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Global Legal Group

The International Comparative Legal Guide to: Business Crime 2011

A practical cross-border insight
into business crime

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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 only authority with criminal *prosecuting* powers, i.e. the power to issue an indictment and commit a person or a corporation to a trial or a hearing in open court, is the Public Prosecutor. The Office of the Public Prosecutor has several divisions, within which prosecutors specialise in investigating and, if need be, prosecuting various (alleged) crimes. But since ‘business crime’ is not a precisely defined area of (alleged) criminal conduct in the Netherlands, corporations and their management (and lower staff) could in principle be indicted by any Dutch Prosecutor. However, the more serious cases of corporate crime are dealt with by a highly specialised branch of the Office of the Public Prosecutor, located in Amsterdam. Its prosecutors have nationwide jurisdiction; they specialise in prosecuting particular types of crimes, including Tax, Antitrust, Insider Trading, Corruption, Bribery and Environmental violations. They also focus on more general crimes such as fraud or embezzlement.

1.2 If there are more than one set of enforcement agencies, please describe how decisions on which body will investigate and prosecute a matter are made.

As said the Public Prosecutor is solely responsible for the decision to *prosecute* any case. But there are quite a few administrative ‘enforcement’ agencies that investigate possible crime in the area of law that has been assigned to them. They liaise with specialised prosecutors. See question 1.3.

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?

In cases of a serious suspicion that an Economic Crime – as covered by the Economic Offences Act (WED) – has been committed, and prior to the hearing in open court, the Prosecutor or the Investigating Judge may request the District Court to issue certain temporary orders. The suspect’s business operations thus might be closed down and he may be ordered to refrain from certain acts or actions. The suspect has the right to appeal. The life span of those orders is never longer than it takes for the final judgment in the case to become irrevocable.

Administrative law enforcement agencies such as the AFM and NMa (see below) can deny the suspected person to act in any capacity of function than he had when he (allegedly) committed the crime. E.g.: a banker might be denied to act as such if he is suspected of insider-trading. Such a measure may run parallel to criminal enforcement concerning the same matter.

Examples of such agencies are:

- Authority for the Financial Markets (AFM).
- Central Bank of the Netherlands (DNB).
- Netherlands Competition Authority (NMa).
- Inspectorate for Transport, Public Works and Water Management (IVW).
- Food and Consumer Product Safety Authority (VWA).
- Environment Inspectorate.
- Labour Inspectorate (AI).

2 Organisation of the Courts

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

There are no specialised criminal courts as such. However, each of the 19 District Courts (of first instance) has a specialised criminal division, within which the court may create specialised panels of judges who deal with business crime cases.

Defendants who have lost at the court of first instance may usually turn to an Appeal Court. If the Prosecutor lost the case, s/he may also appeal. There are 5 Courts of Appeal. The procedure in appeal is ‘*de novo*’, meaning that the defence and prosecution may introduce new evidence. Nevertheless the judgment by the District Court is the starting point for the appeal procedure and the appellate judges usually only scrutinise those parts of the first judgment that are subject to clear and precise objections filed by those appealing.

The Defendant or Prosecutor who lost the appeal usually has the right to file a submission to the Supreme Court, on points of law only.

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

No. Trial by jury does not exist in the Netherlands.

3 Particular Statutes and Crimes

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

o Drafting a false document or falsifying documents and/or using such documents

Article 225 Criminal Code ('CC') provides that it is a crime to draft false documents and to falsify original documents and to use false or falsified documents. This provision is commonly used in business crime prosecutions. Criminal intent, at least conditional intent ('*dolus eventualis*'), is required. Case law demonstrates that courts in general do not have many problems in finding that the Defendant willingly and knowingly took a certain risk, which entails that he 'must' have known that he might violate the law, in which case his intent 'apparently' was focussed on such violation.

o Deception a.k.a. false representation

Article 326 CC penalises conduct by which a person, with the object of obtaining unlawful gain for himself or somebody else, by assuming a false name or a false identity, or by applying artful tricks, or by a stream of lies, induces someone to hand over any property, to make available data having monetary value in commerce, or to incur a debt or renounce a claim. Criminal intent, at least '*dolus eventualis*' is required.

