

# Netherlands

OSK Advocaten



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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?

The Public Prosecutor has a monopoly on prosecution. Business crimes usually are dealt with by the “*functioneel parket*”, a specific department within the Public Prosecutor Service, or the “*landelijke parket*”, a department of the Public Prosecutor Service that fights (inter)national organised and subversive crime, among which are (international) fraud and money laundering. Certain government authorities may also impose sanctions in administrative proceedings that may qualify as a “criminal charge” within the meaning of article 6 of the European Convention on Human Rights (ECHR).

### 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?

The Public Prosecutor has the exclusive authority to prosecute a criminal offence. Investigations will be carried out by various investigative services under the authority of the Public Prosecutor. These investigative services have directives, instructions and covenants concerning investigations.

In some cases, administrative and criminal law coincide (e.g., in fiscal or environmental law). Also in these cases, guidelines and policy agreements determine whether criminal prosecution or administrative enforcement should follow. It is customary that the Public Prosecution Service and the relevant administrative body confer on what approach best suits a particular case.

See question 1.3 for the answer regarding administrative enforcement agencies.

### 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 is not possible under Dutch law. The various investigative/regulatory authorities (such as FIOD (investigative service of the tax authority), AFM (regulatory authority on financial markets), environmental services (regulatory authority in respect to environment), NVWA (Dutch Food and safety authority), Inspectie SZW (Inspection services Social Affairs and Employment) and the ILT (Inspection Services Living Environment and Transport)) can use administrative enforcement.

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

In December 2020, the Court of Appeal of The Hague ordered the prosecution of Mr. Ralph Hamers, the former head of ING Bank, regarding his role in a failure of ING Bank to fulfil its obligations under the Dutch Anti-Money Laundering and Counter Terrorism Financing Act (AML-CTF Act). An allegation for which ING Bank itself had entered into a settlement agreement for €775 million with the Public Prosecution Service in 2018. Thus, although the Public Prosecutor in this case did not first decide itself to prosecute Mr. Hamers, the Court of Appeal decided that he should be prosecuted.

This seems to be the start of a new trend of prosecuting not only companies but also their directors. Shortly after, in April 2021, ABN AMRO Bank entered into a settlement agreement for €480 million with the Public Prosecution Service due to the failure to fulfil its obligations under the AML-CTF Act between 2014 and 2020. In addition, three directors of ABN AMRO, including a former minister, have been identified as suspects in this investigation. The Public Prosecution Service has not yet made a prosecution decision with respect to them.

## 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. In every court, separate (specialised) criminal divisions exist for reviewing economic and environmental criminal cases (article 52 Code on Judicial Organisation (CJO)).

A court ruling can be appealed. There are four geographical jurisdictions with their own Court of Appeal. The Courts of Appeal also have economic criminal divisions (article 64 CJO). Against a judgment of the Court of Appeal, further appeal (“*assatie*”) is possible at the Supreme Court of the Netherlands.

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

No, there is no such right for any type of offence under Dutch law.

### 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

Normally, securities fraud cases will be prosecuted under general criminal law; for example, by prosecution for forgery of documents (article 225 Criminal Code (CC)), swindle (article 326 CC) and insurance deceit (article 327 CC). 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. Swindle or deceit requires an intentional and unlawful misrepresentation of facts leading to the misappropriation of funds or goods of another person. Under article 334 CC, price manipulation by driving up or down the price of commodities, stocks, or other securities by disseminating false information, is criminalised.

#### • 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 366 CC. Prosecution can also be based on general criminal offences, such as money laundering (article 420*bis* CC *et seq.*) and forgery of documents (article 225 CC). The penal provisions carry a (maximum) penalty of €87,000 and a prison sentence of eight years. The auditor/legal entity also runs the risk of being penalised within the administrative law framework, as an accessory (article 5:1 Administrative Law Code) but also as (*inter alia*) an accomplice (see article 67o of the General Tax Act (AWR)).

