Looking back, looking forward.

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The Netherlands Law Year in Review 2016 and Year to Come 2017
January 2017
Modernisation Corporate Law: On 9 December 2016, the Minister of Safety and Justice announced that Dutch corporate law will be further modernised by: (i) introducing rules to combat undue behaviour in public take-overs; (ii) abolishing bearer shares for non-listed Dutch NVs; (iii) simplifying and making more flexible the rules that apply to Dutch NVs; and (iv) expanding the ways to restructure Dutch companies by conversion, merger and demerger. The Minister also announced the preparation of new legislation for Dutch partnerships. This new legislation would create one uniform Code for all types of partnerships, primarily on the basis of the principle of freedom of contract with efficient and uniform rules for establishing, restructuring and terminating the existence of these partnerships, while maintaining their tax status.

Revised Corporate Governance Code: On 8 December 2016, the revised Dutch Corporate Governance Code was published, introducing new corporate governance rules that apply to any financial years starting on or after 1 January 2017. The new Code continues to be based on the “comply or explain” principle, but places further emphasis on the quality of explanations and the willingness of listed companies to discuss departures. The structure and content of the Code have been fully revised, which will require companies subject to the Code to carefully review whether their existing governance practices and related documentation are still compliant. The Code expects greater focus on long-term value creation, company culture and risk management and requires more elaborate statements of management on risk and control in the annual accounts.

Balanced board representation: From 1 January 2016, large Dutch companies are no longer required to maintain a balanced representation of men and women (at least 30% of each gender) on their management and supervisory boards or to report on measures to achieve this balance in their annual accounts if they fail to meet the relevant thresholds. A legislative proposal is pending to re-introduce these requirements for a period up to 1 January 2020.

Prohibition of board memberships: On 1 July 2016, the Prohibition of Board memberships Act entered into force. This Act allows Dutch courts to prohibit any person who has been found guilty of misconduct or bankruptcy fraud from performing management board duties for Dutch legal entities for a period of up to five years. The Dutch Trade Register maintains an online register of any person subject to such prohibition and the Act requires the Dutch Chamber of Commerce and Dutch notaries not to co-operate with the incorporation and registration of a legal entity of which such person would be appointed as board member.

Electronic filing with Dutch Trade Register: On 1 July 2016, the Dutch Trade Register Act and related Acts were amended to require (by governmental decree) the electronic filing of annual accounts and other documentation with the Dutch Trade Register and the use of Standard Business Reporting.

Implementation of the amended Transparency Directive: On 21 January 2016, the amended Transparency Directive was implemented. The amendments primarily resulted in changes to the listed company financial reporting, the regime for notifications of major shareholdings and the sanctioning powers of the Authority for the Financial Markets. The new rules had immediate effect, except for the obligation for certain issuers to report on payments to governments, which applies to financial years starting on or after 1 January 2016 and will be further implemented by a separate governmental decree.

Implementation of the Non-Financial Reporting Directive: This Directive was implemented on 8 December 2016, and applies to financial years starting on or after 1 January 2017 and requires that: (i) large public-interest entities (listed companies, banks and insurance companies) must publish a statement containing information on human rights and bribery and corruption matters in their management reports; and (ii) listed companies must publish details of their diversity policy in their corporate governance statements.

Market Abuse Regulation (MAR) and Market Abuse Directive (MAD): MAR has introduced a new harmonised framework across the EU for market abuse, investment recommendations, disclosure of inside information, insider lists and dealings by senior managers from 3 July 2016. MAR has replaced the market abuse regime previously set out in the Financial Supervision Act. On 11 August 2016, MAD was implemented to further harmonise the Dutch market abuse rules.
Banking Union Reform Package: On 23 November 2016, the European Commission published the Banking Union Reform Package, amending the Capital Requirements Directive, the Capital Requirements Regulation, the Bank Recovery and Resolution Directive, and the Single Resolution Mechanism Regulation. The proposals aim to address any remaining post-crisis challenges to financial stability, including the implementation of agreed global standards. The proposals will enter into force in 2019 at the earliest.

Insurers Recovery and Resolution Act: On 23 December 2016, the cabinet approved the proposal for the Insurers Recovery and Resolution Act. This Act provides for measures to resolve insurers if necessary, with a view to safeguarding the interests of policy holders. In addition, the proposal introduces a possibility to provide advance payments prior to a claims admission meeting in the event of an insolvenecy of an insurer.

Solvency II: A new EEA-wide capital adequacy and risk management regime for insurers and reinsurers came into effect on 1 January 2016. The main aims were to move to a risk-based capital adequacy regime and to harmonise general rules throughout Europe. Solvency II has resulted in significant change for many firms in how they calculate their regulatory capital requirements and to governance and reporting.

Proposed Directive on preventative restructuring frameworks: The proposed Directive on preventative restructuring frameworks would place greater emphasis on corporate rescue and reduce the ability of shareholders and creditors to block a viable restructuring forcing a liquidation. For more, see our client alert.