o Fraud and misrepresentation in connection with sales of securities

According to Article 334 CC it is a crime to disseminate false information with a view to manipulate the price – in any direction – of any stock or other security or merchandise. Criminal intent, at least '*dolus eventualis*', is required. Moreover, the 'Act on Financial Supervision' (Article 5:58, par. 1 d) – as sanctioned in the Economic Offences Act - provides for a more detailed provision, sanctioning 'the dissemination of information that proliferates or may proliferate an incorrect or misleading signal with regard to the supply of, demand for or the price of financial instruments, while he who disseminates said information knows or should reasonably suspect that that information is incorrect or misleading'. Criminal intent, at least '*dolus eventualis*', is required, but conviction is also possible in certain situations of culpable negligence.

o Insider trading

Insider trading is a crime according to the 'Act on Financial Supervision' (Article 5:56) as sanctioned in the Economic Offences Act. Criminal intent (at least '*dolus eventualis*') is a prerequisite for conviction.

o Embezzlement

Embezzlement is a crime according to Article 321 CC and entails the fraudulent conversion of property to a person's own use by someone who has been entrusted with it. It is similar to, though not the same as, theft: the embezzler has a relationship of trust with the victim under which the embezzler was lawfully in possession of the property until he or she appropriated it. Criminal intent, at least '*dolus eventualis*' is required.

o Bribery of government officials

It is a crime to provide or promise any Dutch government official (whether or not at local or national level) – or anyone who will become such an official – anything of value, or render any service to him, in order to induce that official to act in any way 'contrary to his duties' (Article 177 CC). It is a lesser crime to engage in such conduct if the official would be convinced to act in a way, without violating his duties (Article 177a CC). Criminal intent, at least

'*dolus eventualis*' is required.

o Bribery of non-government officials

It is a crime to accept a gift or promise, and remain silent about that situation, *vis-à-vis* one's employer, if that gift or promise relates to something the receiver thereof has (not) done or will (not) do in the course of duty as an employee. Similarly it is a crime to make those promises or hand out such gifts (Article 328 *ter* CC).

o Criminal anti-competition

It is a crime to mislead or deceive the general public or a specific person in any way, in order to preserve or increase a certain market position, if that causes any disadvantage to that person or any competitor (of the defendant) (Article 328 *bis* CC). Criminal intent, at least '*dolus eventualis*' is required.

o Tax crimes

There are several forms of tax crimes, but the most commonly prosecuted is tax evasion (Article 69 General Act on State Taxes). Often the prosecution then also focuses on violation of the common provision of 'fraud' (Article 225 CC, see *supra*) or deception (Article 326 CC, see *supra*), since filing an untrue tax return constitutes 'ordinary' fraud. Criminal intent, at least '*dolus eventualis*' is required.

o Government-contracting fraud

Different than in the US, 'government-contracting fraud' does not exist as such. However, falsifying, concealing, covering up any material fact, making false statements and/or using false documents in dealing with any government official, might easily constitute any form of the common 'fraud' (Article 225 CC) or deception (Article 326 CC) crimes. Criminal intent, at least '*dolus eventualis*' is required.

o Other crimes of particular interest in the Netherlands: Environmental crimes

The Economic Offences Act penalises an enormous amount of lesser or more serious (intentional or negligent) infringements of many environmental laws that focus on clean energy, air, soil and water. Operating a company that in any way might harm the environment requires permits, and the prosecution often focuses on permits not having been issued, or having been issued under false pretences, or having been violated in the course of the production process.

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

Yes. Liability requires evidence of intent (be it '*dolus eventualis*'), which needs to have been focussed on all elements of the crime. Also there needs to be proof of an action in furtherance of the attempt.

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?

Yes, in principle a legal entity can commit any crime. The entity can then be given any sentence (apart from prison); additionally, those people who were actually in charge of the criminal conduct or – on a higher level – ordered it to take place, can be sentenced.

For a legal entity to be sentenced for having committed a crime, case law shows that mainly two criteria have to be met: a) the conduct of an 'employee', officer or director has to be attributed to the company; and b) when a certain state of mind (intent, negligence) is an element of the offence, the knowledge of employees, officers and (board of)

directors may be imputed to the entity.

Imputation of criminal conduct to the entity is regarded to be 'reasonable' if one or more of the following situations can be proven:

- the employee was acting within the scope of his or her employment or – if not 'employed' – that person acted on behalf of the entity;
- the conduct was conducive to the way in which the entity conducted its business;
- the conduct was helpful to the entity in the course of pursuing its business; and/or
- the entity had it in its power to determine if said conduct should or should not take place, and that, or similar, conduct was (or used to be) accepted by the entity; 'accepting' conduct covers the situation in which the entity has failed to fulfil its 'reasonable' obligations to prevent such conduct from happening.