Furthermore, the auditor has obligations that, by omission, can lead to criminal liability. Pursuant to article 26(2) Accounting Organisations Supervision Act, irregularities must be notified to an investigating officer. Also, pursuant to article 16 of the AML-CTF Act, the auditor is required to notify suspicious transactions. According to articles 1(2) and 2(1) of the Economic Offences Act (WED), these are felonies when they have been committed intentionally. These penal provisions carry a term of imprisonment not exceeding two years, community service or a (maximum) fine of €21,750.

#### • Insider trading

Pursuant to article 14 sub a, b and c of the Market Abuse Regulation 596/2014 on market abuse (MAR), it is a criminal offence to engage or attempt to engage in insider dealing, or to recommend, induce and 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 its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates (article 8 MAR). These penal provisions carry a term of imprisonment for a maximum of six years and a (maximum) fine of €87,000 (article 1(1) in conjunction with article 6(1) WED).

#### • Embezzlement

In article 321 CC, embezzlement is made punishable as the intentional misappropriation of any property that belongs in whole or part to another person and that he has in his possession other

than as a result of an offence. This penal provision carries a term of imprisonment not exceeding three years or a (maximum) fine of €87,000.

The sentencing will be higher if the embezzled property was in possession due to personal employment or against a monetary compensation (article 322 CC: imprisonment not exceeding four years), or when the act is committed by a trustee or a guardian of a foundation (article 323 CC: imprisonment not exceeding five years).

#### • Bribery of government officials

Pursuant to articles 177 and 178 CC, bribery of government officials and judges is illegal. Persons in the public service of a foreign state or of an organisation under international law shall be considered equivalent to civil servants (article 178a CC). Anyone who gives a gift or makes a promise to a civil servant or provides or offers him a service with a view to inducing him to act or to refrain from certain acts in the performance of his office, in violation of his duty, is punishable (article 177(1) CC). Furthermore, any person who gives a gift or makes a promise to a civil servant, or provides or offers him a service as a result or as a consequence of certain acts he has undertaken or has refrained from undertaking in the performance of his current or former office, is punishable (article 177(2) CC). Previous offences carry a term of imprisonment not exceeding six years or a (maximum) fine of €87,000.

Bribery of a judge with a view to exercising influence on the decision in a case before his court is punishable (article 178 CC). Anyone who bribes a judge shall be liable to a term of imprisonment not exceeding nine years (article 178(1) CC). If the intention is to obtain a conviction in a criminal case, the offender shall be liable to a term of imprisonment not exceeding 12 years (article 178(2) CC).

#### • Criminal anti-competition

Anti-competition is a criminal offence when someone perpetrates any form of deception in order to mislead the general public or a specific person, if such activity leads to any disadvantage to his competitors or those of that other person (article 328*bis* CC). This offence carries a term of imprisonment not exceeding one year or a (maximum) fine of €87,000.

#### • Cartels and other competition offences

Contracts between companies, decisions of associations of undertakings, and concerted actions of companies for the purpose or effect that the competition on the Dutch market (or a part thereof) will be prevented, limited or distorted, are illegal (article 6(1) Competition Act). It is further prohibited to abuse a market position (article 24 Competition Act). Such an offence can be punished by the Authority for Consumers & Markets with an administrative fine not exceeding €20 million or, in case of a repeat offence, a fine not exceeding €40 million.

#### • Tax crimes

Tax fraud can be prosecuted via general criminal law and via specific criminal law provisions. In the last case, prosecution takes place according to the AWR. The criminal offences are listed in article 68 to 69a AWR. Whether intent or culpability is required depends on the description of the criminal provision applied. A prison sentence not exceeding a term of six years applies and a (maximum) fine of €87,000 or an amount up to three times the tax amount that was not levied due to the offence.

#### • Government-contracting fraud

According to article 323a CC, it is a criminal offence to use subsidies for a purpose other than the one for which they were granted. Imprisonment not exceeding three years and

(maximum) a fine of €87,000 applies. Furthermore, government-contracting fraud can also be prosecuted under general criminal law provisions; for example, fraud (article 225 CC) of deceit (article 3269 CC).

