-guilty verdict by the Court of Appeal to the Supreme Court within two weeks.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

An appeal against a verdict of the Court of First Instance may formally not be restricted to the sentence alone. However, if there is no discussion between the Prosecutor and the defence on the facts and the law, the Court of Appeal may focus solely on the sentencing. In an appeal to the Supreme Court, the procedure may be restricted to grievances against the sentence.

16.3 What is the appellate court's standard of review?

There is a low standard of review, nearly equivalent to a trial *de novo*. The Court of Appeal may freshly determine the facts of the case, assess the application of the law and decide on sentencing. In addition, the defence may request new investigative measures and bring forward new circumstances and arguments, without restriction.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

The Court of Appeal may either wholly or partially uphold and either wholly or partially overturn all areas of verdict. The ruling of the Court of Appeal supersedes the ruling of the Court of First Instance.

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