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

Yes. See question 4.1. But the liability is not automatic nor strict: a criminal case must be made separately against the individuals.

5 Statutes of Limitations

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

As a rule, the period starts running the day after the crime has been committed. The Criminal Code sets out the following periods for crimes:

- 6 years, if the crime only carries a financial sanction or a prison sentence of less than 3 years;
- 12 years for crimes that carry a prison sentence of more than 3 years but less than 20 years;
- 20 years for crimes that carry a prison sentence of more than 20 years; and
- crimes that carry a maximum penalty of imprisonment for life are not subject to any limitation period.

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

Usually, no. But in the prosecution of a person for being a member of a 'criminal organisation' – that is an organisation that aims to commit crimes (even though the actual crimes may not have been committed yet) – the limitations regarding the concrete or intended crimes of the organisation, do not block the possibility to prosecute an alleged member of said organisation. The crime of membership of such an organisation has its own limitation period.

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

Yes. Certain official actions by a Public Prosecutor or a Judge can cause the limitations period to start all over again. In particular:

- when the Prosecutor issues an indictment;
- when the Prosecutor submits a request to the Investigating Judge to start a pre-trial investigation; or
- when the Prosecutor submits a request to the Investigating Judge to be given leave to start a financial investigation concerning the suspect.

In such situations the total length of the period of limitations for crimes is twice the length of the initial period as prescribed by law (see question 5.1).

6 Initiation of Investigations

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

Public Prosecutors generally are autonomous to initiate investigations regarding (alleged) crimes. Dutch law does not require the government to initiate investigations under particular circumstances. In exceptional cases – subject to disclosure to the trial court – the Minister of Justice can issue instructions to an individual Prosecutor how to handle a case.

However, the use of coercive measures to be applied in the course of an investigation, e.g. search and seizure, interception of telecommunications, has been precisely regulated by Law (in the Code of Criminal Procedure). A prerequisite for such application is in general that 'reasonable grounds' or a 'serious suspicion' carry the thought that a crime has been committed.

With regard to the vast amount of 'business related' crimes penalised by the Economic Offences Act (WED), the situation differs substantially: the enforcement officers have the power to enter premises, to conduct investigations on site, and to seize what they want even if a lower level of suspicion would exist than the Code of Criminal Procedure prescribes for the application of similar measures in relation to (alleged) crimes penalised in the 'ordinary' Criminal Code. The officers under the WED only have to feel that it is 'reasonably necessary' for the fulfillment of their duties that said far-reaching coercive measures be applied.

7 Procedures for Gathering Information from a Company

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

The government has a wide range of tools at its disposal. Companies can be ordered to produce documents, company offices and homes of directors and employees can be raided, documents and computers can be seized and persons can be submitted to questioning. Very often telephone, fax and e-mail communications are intercepted. Covert use of microphones to tape conversations has also become popular.

The CCP sets out coercive powers regarding general criminal law (e.g. deception, fraud, corruption, embezzlement). These powers are supplemented by numerous special Statutes, concerning specific (economic) offences, like the WED.

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?

The circumstances vary depending on the nature of the suspicion; the powers granted by special Statutes are more extensive than those enshrined in the CCP. The latter allows law-enforcement officers to

issue a warrant to hand over documents, if there are reasonable grounds for suspicion that a crime that carries a maximum penalty of 4 years' imprisonment or more has been committed. Investigating Judges can, if the Prosecutor so demands, issue a warrant to produce any documents that are liable to seizure. The power of all these officials is limited, as such warrants *cannot be addressed to a suspect in a criminal case* (the company under investigation).

Issuing such warrants under special Statutes (e.g. the WED) is not restricted in this way, nor do those warrants require a 'reasonable grounds for suspicion' (the mere 'interest of the investigation' is enough to justify the warrant). See question 6.1.

The CCP empowers different officials to enter and search premises and seize relevant materials. Generally the Investigating Judge and Public Prosecutor may enter the company premises and conduct seizure if they have 'reasonable grounds' to suspect that a crime has been committed that carries a maximum prison sentence of 4 years or more. In some special Statutes such powers are granted to all law-enforcement officers and are not limited with regard to the seriousness of the alleged crime.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, do the Netherlands recognise any privileges protecting documents prepared by attorneys or communications with attorneys? Do Dutch labour laws protect personal documents of employees, even if located in company files?

