Yesterday. Today. Tomorrow.
Linklaters

Year in review,
Year to come
The Netherlands Law

January 2020
Year in Review 2019 and Year to Come 2020 summarises some of the major developments in the Netherlands, and a selection of key changes that we anticipate over 2020. Implementation of EU directives and rules continues to be an important driver for legislative proposals, in particular in the field of financial regulation. The introduction of the possibility of claiming monetary damages in a collective action is an interesting development.

**New partnership rules stalled:**
An ambitious overhaul of the rules regarding partnerships and limited partnerships was circulated for consultation, but the overwhelming number of (often conflicting) responses seems to have considerably slowed down this process.

**Inquiry proceedings:**
To facilitate the access of shareholders to inquiry proceedings with the Dutch Enterprise Chamber (a Court specialised in conflicts between enterprises), the requirements to request inquiry proceedings for listed companies have been lowered to 1% of the issued capital or a stock exchange value of EUR 20 million (previously at least 10% of the issued capital or EUR 225,000 nominal share capital was required).

**Shareholder Rights Directive:**
The Shareholder Rights Directive was implemented in the Netherlands on 1 December 2019, introducing new requirements for the content of the remuneration policy, such as an explanation of how the policy supports the company’s strategy, the long-term interests and the sustainability of the company. In addition, listed companies must submit a remuneration report to the general meeting for an advisory vote and disclose details regarding price sensitive related parties transactions.

**Mandatory conversion of bearer shares:**
To prevent abuse, tax evasion and money-laundering, shareholders may no longer hold physical bearer shares in Dutch companies. Bearer shares can only be traded through a securities account with an intermediary. Bearer shares not deposited with a securities intermediary must have been replaced by registered shares before 1 January 2020 and, if not done so, were converted to registered shares by operation of law as of that date. Shareholders’ rights will be suspended until the bearer shares have been handed in to the company.

**Works council and remuneration of board members:**
As of 1 January 2019 the Works Council Act provides that shareholders of companies with more than 100 employees in the Netherlands must discuss the remuneration of board members with the works council at least once a year. In addition, since the implementation of the Shareholders Rights Directive on 1 December 2019, works councils of listed companies have a right of advice in respect of changes to the remuneration policy.

**Rules for forced dissolution by Chamber of Commerce expanded:**
The rules for mandatory dissolution of dormant Dutch companies registered with the Trade Register have been expanded. If two of the following situations apply, the Chamber of Commerce is entitled to resolve that the relevant company is dissolved: (i) no board members are registered for at least one year; (ii) each registered board member is deceased, was unavailable at the registered address, and/or was not registered in the Base Registration for individuals; (iii) the company did not comply with the publication formalities of annual accounts for at least a year; (iv) the company did not file a corporate income tax return for a year following a directive to such effect; (v) the company is not or no longer available at the registered address and also did not file an address change.

**Innovation of civil procedure:**
In July 2019 an Act which repealed the legislation that allowed for mandatory digital litigation before the civil courts of Gelderland and Midden-Nederland was accepted. Only for proceedings at the Dutch Supreme Court the obligation to litigate digitally remains. With this Act, the simplification of civil procedural law continues as usual. A number of important substantive procedural innovations will now become mandatory for all courts. Judges will have more room to direct the proceedings and will be able to better attune the oral hearings to what is necessary for the case and the parties in order to reach a solution to the dispute.
Pension reform:
In June 2019 an agreement was reached between the government, trade unions and employers’ associations to reform the current pension system. These reforms have been ten years in the making. The government has been trying to develop a new framework to ensure the supplementary pension provision works together with the state provision to future-proof the Dutch pensions system. The key changes are: (i) the state retirement age remains at 66 years and four months until 2021 and then increases in steps to age 67 between 2022 and 2024. After that, the state retirement age rises by eight months for each year’s increase in life expectancy; (ii) to enable employees with lower incomes to retire early, the early retirement levy (the RVU levy) will be relaxed during 2021-2025. If early retirement takes place for up to three years before state retirement age, employers will not have to pay an additional tax levy of 52% (the RVU levy) over an exempt amount of approximately €19,000 per year; (iii) disability insurance will be mandatory for independent contractors (but they will not be required to join a pension scheme); (iv) a maximum lump-sum payment of 10% of pension on retirement; (v) pension accrual will be based on non-age-related maximum contributions and the tax framework for all pension schemes will be the same; and (vi) pension funds will have the option of more flexibility to decrease or increase pension payments. The agreement still requires legislative proposals to be adopted in parliament. The changes to state pension age have already been adopted and will take effect on 1 January 2020. The other rules are expected to come into force in 2022.

Recovery and Resolution of Insurers Act:
The Recovery and Resolution of Insurers Act came into force in January 2019. The Act aims to protect policyholders by enhancing and expanding the scope of regulatory instruments regarding the recovery and resolution of insurers. The special insolvency proceeding of emergency regulation was repealed in the process.

Overseas Person Exemption:
A new exemption has been introduced in article 10a of the Exemption Regulations under the Financial Supervision Act, which applies to non-EEA firms that only deal on own account in the Netherlands: (i) on a Dutch trading venue; or (ii) OTC with a Dutch counterparty having a licence or being able to rely on an exemption to provide investment services in the Netherlands or deal on own account in the Netherlands.

EMIR:
The EMIR REFIT Regulation saw changes to counterparty classification and reduction in the scope of the clearing obligation. A further temporary exemption from clearing for pension schemes and exemption from reporting for certain intra-group transactions were also granted. Read more...

EU Securitisation Regulation:
The Regulation, which consolidated existing risk retention, disclosure and due diligence requirements and established a new regime for simple, transparent and standardised (STS) securitisations, applies to securitisations which closed on or after 1 January 2019.