#### • Environmental crimes

Pursuant to articles 172–173b CC, it is prohibited to poison drinking water supplies, the soil, the air or the surface. The sentences vary between six months' and 15 years' imprisonment (if the act is fatal). Articles 161*quater* and 161*quinquies* CC, respectively, criminalise the intentional and culpable exposure of people, animals, plants, and goods to ionising radiation and the contamination of the environment with nuclear materials. The sentences vary between six months' imprisonment and life imprisonment, if the act is intentional and fatal (in principle, a life sentence in the Netherlands is a lifetime).

Moreover, many environmental offences are punishable under the WED. For example, under article 5 Directive on Major Accident Hazards (BRZO), the implementation of the Seveso III Regulation, all companies that deal with large quantities of hazardous substances are required to take all necessary measures to prevent serious accidents and limit the consequences for people and the environment. Violation of this legal requirement is punishable according to article 5 BRZO in conjunction with article 8.40(1) Environmental Management Act and articles 1a(1) and 2(1) WED. Sentences vary from a term of imprisonment not exceeding one year and a (maximum) fine of €21,750 for a misdemeanour and six years or a (maximum) fine of €87,000 in case of a felony. For legal entities, the fine can be increased to €870,000.

#### • Campaign-finance/election law

Election fraud can be prosecuted pursuant to articles 126–129 CC. According to these provisions, it is illegal to bribe another person by means of gifts or promises in order to cause him either to refrain from exercising his right to vote or to cause him to exercise that right in a particular way, to employ any form of deception resulting in invalidation of a vote cast, to intentionally assume the identity of another, or, lastly, to intentionally invalidate a vote or to employ a false outcome. The maximum sentence is six months' imprisonment or a (maximum) fine of €8,700.

#### • Market manipulation in connection with the sale of derivatives

As of 3 July 2016, the MAR and Directive 2014/57/EU (Directive on market abuse) are applicable. Article 15 states that it is illegal to manipulate or attempt to manipulate. Article 12 explains 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. Market manipulation is seen as an economic offence and is made punishable under article 1(1) WED. Pursuant to article 6(1) WED, the offence carries the penalty of imprisonment not exceeding six years and a (maximum) fine of €87,000. Furthermore, price and rate manipulation is illegal, according to article 334 CC, if a person drives up or down the price of commodities, stocks or other securities by disseminating false information. This offence carries a term of imprisonment not exceeding two years or a (maximum) fine of €87,000.

#### • Money laundering or wire fraud

Any person who hides or conceals the real nature, the source, the location, the transfer or the moving of an object, or hides or conceals the identity of the person entitled to an object or has it in his possession, while he knows that the object derives – directly or indirectly – from any serious offence, is guilty of money laundering (article 420*bis* CC *et seq.*). This applies as well to he who obtains an object, has an object in his possession,

transfers or converts an object or makes use of such an object. Additionally, he who obtains and holds in possession an object that directly derives from his own serious offence is punishable. The sentences vary from a term of imprisonment of three months or a (maximum) fine of €21,750 for minor negligent laundering (article 420*quater* 1 CC) to imprisonment not exceeding eight years or a (maximum) fine of €87,000 for habitual money laundering (article 420*ter* CC).

#### • Cybersecurity and data protection law

Article 138ab CC criminalises the intentional and unlawful entering of another's computer system (i.e., hacking). The intentional and unlawfully hindering of access to, or use of, a computerised system by sending that system an overload of data (i.e., DDoS attack) is criminalised in article 138b CC. Possessing any technical aids or login codes for the purpose of committing the crimes referred to in articles 138ab and 138b CC is punishable under article 139d CC. These offences carry a term of imprisonment not exceeding five years or a maximum fine of €21,750.

Article 139g CC criminalises the possession or dissemination of computer data that one knows to be, or one must reasonably assume to be, derived from any crime. Data embezzlement (the intentional and unlawful copying of computer data for oneself or another person where the access to the computer itself was not illegal) is criminalised in article 138c CC.

