

## Directors' liabilities - Netherlands

### 1. Obligation to file

i) Is there an obligation on directors to file for formal insolvency proceedings?

Under Dutch law there is no formal obligation for managing directors or supervisory board members<sup>1</sup> to file for insolvency proceedings. In fact bankruptcy proceedings may only be initiated after a decision by the general meeting of shareholders. However, the managing board is normally speaking - and in some circumstances subject to prior approval of the supervisory board - entitled to file for a suspension of payments.

Dutch law does provide that in *Naamloze Vennootschappen*<sup>2</sup> a general meeting of shareholders must be convened when the managing directors may reasonably assume that the net asset value of the company is less than 50% of the paid and called up capital (article 2:108a NCC<sup>3</sup>).

Although no formal obligation to file for bankruptcy or moratorium proceedings exists, it is generally accepted, both in doctrine and in case law, that a managing director should not enter into obligations which he knows, or should know, that the company will be unable to fulfil. This means that if the managing board has reason to believe that the company is or will become insolvent, the company must in fact cease doing business.

ii) If so when does this arise

Not applicable.

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<sup>1</sup> In the Netherlands companies either have a managing board with only executive members (the normal situation in smaller companies) or a managing board with only executive members and a supervisory board ("*Raad van Commissarissen*") with only non-executive members (the normal situation in larger companies). Only in extraordinary situations may the supervisory board empower one of its members with executive authority.

<sup>2</sup> In the Netherlands there are two widely used forms of companies: "*besloten vennootschap met beperkte aansprakelijkheid*" normally abbreviated as "*B.V.*" which is the common form for smaller privately held companies with limited liability, and the "*naamloze vennootschap*", normally abbreviated as "*N.V.*" which is the common form for larger and publicly held companies.

<sup>3</sup> Netherlands Civil Code ("*Burgerlijk Wetboek*")

## 2. Who can be held liable

A managing director may be held personally liable on several grounds *inter alia* the following:

- a. by the company (and in a bankruptcy by the trustee in bankruptcy of the company) if he did not fulfil his tasks as managing director properly (article 2:9 NCC)
- b. by the company or a creditor on the basis of tort (article 6:162 NCC)
- c. by the trustee in bankruptcy on the basis of mismanagement that was an important cause of the bankruptcy (article 2:138 NCC and 2:248 NCC)
- d. by the tax authorities, the social security authorities and pension funds in the event of mismanagement<sup>4</sup>
- e. by any third party in case of misleading financial figures (articles 2:139 NCC ad 2:249 NCC)

Generally speaking, a de facto director, meaning any director who has acted as if he were a managing director and has thus (co-)managed the company, may be held personally liable in the same manner as formal managing directors in all the abovementioned situations.

A member of the supervisory board may be held personally liable on more or less the same grounds as a managing director may be held personally liable. However, since the supervisory board is charged only with the supervision of the management and the general state of affairs of the company (article 2:140 NCC), such liability is normally less likely than personal liability of a managing director.

## 3. Sanctions

- i) What are the possible sanctions against directors of insolvent companies?

In the event of mismanagement, the directors of insolvent companies may be jointly and severally liable (see above under 2) towards the bankruptcy estate for the full deficit in the bankruptcy. In the event of fraud, there may also be criminal law sanctions.

The Ministry of Justice keeps a register of directors of companies that went bankrupt. In some cases this may mean that they will not be able to form new companies for a certain period of time.

- ii) Are there sanctions/restrictions that are imposed automatically

The registration by the Ministry of Justice is automatic. None of the sanctions are imposed automatically.

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<sup>4</sup> In the event of liability based on mismanagement, the NCC, the tax laws and social security laws work with a number of assumptions of mismanagement and liability. Especially if the books and records of a company are not kept in (perfect) order and/or the annual accounts are not filed and published in due time, mismanagement is a fact, and it is assumed that this mismanagement is an important cause of the bankruptcy or the non payment of the taxes. Management that is unable to undo such assumption will be held personally liable for the deficit of the bankruptcy estate or, as the case may be, those unpaid taxes.

#### **4. Proceedings against directors**

Actions against directors based on tort may be brought by any damaged party. The same is true for actions based on the publication of misleading prospectuses and financial figures. Actions based on the directors not performing properly may in general only be brought by the company or, as the case may be, the trustee in bankruptcy of the company. Actions based on mismanagement as meant in the articles 2:138 NCC and 2:248 NCC may only be brought by the trustee in bankruptcy.

The specific actions mentioned in the various tax and security laws and regulations may only be brought by the relevant tax and social security authorities.

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