



ICLG

The International Comparative Legal Guide to: **Business Crime 2018**

8th Edition

A practical cross-border insight into business crime

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Netherlands



S.G.C. (Sanne) Bocxe



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Van Oosten Advocaten

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’s office or the “*landelijk parket*”, a department of the Public Prosecutor’s Office that fights (inter)national organised and subversive crime, among which are (international) fraud and money laundering.

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. Investigations will be carried out by various investigative services under the authority of the Public Prosecutor. There are directives, instructions and covenants concerning investigations by these investigative services.

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. 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, *inter alia*, by administrative penalties.

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 at first instance will be judged. Sub-district court judges are

competent to judge minor offences, magistrates are competent to judge offences that are straightforward and which can only lead to a maximum prison sentence of one year (368 Criminal Procedure Code; CPC). They judge a case alone. More complex cases will be reviewed by a panel of three judges. Separate (specialised) criminal divisions exist for economic and environmental crimes (52 Code on Judicial Organisation; CJO) which have the exclusive competence to review these cases.

A court ruling can be appealed. There are four geographical jurisdictions with their own court of appeal. There are also economic criminal divisions in the courts of appeal (64 CJO). Against a judgment of the court of appeal, further appeal (“*cassatie*”) is possible at the Supreme Court.

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

No, there is no such right.

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:

o Securities fraud

Normally securities fraud cases will be prosecuted under general criminal law, for example by prosecution for forgery of documents (225 Criminal Code; CC), swindle (326 CC) and insurance deceit (327 CC). Roughly speaking, for the crime of fraud it is necessary that at the establishment of an insurance policy, a misrepresentation of facts was deliberately given, intended to unlawfully get insurance coverage or a payment service. These penal provisions carry a (maximum) fine of €82,000 and a term of imprisonment of six years. In principle, serious fraud will be prosecuted and minor cases will be dealt with in civil proceedings by the insurance company itself.

o Accounting fraud

In case of active cooperation, prosecution can be based on complicity in general criminal offences such as money laundering (420bis CC and further) and forgery of documents (225 CC). For criminality, normally intent is required but with some penal provisions fault suffices. The penal provisions carry a (maximum) penalty of €82,000 and a prison sentence of eight years. The auditor/organisation also runs the risk of being penalised within the administrative law framework, as an accessory (5:1 Administrative Law Code) but also as (*inter alia*) an accomplice (see 67o AWR).

Furthermore the auditor has obligations which by omission can lead to criminal liability. Pursuant to section 26 article 2 WTA, irregularities must be notified to an investigating officer. Also, pursuant to section 16 Wwft, the auditor is required to notify suspicious transactions. According to section 1, first article under 2 jo. section 2, first article of the Economic Offences Act (WED) these are felonies if and 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 €20,500.

o Insider trading

Pursuant to section 14 sub a, b and c MMVO (Regulation 596/2014 on market abuse), 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 (7 MMVO).

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 (8 MMVO). These penal provisions carry a term of imprisonment for a maximum of six years and a (maximum) fine of €82,000 (1 article 1 jo. 6 article 1 WED).

o Embezzlement

In section 321 CC, embezzlement is made punishable as the intentional misappropriation of any property which belongs in whole or part to another person and which 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 €82,000.

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

o Bribery of government officials

Pursuant to sections 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 (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 (177 article 1 CC). Further, 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 (177 art. 2 CC). Previous offences carry a term of imprisonment not exceeding six years or a (maximum) fine of €82,000.

Bribery of a judge with a view to exercising influence on the decision in a case before his court shall be liable to a term of imprisonment not exceeding nine years (178 art. 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 (178 art. 2 CC).

o 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 (328bis CC). This offence carries a term of imprisonment not exceeding one year or a (maximum) fine of €82,000.

o 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 (6 art. 1 Competition Act). It is further prohibited to abuse a market position (24 Competition Act). Such an offence can be punished with an administrative fine not exceeding €900,000 or, if this is more, 10% of the revenue of the company or in case of an association of undertakings 10% of the revenue of the association. In case of a violation of section 6 article 1 of the Competition Act, this amount can be multiplied by the amount of years that the offence has occurred, not exceeding four years. Recidivism within five years can increase the fine by 100%.

o 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 sections 68 to 69a AWR. A prison sentence not exceeding a term of six years applies and a (maximum) fine of €82,000 or an amount up to three times the tax amount that was not levied due to the offence.

o Government-contracting fraud

According to section 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 €82,000 applies.

o Environmental crimes

Pursuant to section 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). Moreover, many environmental offences are made punishable under the WED. For example, under section 5 Risk of Serious Accidents Act, the implementation of the Seveso III-regulation, all companies who 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 section 5 Brzo in conjunction with section 8.40 article 1 Environmental Management Act and Section 1a sub 1 and section 2 article 1 WED. Sentences vary from a term of imprisonment not exceeding one year and a (maximum) fine of €20,500 for an offence and six years or a (maximum) fine of €82,000 in case of a felony. For legal entities, the fine can be increased to €820,000.

o Campaign-finance/election law

Election fraud can be prosecuted pursuant to section 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 €8,200.

o Market manipulation in connection with the sale of derivatives

As of 3 July 2016, Regulation 596/2014 (MMVO) and Directive 2014/57/EU (Directive on market abuse) are applicable. Section 15 states that it is illegal to manipulate or attempt to manipulate. Section 12 explains what constitutes market manipulation. Section 13

MMVO lists the acts that are regarded as accepted market practices and which therefore do not fall under the prohibition of section 15. Market manipulation is seen as an economic offence and is made punishable under section 1 article 1 WED. Pursuant to section 6 article 1 WED, the offence carries a penalty of imprisonment not exceeding six years and a (maximum) fine of €82,000. Furthermore, price and rate manipulation is illegal, according to section 334 CC, if a person drives up or drives 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 €82,000.