Furthermore, according to articles 161*sexies* and 161*septies* CC, any person who intentionally destroys, damages, or renders unusable a telecommunication infrastructure facility can be prosecuted.

#### • 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. According to 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.

#### • Any other crime of particular interest in your jurisdiction

Since the so-called “Childcare benefits affair”, a Dutch political affair resulting from unjustified suspicions of childcare benefits fraud and a strict recovery policy by the central government, the dusty article 366 CC “*Knevelarij*” has become relevant again. The article makes it punishable to collect, receive or withhold, for example, money by someone who abuses his position as a civil servant to do so and while knowing that this money is not owed.

A large group of parents, who have been affected by the affair, have filed charges against the tax authorities and their officials under this article, among others.

**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?**

Preparation to commit a serious offence that, by statutory definition, carries a term of imprisonment of eight years or more, is punishable, if the offender intentionally obtains, manufactures, imports, conveys in transit, exports or has possession of objects, substances, information carriers, spaces or means of transport intended for the commission of that serious offence (article 46 CC).

An attempt to commit a serious offence is punishable if the intention of the offender has revealed itself by a commencement of the performance of the criminal act (article 45 CC).

Neither preparation nor an attempt shall exist if the serious offence 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?**

Legal entities can be prosecuted for criminal offences (article 51 CC). The conditions are a) that they are the party to which the violated norm applies, or b) when a criminal relevant act or omission of a natural person can be reasonably attributed to the legal entity. The possible attribution depends on the circumstances of the case. An important landmark is whether the conduct has taken place in the domain of the legal entity. There could be a conduct in the sphere of the legal entity when there is an act or omission of someone who has worked for the legal entity in the capacity of employee or another capacity, if the act fits the normal operation of the legal entity, if the act has benefited the legal entity in their business, if the legal entity had the power to decide if the act took place or not and if such or comparable conduct was accepted or used to be accepted by the legal entity according to the actual course of events. Here, acceptance also includes the omission to take due care by the legal entity in order to prevent the conduct.

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

Manager, officers and directors (*de facto* managers) can only be prosecuted if it is established that the legal person has committed a criminal offence.

Criminal proceedings may be instituted on *de facto* managers who have ordered the commission of a criminal offence as well as their actual superiors (article 51(2) CC). Ordering in this context means an explicit order (solely allowing is insufficient) whereby the person who gave the order intended the act (the conduct and the punishable circumstances).

Furthermore, in case law, four criteria are established that lead to actual directing and upon which managers, officers and directors have criminal liability:

- i) the officer must have the authority to intervene;
- ii) the officer must have been "reasonably required" to undertake measures to prevent the illegal acts;
- iii) despite this, he must have omitted to take these measures; and
- iv) he must have at least "deliberately accepted the fair chance" that the illegal acts would occur.

**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 Prosecutor has the power to determine whether to prosecute or not based on the criminal investigation (this is the prosecutorial discretion, laid down in article 167 of the Code of Criminal Procedure (CPC)). Article 51(2)(3) CC explicitly states that the legal entity as well as the actual director/officer/manager can be prosecuted for the same facts. In reference to the answer at question 1.4, practice shows that recently the focus is also increasingly on the natural person.

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

This is only possible if the acquiring company can actually be identified as the former company. A material test should determine this. Elements of this material test are, e.g., if the same trading name is used, if employees (or the director) stay unchanged, and a check of the actual control within the company.

## 5 Statutes of Limitations

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

According to article 70 CC, the right to institute criminal proceedings shall be prescribed upon lapse of the period of limitation of:

- i) three years for all minor offences;
- ii) six years for serious offences punishable by a fine, detention or imprisonment not exceeding three years;
- iii) 12 years for serious offences punishable by a term of imprisonment of more than three years; and
- iv) 20 years for serious offences punishable by a term of imprisonment of more than 10 years.