House for whistleblowers: On 1 July 2016, the House for Whistleblowers Act entered into force. The purpose of this Act is to improve the conditions for reporting wrongdoings and to protect whistleblowers by creating a “House for whistleblowers” that will investigate societal misconduct, advise whistleblowers and provide suggestions for solutions.

Introduction of a general pension fund: From 1 January 2016, a general pension fund was introduced that is able to carry out different pension schemes for different employers, while pension schemes can be financially ring-fenced.

Reduction of employment law protection for pensioners: From 1 January 2016, the employment law protection of pensioners was reduced to make it more attractive for employers to continue their employment or hire older workers. The obligation to pay wages during illness and to reintegrate the employee has been reduced to six weeks (for a temporary period of 13 weeks), and it is now possible to use a large number of fixed-term contracts.

EU Directive on cartel litigation: By 27 December 2016, the EU Directive on antitrust damage actions had to be implemented in all EU Member States. This implementation is important for the position of plaintiffs and defendants in cartel damage cases. The Directive allows for broad discovery, recognises passing on defence, introduces a new regime for statutory period of limitation and contains important provisions on joint and several liabilities of defendants and recourse. The Dutch implementation Act entered into force on 26 December 2016. The implementation means it will be even more attractive to start follow-on compensation procedures.

Dutch fiscal unity regime: From 9 December 2016, the corporate income tax fiscal unity scope was expanded to allow fiscal unities between Dutch domestic companies with an EU/EEA parent or EU/EEA intermediate holding company. Dutch companies within a group can therefore form a fiscal unity in more situations than before.

ATAD: The EU Ecofin Council reached agreement in July 2016 on the Anti-Tax Avoidance Directive (ATAD). The ATAD aims to set a minimum standard on anti-abuse rules in five areas: interest deduction, exit taxation, a general anti-avoidance rule, controlled foreign companies and hybrid mismatches. Member States are required to implement the measures by 31 December 2018. The impact of the ATAD should become clearer in the years to come. It is expected that the ATAD will further limit the deduction of interest expenses for Dutch tax purposes. Moreover, certain interest deduction limitation provisions are expected to be abolished.

Multilateral Instrument (MLI): In November, more than 100 jurisdictions concluded negotiations on a MLI that is intended to implement certain tax treaty related aspects of the OECD BEPS initiative. The MLI is designed as a quick and effective mechanism to allow governments to bring their treaties into line with these aspects of the BEPS project, instead of renegotiating individual treaties. The impact of the MLI should become clearer in the years to come.
Management and supervision of legal entities: A legislative proposal is pending to introduce uniform rules for management and supervision of legal entities (other than Dutch NVs and BVs) and to allow for a one tier board management system for these legal entities. These new rules would introduce specific duties (and related liabilities) for management and supervisory board members, as well as rules for conflicts of interest, absence or prevention of duties and dismissal in case of non-performance.

Anti-Money Laundering Directive 4 (MLDIV): MLDIV and the accompanying Wire Transfer Regulations will apply by June 2017. They expand the current AML regime scope, change customer due diligence and increase transparency of beneficial ownership, imposing higher standards with greater flexibility for entities and regulators to adapt to specific risks. Amendments to the Level 1 text of MLDIV (“MLDV”) are still under consideration and a final position will be confirmed in 2017, along with the final Level 2 and Level 3 legislation.

MiFID II: The remaining delegated acts and technical standards for MiFID II and MiFIR are to be published in the Official Journal and further final guidelines and questions and answers are expected from ESMA.

EMIR: EMIR will continue to be phased in during 2017, particularly as to margin requirements and mandatory clearing. The European Commission is expected to review EMIR in 2017. Changes are likely on streamlining of reporting, ensuring the regulatory burden imposed by EMIR is proportionate for different types of entities and to address difficulties in accessing clearing for non-financial counterparties and small financial counterparties. It may also make permanent the temporary exemption from mandatory clearing for pension funds. Reforms are also expected on the recovery and resolution of central counterparties.

Amendment Act regarding investment objects and investment bonds: Following a consultation in 2016, further developments are expected in respect of a proposal for an act introducing supervision over the management of investment objects and the management of investment bonds. The act seeks to increase investor protection and to prevent *mala fide* parties from entering the market.

Implementation Decree Payment Accounts Directive: Further work is also expected in respect of a proposal for a decree setting out further regulations regarding the requirement to provide information to consumers in respect of services related to payment accounts. A consultation was held in 2016 on the current proposal of the implementation decree.

Consumer credit, lending and credit for goods in the Dutch Civil Code: On 1 January 2017, new paragraphs were introduced in Book 7 of the Dutch Civil Code which deal with the civil law aspects of consumer credit, lending and credit for goods. The majority of the rules were previously included in various other acts and regulations and have now been bundled and updated.