The CCP mainly limits the powers to issue a warrant to deliver documents as follows:

- 1) as stated above, a warrant based on the CPP cannot be addressed to the suspect (even if it is a company); however the powers to issue a warrant based on some special Statutes are not restricted in this way; and
- 2) Dutch law recognises professional privileges (e.g. granted to lawyers and physicians): attorney-client privileged communications and attorney work-products are, as a rule, exempt from seizure, unless the documents themselves are the object of a crime. However, in exceptional circumstances the attorney-client privilege can be overruled by the interests of establishing the truth. When allegedly privileged documents are being seized a special procedure kicks in: the documents are sealed pending a decision of the District Court if they indeed qualify as privileged.

Dutch labour laws generally do not protect employee documents from disclosure.

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?

The CCP provides the entry of private residences (the *home* of the employee) with more safeguards than the entry of other premises; in general only the Investigating Judge has the power to enter a private home if there are 'reasonable grounds' for the suspicion that a crime has been committed that carries a maximum sentence of at least 4 years. Other than this the same rules apply as set out above.

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

See questions 7.2-7.4.

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?

Anyone under investigation can be asked to voluntarily submit to an interview by any given law enforcement officer. There is no legal obligation to comply with such request because the suspect has the right to remain silent. In practice, the legal representative of the company under investigation can never be compelled to answer.

Detained suspects can be subjected to interrogations by law enforcement officers, the Public Prosecutor and Investigating Magistrate; the right to remain silent prevails.

At trial or in the appellate stage (legal representative of) the Defendant can be submitted to questioning by the Judges, the Prosecutor and the defence; the right to remain silent prevails.

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

Company staff or officials who are not suspected of the crime themselves, or any third person, can only be compelled to answer if they are ordered to do so by a Judge; no obligation exists to answer questions put to such third persons by any law enforcement officer or the Public Prosecutor.

These third persons (witnesses) may refrain from answering questions if their answers could criminally compromise themselves or certain (close) relatives.

7.8 What protections can a person being questioned by the government assert? Is there a right to refuse to answer the government's questions? Is there a right to be represented by an attorney during questioning?

See questions 7.6 and 7.7. Every law enforcement officer, Prosecutor and Judge who is going to question a suspect concerning the latter's (possible) involvement in a crime must inform the suspect of his or her right to remain silent.

Dutch Law does not (yet) give the suspect a general and enforceable right to be represented by an attorney during questioning by law enforcement officers or Public Prosecutor. However, prior to the start of the interview by such officials a detained suspect must be given the opportunity to consult an attorney. In the mean time practice shows that the defence is usually allowed to be present during client questioning in high profile cases.

When interviewed by a Judge the suspect has the right to be represented by counsel.

Witnesses have no right to be represented by an attorney during questioning. He or she is obliged to answer questions from any Judge, with two exceptions:

- 1) doctors, notaries, clergymen and attorneys (including their employees) have the right to invoke their professional privilege; and
- 2) for ordinary witnesses: see question 7.7.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal cases are exclusively initiated by the Public Prosecutor.

8.2 Are there any rules or guidelines governing the government's decision to charge an entity or individual with a crime? If so, please describe them.

Guidelines governing the Public Prosecutor's decision to prosecute have been drafted for many different types of crime (e.g. discrimination, traffic, fraud). The guidelines serve to maintain equality when prosecuting quite 'common' crimes.

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 are available to dispose of criminal investigations.

A defendant and the Public Prosecutor can enter into an 'out-of-court-settlement', meaning that the suspect pays a fine in order to avoid a hearing in open court. In many common cases offering an out-of-court settlement is part of the prosecuting guidelines. If the suspect does not accept the offer, an indictment will be issued. A special guideline exists concerning settlements of €50,000 and above and concerning 'sensitive' or high profile cases. Reaching a deal in such cases requires that the Minister of Justice also agrees to the settlement.

8.4 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 are appropriate.

See question 1.3. Indeed other agencies can e.g. seek civil or administrative monetary sanctions or a cease and desist order. In case of an administrative sanction, criminal prosecution for the same fact would violate the principle of '*ne bis in idem*' (double jeopardy rule).