The right to institute criminal proceedings shall not be prescribed upon lapse of the period of limitation in the case of serious offences punishable by 12 years or more, nor in the case of some specific offences.

The period of limitation shall begin on the day following the day on which the offence was committed (article 71 CC) and will be interrupted by any act of prosecution (article 72 CC). After interruption, a new period of limitation shall begin.

**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 act with a longer period in which the act was committed, the period of limitation will only begin after this period has ended. In that case, the period of limitation has not expired, and prosecution will be possible.

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

Yes; see the answer to question 5.1. The period of limitation can be tolled by any act of prosecution (article 72 CC). After any act of prosecution, a new period of limitation begins, but the total period of limitation shall not exceed 10 years for misdemeanours, or double the period of limitation applicable of 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?**

The criminal law of the Netherlands shall apply to:



- i) any person who commits a criminal offence in the Netherlands or on board a Dutch vessel or aircraft (articles 2 and 3 CC);
- ii) any Dutch national who commits a criminal offence abroad which offence is also punishable under the law of the country where it was committed (article 7 CC); and
- iii) any person who commits a criminal offence against a Dutch person, a Dutch civil servant, a Dutch vehicle, vessel or aircraft outside the Netherlands, for as far as this is an offence punishable with a prison sentence of eight years or more and this act is also punishable in the country where it was committed (article 5 CC).

In addition, Dutch criminal law is also applicable to specific criminal offences committed outside the Netherlands (articles 4, 6, 8 to 8c CC).

There are no specific regulations for business crimes relating to territory.

On foreign territory and territory outside the Dutch jurisdiction, the law enforcement authorities depend on the judicial assistance of the respective country; the principle of territorial state sovereignty applies. The applicable judicial assistance law must be established on an individual basis for each country and for the facts of the respective case. In most cases, the legal assistance is based on contracts according to international law; however, in the European legal system, multilateral arrangements prevail.

#### 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 Prosecutor is responsible for the investigation of criminal offences (article 148 CPC). Investigations can be initiated based on (among others) reports of a crime, charges and (anonymous) tips. Furthermore, regulatory authorities can notify the Public Prosecutor Service in case of an indication of a crime. The Public Prosecutor will make the decisions on criminal proceedings regarding these investigations.

#### 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?

Article 552h CPC regulates International Legal Assistance in criminal cases: providing cooperation in investigation, prosecution, trial and execution of criminal offences by foreign authorities. In principle, all requests for legal assistance are processed without regard to the country of origin and the intensity of the legal assistance relationship. Received requests for legal assistance are required to prevent violations of human rights (among which is the right to a fair process). This could lead to a refusal if the presumption exists that the execution thereof will lead to, or contribute to, a violation of fundamental rights in the requesting state. Besides the formal requests for legal assistance as mentioned above, the police and other investigative authorities also process informal requests for information. These see to the prevention of criminal offences and the enforcement of public order.

## 7 Procedures for Gathering Information from a Company

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

Investigation powers are listed in article 94 CPC *et seq.* In articles 17–25 WED, the investigation powers for economic offences are listed. The following subjects are (among others) governed in these provisions: when it is allowed to search a premises; when objects can be seized to reveal the truth; when surveillance or infiltration is allowed; when confidential communication may be recorded; and how information can be seized.

#### 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?

According to article 18 WED *et seq.*, criminal investigators (except for the FIOD-ECD in case of tax crimes) are allowed (in the interest of the investigation) to demand that a company submits any documents or data that are reasonably necessary for a criminal investigator to fulfil his tasks. The criminal investigator is also allowed to make copies. Furthermore, they are allowed to enter any place (including offices). According to article 26 WED, it is considered an economic offence if a company intentionally refuses to comply.

It is noteworthy that in cases where a suspect is caught in the commission of a criminal offence or where he is suspected of having committed a serious offence for which provisional detention is allowed, the Public Prosecutor may, for the purpose of seizure, search any place (with the exception of a dwelling without the permission of its occupant).