o 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 (420bis CC e.a.). 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. The nature of serious offence is irrelevant. Additionally, as from 1 January 2017, 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 €20,500 for minor negligent laundering (420quater 1 CC) to imprisonment not exceeding eight years or a (maximum) fine of €82,000 for habitual laundering (420ter CC).

o Cybersecurity law

According to section 161sexies and 161septies CC, any person who intentionally destroys, damages or renders unusable a telecommunication infrastructure facility can be prosecuted. The sentencing is a term of imprisonment not exceeding six years or a (maximum) fine of €82,000 if such an act was not likely to endanger the life of another person. Further, under section 138ab and section 138b CC, computer trespass and hindering of access to or use of a computerised system is made punishable. The sentencing is a term of imprisonment not exceeding five years or a (maximum) fine of €20,500.

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 which, 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 (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 (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 (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 (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 area of the legal entity. There could be a conduct in the area 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?

Criminal proceedings may be instituted on natural persons who have ordered the commission of a criminal offence as well as their actual superiors (51 article 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). In case law, four criteria are established which 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 principle of opportunity gives the Public Prosecutor margin to determine whether to prosecute or not based on the criminal investigation (167 CPC). Section 51 art. 2 sub 3 CPC explicitly states that the legal entity as well as the actual director/officer can be prosecuted for the same facts. Practice shows that generally both are prosecuted.

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 old 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?

The right to institute criminal proceedings shall be precluded 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) twelve years for serious offences punishable by a term of imprisonment of more than three years; and
- (iv) twenty years for serious offences punishable by a term of imprisonment of more than ten years.

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

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

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 start to run after this period has ended. In that case, the period of limitation will not have lapsed and prosecution will be possible.

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

See under question 5.1.

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 (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 (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 (5 CC).

There are no specific regulations for business crimes.

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 has to 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 (148 CPC). Investigations can be initiated based on (among others) charges and (anonymous) tips. Furthermore, regulatory authorities are sometimes by law required to notify the Public Prosecutor. 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?

Section 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 section 94 CPC and further. In sections 17 to 25 WED, the investigation powers for economic offences are listed. The following subjects (among others) are 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 section 18 WED and further, 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, which 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 section 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? Do the labour laws in your jurisdiction protect personal documents of employees, even if located in company files?

In principle, all documents that are found during a search can be seized to reveal the truth. Some documents are protected against seizure; for example, documents between a suspect and his lawyer or a notary with privilege.

In case of people who have privilege, no letters or other documents will be seized that fall under their confidentiality, unless they give permission. In case of a dispute, the supervisory judge decides. According to section 218 CPC, persons who have a duty of secrecy by reason of their position, profession or office may also assert privilege, but only in regard of information entrusted to them in their aforementioned capacity.

7.4 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) (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 to be 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 (126 CPC).

7.5 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 to be 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 (126nc CPC). Hereto, no search can be undertaken. When it does not concern identifying data, section 126nc as mentioned under question 7.4 applies.

Questioning of Individuals:

7.6 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 (215 CPC). The only exception is when the witness asserts a right of privilege. A witness can assert a privilege when he is a suspect in the case, or if he is a relative or has a 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 which cannot be assumed to have been given freely.

7.7 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 7.6.

7.8 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 (“*cautie*”) 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 punishment order (“*strafbeschikking*”, a punishment which will be imposed by the Public Prosecutor itself) or issue a summons.

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

The principle of opportunity gives the Public Prosecution the freedom to make an assessment, and who will be summoned.

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 (74 CC). In that case, it is possible under 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. If the suspect does not agree with the suggested settlement, the case will be brought before the court. Compliance with these conditions shall preclude the right to institute criminal proceedings.

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.

No, such agreements are not available.

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.

A civil case cannot replace criminal prosecution. This does not mean that it is not possible for a civil case to run simultaneously or subsequently. The injured party has the possibility to join the criminal proceedings and claim material and tangible damage which the party suffered as a result of the criminal act (51f e.v. CPC).

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 through the hearing has become convinced thereof from legal means of evidence (338 CPC). This evidence has to 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 judge 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 (47 CC) is when there has been close and intentional cooperation. It is not relevant if all the criminal acts were committed jointly. The intellectual and/or material contribution of the suspect has to be considerable. The judge 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 (47 CPC) 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 will be punished as the accomplice of a felony (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 is when the suspect has deliberately and knowingly taken the considerable chance that a certain consequence shall occur.

The Public Prosecution 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 Prosecution 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 he knew 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 Prosecution 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 section 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 which 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 could have positive consequences for the sentencing, although this is up to 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 under 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?

A defendant can make a confession at any time. This confession may have a mitigating effect on the sentencing. It is possible that the defence and the Public Prosecutor reach an agreement regarding the mutual trial position and bring the consensually reached outcome to a judge. However, the judge is not bound to honour these agreements when he imposes the actual sentence.

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?

There are no rules regarding plea bargaining. The judge has the choice to align with the proposed outcome regarding the proven facts and the sentencing, but he may derogate as well.

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 judge determines in his judgment if the defendant has committed an offence, and if so, which offence is proven according to the law. Then the judge decides if the defendant is punishable and which punishment or measure to impose. The punishments are divided in section 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 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 judge is, in principle, free in his decision regarding sentencing. Often the judge will align with similar cases in case law. The judge will take the personal circumstances of the defendant into consideration.

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’s Office 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 (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. In the event that the judgment is wholly or partially quashed, the Court of Appeal shall do what the first instance court ought to have done.

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