Other than that, a victim can seek financial compensation in criminal proceedings in case the crime caused damage which is easy to establish (if not, the victim can turn to the civil courts and file a suit against the convicted person).

9 Burden of Proof

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

The Public Prosecutor always has to present evidence on each and every (vital) element of the crime as enshrined in the indictment. It is not for the Defendant to prove that the indictment is a total mistake. Anything the defence wants to prove though, should obviously be made as compelling as possible.

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

The Public Prosecutor must prove every (vital) element of the crime beyond a reasonable doubt. So the trial and appellate judges will have to be convinced by the evidence in order to be able to reach a conviction.

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 is the arbiter of fact and will have to assess whether the Public Prosecutor has satisfied the burden of proof.

10 Conspiracy / Aiding and Abetting

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

Yes. Anyone who knowingly and wilfully cooperates with another person to commit a crime or instigates a crime can be held liable. Anyone who 'helps' someone to commit a crime, by aiding and abetting during the crime or by giving 'opportunity, means or information to commit a crime' can be held liable. The maximum penalty for the predicate offence in such cases is reduced by 1/3.

Moreover: conspiracy to commit terrorist acts has its own provisions.

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?

Yes. But the burden of proof of '*mens rea*' (intent or negligence) still lies on the Prosecutor. To prove intent it is sufficient to demonstrate that the Defendant was aware of the considerable possibility that the crime would take place and nevertheless accepted that possibility (conditional intent or *dolus eventualis*).

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?

Yes, but the number of cases in which such a defence has been successful is very limited, because generally everyone is presumed to know the law. The mistake of law defence can therefore only succeed in cases where the Defendant had gathered trustworthy information concerning the law from an undisputed expert.

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?

Yes. The Defendant must be able to convince the Judges that he had

a realistic reason not to be aware of the facts that constituted the unlawfulness. The threshold is lower than the ignorance of law defence. Again: the burden of proof of Defendant's knowledge lies with the Public Prosecutor.

12 Voluntary Disclosure Obligations

12.1 If a person becomes aware that a crime has been committed, must the person report the crime to the government? Can the person be liable for failing to report the crime to the government?

Generally: no. There are some exceptions not relevant to business crime. Moreover, there is an obligation to report for public entities (as well as civil legal entities and their staff whose tasks and duties are defined by law) and public servants who, during the discharge of their duties, obtain knowledge of a crime by a public servant in the course of his duties, for the investigation of which they are not responsible. No reporting obligation exists if the reporting person would, by reporting, risk incriminating himself or certain of his (close) relatives.

13 Cooperation Provisions / Leniency

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

Any suspect – also those who voluntarily disclose criminal conduct - can request leniency on any given ground. Often those grounds focus on securing an out-of-court-settlement: then a fine is paid in order to avoid the case from going to a public trial. There are no general guidelines from the government or Public Prosecution on how to handle these kind of requests. Judges have no involvement with these settlements. If the case goes to trial the Defendant can present the same grounds to the Judges and request leniency.

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

See question 13.1. There is no 'generally received favourable treatment' in response to any voluntary disclosure of criminal conduct or cooperation in a criminal investigation.

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?

No, plea bargaining is not part of Dutch criminal procedures. However, it is possible to enter into negotiations with the Public Prosecutor as explained in question 13.1.

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?

Not applicable. See question 14.1.

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 sentence on the defendant? Please describe the sentencing process.

There are no strict sentencing guidelines for the *Judges*. There are no minimum penalties per category of criminal conduct. The Criminal Code and various special Acts only provide maximum sentences, and the trial and appellate courts are totally free to decide about appropriate sentencing, after having received advice in that respect from the Prosecutor. For a number of crimes the Prosecutor's apply guidelines to reach their advice. In that system each crime is awarded a number of points; special circumstances, such as recidivism, may score extra points. Those points are converted into 'penalty points' which represent a certain amount of fine, hours of community service punishment or days of imprisonment. As said: eventually, the court is at liberty to either adopt the prosecutor advice, or to decide otherwise.

Fines are classified into six categories, and every crime has a connection with one of those categories. The range goes from category I: €370 to category VI: €740,000. For corporations there is a special regime, in that a fine can be imposed up to the amount of the next higher category, if the category that had originally been attached to the crime in question does not allow for 'appropriate' punishment. In case of an Economic Crime the maximum fine for corporations can, under specific circumstances, even be two categories higher.