### 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?

In principle, all documents that are found during a search can be seized to reveal the truth. Pursuant to article 98 CPC, documents subject to secrecy may not be seized from persons who have a legal duty of secrecy (ex article 218 and 218a CPC), such as notaries or attorneys.

In case of people who have legal privilege, no letters or other documents will be seized that fall under their confidentiality, unless they give permission. According to article 218 CPC, persons who have a legal duty of secrecy may assert privilege, but only in regard to information entrusted to them in their aforementioned capacity.

If, during a search, the company takes the view that certain documents are covered by legal privilege, these will normally be handed over to the investigative judge in a sealed envelope. The investigative judge will then ask the attorney if these documents are covered by his legal privilege.

**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?**

Article 6 of the General Data Protection Regulation (GDPR) states that 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 the article. 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.

**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?**

In cases where the suspect is caught red-handed in the commission of a criminal offence or where he is suspected of having committed a serious offence for which provisional detention is allowed, the Public Prosecutor may, for the purpose of seizure, search any place (with the exception of a dwelling without the permission of its occupant and the office of a person who can assert privilege) (article 96c CPC). Regarding the dwelling, the occupant will usually be questioned and invited to hand over the object voluntarily for the purpose of seizure.

If an employee is not considered a suspect, the Public Prosecutor – in the interest of an investigation of a charge for a serious offence for which provisional detention is allowed – can order a person who is suspected to have access to certain saved or recorded documents to hand over these documents (article 126 CPC). Furthermore, it is not fully crystallised under Dutch law whether employees of a suspected company may exercise a suspected company's right not to incriminate itself.

**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 a serious offence, the investigating officer may, in the interest of the investigation, request a person, who may be reasonably considered the appropriate person for that purpose and who processes data other than for personal use, to provide specific stored or recorded identifying data of a person (article 126nc CPC). Hereto, no search can be undertaken. When it does not concern identifying data, article 126nd as mentioned in question 7.5 applies.

#### 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?**

There is a difference between a witness who is also a suspect and a non-suspect witness. Both can be questioned by the police during the investigation and are not required to appear and/or to answer to the police. Furthermore, a witness can be

questioned by the (investigative) judge and can be required to appear (which can be enforced by the police). The witness shall state the truth (article 215 CPC).

The only exception is when the witness asserts a right to not incriminate himself. A witness can furthermore refuse to answer questions in case he is a relative of the suspect or has a legal duty of secrecy. The suspect will be notified that he is not required to answer and the interrogator refrains from all actions intended to get a statement that cannot be assumed to have been given freely.

**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 in 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?**

A person needs to be informed about his rights and obligations prior to an interrogation. Suspects need to be informed that they are not required to answer (“*cautiv*”) and that they have a right to an attorney prior to and during an investigation. Suspects need to be informed about their privilege regarding kinship and duty of secrecy.

## 8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

**8.1 How are criminal cases initiated?**

The Public Prosecutor may issue a summons or can issue a punishment order (“*strafbeschikking*”), a penalty that is imposed by the Public Prosecution Service itself and that may be appealed to the court.

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

Considering the prosecutorial discretion, laid down in article 167 CPC, the Public Prosecutor has broad discretionary powers in deciding who will be brought to trial, and for which offences. In his decision making, the Prosecutor must take into account the interest of society, which includes the interest of possible victims and the interest of the suspect. The Public Prosecutor Service has established policy, laid down in guidelines, regarding specific offences that contain factors that the Prosecutor should take into consideration when deciding to prosecute a case.

**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.**

In case of offences for which the law prescribes sentences of imprisonment for no more than six years, the Public Prosecutor

may settle a case (article 74 CC). In that case, it is possible under certain conditions, e.g., payment of a sum of money or deprivation of unlawfully obtained gains, to void criminal proceedings. These settlements do not need approval of the court. Where settlement agreements contain a fine of more than €200,000 or have a total value of more than €1 million, the Prosecutor must also comply with the *Instruction Large settlements agreements*, which, in sum, prescribe that before such an agreement is offered to the defendant, the Prosecutor must seek the advice of an independent review committee. After the committee has given a positive advice and the agreement is settled, the Public Prosecutor has to announce the agreement by a press release and a statement of facts. Compliance with these conditions shall preclude the right to institute criminal proceedings.