EU Insolvency Regulation: The new European Insolvency Regulation will start to apply to insolvency proceedings commenced from 26 June 2017. It recasts and repeals the 2000 Regulation. Building on the earlier Regulation, it will now apply to pre-insolvency rescue proceedings to ensure their recognition across the EU and avoid unnecessary liquidations which are generally value destructive. The recast Regulation also provides for a new group co-ordination proceeding, although it remains to be seen how often it will be used given its limitations (notably, that a group co-ordinator’s plan will be non-binding). The provisions on Member States maintaining national insolvency registers and the establishment by the Commission of a decentralised system for their interconnection will not apply, however, until 2018 and 2019, respectively. Read more…

Dutch insolvency law reform: Reform of Dutch insolvency law is forthcoming on three main themes: combating insolvency fraud, promotion of corporate rescue and modernisation of insolvency proceedings. As part of the first tranche of the Business Continuity Act, a bill is currently pending in the Dutch Parliament which aims to provide a statutory basis for the appointment of a silent liquidator and the facilitation of pre-packaged arrangements. A draft legislative proposal to introduce a pre-insolvency plan (scheme) will likely be adapted to the Proposed EU Directive on preventative restructuring frameworks. Various other proposed measures to modernise Dutch insolvency law relate to (among other things) digitalisation, the claims admission procedure and asset sales.
European Account Preservation Order Regulation: As of 18 January 2017, the European Account Preservation Order Regulation will come into force, introducing a new instrument for claimants seeking to freeze bank accounts within the EU (but not in the UK or in Denmark). This Preservation Order can be obtained from the EU Member State courts with jurisdiction over the substance of the matter; and for when a claimant’s judgment (or authentic instrument) is enforceable in the EU Member State of enforcement. This Preservation Order would be available from the court that issued that judgment. National law remedies will continue to exist alongside the Preservation Orders under this regulation.

Litigating in English: The Dutch government published a draft legislative proposal for the establishment of a Netherlands Commercial Court and a Netherlands Commercial Court of Appeal, both in Amsterdam. Parties involved in international commercial disputes may agree on litigating before these new courts, which will have English as the working language. The court registry fees will be higher than for regular proceedings conducted in Dutch.

Innovation in civil procedure: The Dutch legislator adopted several changes to the Dutch Code of Civil Procedure with the aim of reducing the duration of the proceedings, simplifying the rules of civil procedure and to digitising the legal system. Under the new system all proceedings are initiated by the completion of an online form, a claimant is no longer under an obligation to involve a court bailiff to serve a writ of summons, new and tighter deadlines for the submission of procedural documents are introduced and case-management by courts at an early stage of the proceedings is encouraged. The first phase, which includes the digitisation of the filing of procedural documents, is scheduled for summer 2017.

Mass claims in collective actions: Under Dutch law, a foundation or association that represents a certain group of persons may only initiate a class action for declaratory relief before the Dutch courts. However, a legislative proposal allowing for redress of mass damages in collective actions is currently under debate in the Dutch Parliament and introduces several changes to the current system. Most notably, pursuant to the legislative proposal, legal entities which meet certain requirements, such as sufficient funding and internal supervision, may start a collective damages action on behalf of a certain group of persons. An increase in class actions can be expected when the proposal is accepted and implemented. Read more…

Merger Control thresholds: The European Commission’s proposals on procedural and jurisdictional aspects of EU merger control are expected later in 2017 and will likely include changes to the jurisdictional thresholds. It has consulted specifically on transactions which are significant from a market perspective, but do not meet current turnover thresholds and thus escape review, and invited views on further simplification.

Increased antitrust powers: In early 2017, the European Commission is expected to propose increasing national competition authorities’ enforcement powers (e.g. fining, leniency and independence). Read more…

European data protection reform: The General Data Protection Regulation will apply in all Member States from May 2018. This is the biggest shake-up of European data protection laws in 20 years, with fines of up to 4% of annual worldwide turnover. Our at-a-glance summary is available here and survival guide here.

Dividend withholding tax exemption: An amendment has been proposed to the Dutch dividend withholding tax rules introducing a withholding exemption, as from January 2018, for companies with capital divided into shares on dividends distributed to corporate shareholders in a country with which the Netherlands has a full-scale double tax treaty holding at least 5% of the distributing company’s shares under the condition that there is no abuse involved. The same withholding exemption should apply to distributions made by Dutch co-operatives to members in a country with which the Netherlands has a full-scale double tax treaty holding a membership interest in the co-op of at least 5%, unless in abuse cases.

EU Member States’ changing political landscape: In 2017, further changes to the political landscape in Europe are expected, including parliamentary elections in the Netherlands, Germany, Italy (possibly), as well as presidential elections in France. The outcome of the parliamentary elections in the Netherlands will likely have a significant impact on prospective statutory reform (e.g. in the field of corporate, employment and insolvency law).
We hope that you have found this guide useful. Please contact your usual Linklaters contact if you would like to discuss any of these matters further.