Moreover: WED as well as CC facilitate financial sanctions by way of 'confiscation' of illegally obtained asset/profits.

Imprisonment can either be temporary or for life. Temporary imprisonment carries a maximum period of 30 years, subject to the crime. The legislator has determined the maximum period for each crime, which can be found in the CC or in separate Acts. Of course legal entities cannot be sent to prison. But those natural persons who were actually in charge of or ordered the crime to be committed, surely can. Life imprisonment for business crime seems unlikely (apart from 'Murder Inc.').

Community service punishment (labour and/or some form of training) can be imposed for a maximum of 480 hours, of which a maximum of 240 hours may consist of labour.

Accumulation of sanctions is possible: imprisonment and community punishment can be imposed next to each other. A fine can be imposed in addition to imprisonment as well as in addition to community punishment. Additionally the court could order its judgment to be made public through the media. In cases of Economic Crimes the judgment could also entail closing down the corporation which committed the crime.

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.

Not as such. However, the court will take into account all relevant circumstances, such as: is the defendant a first offender, did he pay damages to the victim, or has the corporation in the mean time incorporated a proper system of compliance?

16 Appeals

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

In the Netherlands no distinction is made between the guilty verdict as such and sentencing. Verdict and sentencing are enshrined in the same written judgment. There is no specific sentencing hearing after a guilty verdict. The cases are being dealt with in open court and during those trial days every aspect of the case, including the personal situation of the defendant, is being discussed by the Prosecutor, defence and Judges.

A non-guilty verdict – an acquittal – is appealable by the Public Prosecutor.

A guilty verdict – including the sentencing part thereof - is appealable by both Defendant and Public Prosecutor (who may find the sentencing too lenient or disagrees if the Defendant has been acquitted on some points, even if he got a guilty verdict on other points).

The appeal may be about points of law and/or about the assessment of the facts. Appeal is a trial '*de novo*', but certain restrictions apply. See question 2.1.

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

See question 16.1.

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

The appellate court may overturn any District Court's finding of fact or law, since appeal is a trial '*de novo*'. See question 2.1.

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

It can remedy any error on point of fact and/or law.



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Jan Sjöcrona is a senior partner in the firm's The Hague office. 'The International Who's Who Legal of Business Lawyers' and 'The European Legal 500' annually qualify him as a *leading practitioner* in the field of business crime. He has extensive experience defending criminal investigations in cases of alleged economic and financial crime (tax, customs, corruption, insider trading, money laundering, complex fraud cases), in the first instance, in appeal and at Supreme Court level. Clients include national and multinational corporations, governmental bodies and banks. He is a recognised expert regarding mutual legal assistance and extradition. Mr. Sjöcrona graduated from Leiden University in 1980 and joined the Bar in 1985. During the first half of the Nineties he also was Professor to the Chair of International Criminal Law at the University of Tilburg. He wrote his PhD thesis on Mutual Legal Assistance and has written a book on International Criminal Law with co-author ICTY Judge Alphons Orie; a new edition was released in 2009, with other specialists contributing also. Mr. Sjöcrona is a frequent speaker at domestic and international conferences. He is founding-member of the Dutch Association of Criminal Defence Counsel and of the European Criminal Bar Association. He co-chaired the International Bar Association's *Business Crime Committee* in 2009-2010.



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Enide Perez is a partner in the firm's The Hague office; she started her career at the firm's office in Rotterdam in 1997. She specialises in cases involving tax offences, fraud, corruption and economic offences, such as environmental offences and violations of health and safety regulations (industrial accidents). She advises on possible liability under criminal law of companies and its executives and on how to prevent such liability. She provides legal assistance at all stages of criminal proceedings: from 'dawn raids', during the interview of clients by special law enforcement agencies (e.g. Fiscal Intelligence and Investigation Service and the Health and Safety Inspectorate), during negotiations with Public Prosecutors on out-of-court settlements, and - of course - during the trials and on appeal. Mrs. Perez has written articles on money-laundering legislation, on the documentation of data of criminal proceedings against both natural persons and legal entities and on the UK Bribery Act and its consequences for Dutch legal entities. She teaches Criminal Procedure as part of the vocational training for advocates and is a member of the Dutch association of Criminal Defence Counsel as well as the International Bar Association.

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