If the suspect does not agree with the suggested settlement, the case will be brought before the court.

**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.**

Such agreements are not yet available, but the legislator is currently working on a bill concerning the judicial approval of settlement agreements. The final proposal of the bill is expected before 2023.

**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 do not exist in the Dutch legal system. Furthermore, a civil case cannot replace criminal prosecution. However, it is possible to recover damages from a criminal offence in a civil procedure, which can run simultaneously or subsequently to a criminal case. In addition, an injured party has the possibility to join the criminal proceedings and claim material and tangible damage that the party suffered as a result of the criminal act (article 51f *et seq.* CPC).

**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 who is a victim of a suspect's alleged criminal offence, may complain about a decision of the Prosecutor not to (further) prosecute the suspect before the Court of Appeal (article 12 CPC). Such a complaint can also concern the non-prosecution of a suspect via a settlement agreement that has been reached.

## 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?**

The Public Prosecutor has the burden of proof for crimes. The defence does not have to prove that the crime was not committed.

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

The court may find that there is evidence that the defendant committed the offence as charged in the indictment only when the court, on the basis of the examination and during the court hearing, has become convinced thereof from legal means of evidence (article 338 CPC). This evidence must cover all elements that make an act illegal.

**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 adequate legal and convincing evidence that the suspect has committed the charged 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?**

This is possible. The law distinguishes between the suspects that jointly commit an offence, cause another person to commit an offence, instigate an offence, or are an accomplice to an offence.

Jointly committing an offence (article 47 CC(1)(1)) occurs when there has been close and intentional cooperation. It is not relevant whether all the criminal acts were committed jointly. The intellectual and/or material contribution of the suspect must be considerable. The court can take into account the intensity of the cooperation, the mutual division of tasks, the suspect's part in the preparation, the execution or the processing of the offence and the importance of the role of the suspect, his presence at key moments and the fact that he did not withdraw when given an opportunity.

Instigation (article 47 CC (1)(2)) is when someone, by means of gifts, promises, abuse of authority, use of force, threat or deception or by providing opportunity, means or information, intentionally solicits the commission of the offence. Persons who intentionally aid and abet the commission of the serious offence or who intentionally provide opportunity, means or information can be punished as the accomplice of a felony (article 48 CPC).

## 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?**

The defence can argue that there is no intent. For an act to be punishable, normally an offence needs to be carried out intentionally, deliberately, and knowingly. The lower threshold for intent is conditional intent. Conditional intent occurs when the suspect has deliberately and knowingly taken the considerable chance that a certain consequence shall occur.

In business crimes, the Public Prosecutor has to prove at least conditional intent.

**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?

The intent does not have to be aimed at the violation of the prohibition (the unlawfulness). There can be a form of intent on the commitment of the (illegal) act, whereby it is not necessary that the suspect is aware that his act is illegal. The burden of proof of the Public Prosecutor only applies to proving that the illegal act was committed.

**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?

Committing an illegal act has to be done intentionally. If someone was not aware that his acts were an element of an offence, there is no intent. The Public Prosecutor needs to prove that the suspect was aware that his acts were an element of an offence.

## 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, any person who has knowledge of any serious offences against the safety of the state, offences causing danger to life, kidnapping, rape and unlawful imprisonment shall be obliged to report. This disclosure obligation does not apply to persons who herewith run the risk of prosecution or have privilege. Regarding other offences, disclosure is merely voluntary.

There is no legal regulation that makes the omission to report a crime punishable. There are no provisions under which credits can be received for he who files a report. If it concerns their own crimes, voluntary disclosure can have a positive influence on the prosecution's decision whether to prosecute or to proceed with an extrajudicial settlement. It can also have positive consequences for the sentencing, although this is at the discretion of the judge.

## 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?

There are no provisions or regulations concerning leniency or credit in exchange for voluntary disclosure or cooperation.

**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 the previous answer.

## 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 plea-bargaining provisions, the Public Prosecutor Service is increasingly making use of so-called "process agreements": the defence and the Public Prosecutor may present a mutual trial position and sentencing consensus to the court. The court is not bound to honour these positions and may reach an entirely different verdict.

Recently, the Public Prosecutor has sought process agreements in more and more cases. However, according to recent rulings, courts do not yet seem benevolent in embarking on the agreements. In June 2022, after cassation in the interest of the law was instituted on this matter, the Attorney General at the Netherlands Supreme Court concluded that, because there is no legal basis for these kinds of agreements, restraint on agreements is required. He argues that the legislator cannot remain aloof, and that, as long as a specific statutory regulation is lacking, it will have to be assessed on a case-by-case basis whether the handling of the case in which process agreements have been made is in accordance with the requirements of the right to a fair trial as laid down in article 6 ECHR, the system of the law and principles of due process. Additionally, according to the Attorney General, there is, among other things, no place in current law for agreements on possible confessions.

The Supreme Court's ruling on this is expected by the end of September 2022.

**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 the previous answer.

## 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 court determines in his judgment whether the defendant has committed an offence, and if so, which offence is proven according to the law. The then court decides whether the defendant is punishable and which punishment or measure to impose. The punishments are divided in article 9 CC into principal punishments and additional punishments. The principal punishments are imprisonment, detention, community service or a fine. The additional punishments are disqualification from certain rights, confiscation of assets or publication of the judgment.

The legislator has imposed a minimum punishment boundary for imprisonment of one day. A maximum boundary is set per crime. Within these boundaries, the court is, in principle, free



in his decision regarding sentencing. Often the court will align with similar cases in case law. The court will take the personal circumstances of the defendant into consideration.

The main punishments for legal persons are a fine and deprivation of illegally forfeited proceeds.

**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.**

No, the court does not have to determine whether the sentence satisfies any 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 the subject of an appeal by both the defendant and Prosecutor. The Public Prosecutor alone can appeal a non-guilty verdict. The appeal must be lodged within two weeks. Appeals against the verdict of the Court of Appeal (“*cassatie*”) also need to be lodged within two weeks.

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

The appeal may only be filed against the judgment in its entirety (article 407 CPC). There are no provisions to appeal solely against the sentencing.

**16.3 What is the appellate court’s standard of review?**

The Court of Appeal will review the case in its entirety, regarding the facts as well as the applied law. The defence and the Public Prosecutor may bring forward their complaints, which creates the focus of the procedure. The Supreme Court only reviews the applied law in a case; the establishment of facts is reserved for the court and the Court of Appeal.

**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 quash the judgment. The Court of Appeal shall wholly uphold the judgment either by wholly or partially adopting or by supplementing or amending grounds of the verdict of the District Court. In the event that the judgment is wholly or partially quashed, the Court of Appeal shall do what the District Court ought to have done.



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OSK Advocaten is a boutique law firm exclusively focused on advocacy that belongs to the best in the Netherlands for specialised criminal and regulatory defence work and commercial and corporate litigation and arbitration. Geertjan van Oosten has extensive experience in complex corporate and white-collar crime defence work, including in the field of industrial safety standards and environmental and financial regulations. He has composed a team of defence lawyers within his firm with the same specialisation to adequately attend his clients. Geertjan van Oosten and his team frequently act for national and international listed companies and are regularly instructed by foreign service providers to provide advocacy before a variety of courts and other fora in the Netherlands.

The team has a keen understanding of the complex environment companies and professionals perform in and of the financial and reputational

risks associated with violation of regulations and becoming the subject of investigation by prosecutors and regulators with extensive powers. The team will act appropriately and adequately and will always seek to resolve disputes discreetly and in the most efficient manner.

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