Prospectus Regulation:
The Prospectus Regulation became applicable in its entirety on 21 July 2019, repealing the Prospectus Directive and overhauling the pan European prospectus regime. Read more...

EU updates bank prudential rules:
Adopting important changes to the EU rules on the prudential regulation of banks and on bank resolution, CRR2, CRD IV, BRRD2 and SRM R2 were published in the Official Journal in June. Read more... here and here.

Interest rate reform:
2019 has seen significant developments on interest rate reform, with the development of market conventions, particularly in relation to SONIA FRNs and by the LMA’s publication of new draft compounded risk-free rate facilities agreements. Read more...

Investment firms review:
The Investment Firms Directive and Regulation, which overhaul the prudential and remuneration regimes that apply to investment firms, were finalised and published in the Official Journal in December. Read more...

Temporary Brexit exemption for UK investment firms:
On 4 February 2019 the Dutch Minister of Finance published a temporary exemption for UK investment firms that only deal on own account in the Netherlands, or provide services to eligible counterparties or per se professional clients in the Netherlands. By way of Ministerial Regulation an existing exemption which is currently available only for investment firms in the United States, Switzerland or Australia will temporarily also become available to UK investment firms in case of a no-deal Brexit. For more general information on the Brexit process read... here, here and here.

Collective Damages Act:
The Collective Damages Act (WAMCA) entered into force on 1 January 2020. The key element introduced by the WAMCA is the possibility of claiming monetary damages in a collective action based on Section 3:305a of the Dutch Civil Code. It also includes stricter requirements for the representative organisations filing the collective action, such as transparency regarding their funding. In addition, there are some procedural changes introduced, with the aim of more efficiency and effectiveness of the proceedings. For example, an Exclusive Representative will be appointed, collective actions relating to similar events will be dealt with together and there is a focus on the (collective) settlement of the claims. Read more and here...

Netherlands Commercial Court
On 1 January 2019 the Netherlands Commercial Court (NCC) opened its doors. The NCC is competent to hear international civil and commercial matters in the English language if the Court of Amsterdam is competent and parties agree to submit their case to the NCC in English. Linklaters assists a client in the first proceedings on the merits at the NCC. Read more and watch here...

The Netherlands deposited its instrument of acceptance for the MLI:
The Netherlands deposited its instrument of acceptance for the Multilateral Instrument with the OECD. As a result, the MLI will affect Dutch tax treaties as from 1 January 2020, provided that both parties to the treaty have included the relevant tax treaty as ‘covered tax agreement’ and the MLI has also entered into effect with respect to the relevant treaty partner.

Multi-party set-off in insolvency:
The Dutch Supreme Court confirmed that contractual clauses allowing a creditor to set-off obligations towards the debtor against claims vis-à-vis a third party can be enforced in Dutch insolvency proceedings, subject to a limited exception.
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2020 may see further significant changes in laws and regulations in the Netherlands, if the reform proposals take more solid form.

Rules for turbo-liquidations under review:
The turbo-liquidation procedure was introduced to allow for a cost-efficient and fast way to liquidate companies without assets, but there are indications that this procedure is being abused to the detriment of creditors. Measures under consideration include the mandatory preparation and deposit of a final accounting and the requirement for the board to announce the turbo-liquidation and explain the absence of assets. Also, all missing annual accounts over previous years must be deposited before the company can be deregistered. A legislative proposal for consultation is expected at the beginning of 2020. When introduced, these measures will significantly limit the efficiency of the turbo-liquidation procedure.

Statutory response time:
The Dutch Government is considering introducing a statutory response time of a maximum of 250 days for management boards of listed companies in the event of a hostile takeover or other actions by activist shareholders to allow them to identify and consider the interests of the company and its stakeholders.

Dual voting and non-voting shares:
In view of the potential impact on liquidity of the shares and the variety of international capital markets in which Dutch listed companies operate, the Dutch government does not want to introduce the French default rule that shareholders holding shares for more than two years obtain dual voting on those shares, but the introduction of non-voting or no par value shares will be further considered.

Digital incorporation of private limited companies (BVs):
An EU Directive has been adopted requiring that the incorporation and registration of a Dutch BV is made possible by digital means without physical presence of the shareholders and board members being required before August 2021. A legislative proposal to this effect is expected in 2020.

Cross-border conversion, merger and demerger:
A proposal for a new EU Directive on cross-border conversions, mergers and demergers has been published. The proposal contains a framework for these type of restructurings, including additional rules to protect the interests of creditors, employees and minority shareholders.

UBO register:
Based on the Fourth EU Anti-money laundering directive, a further legislative proposal is pending to introduce a public register for ultimate beneficial owners of Dutch entities. This legislation should have entered into force as of 10 January 2020, but is currently not expected before 1 March 2020. In this register held by the Trade Register specific details of ultimate beneficial owners must be published. Also documentation supporting the interest must be deposited with the Trade Register. Once implemented, new legal entities shall be registered without simultaneous registration of the required UBO details. Existing registered entities will be required to ultimately make the required UBO disclosures within 18 months of the actual Dutch implementation date.

Balanced Labour market Act:
A substantial change to Dutch dismissal laws came into effect on 1 January 2020. Amongst others: (i) it amends the accrual of the statutory severance, which will inter alia start accruing from the first day of employment (currently: after two years); (ii) the maximum number of fixed terms contracts is extended to three contracts within three years (currently: three contracts within two years); (iii) so-called payroll staff will be entitled to equal pay compared to regular staff; and (iv) dismissal will become possible on a combination of grounds (currently: only one ground is possible), although in such cases the court may award a higher statutory severance. The proposed date of entry into force of the new obligations regarding an adequate pension scheme for payroll staff is 1 January 2021.

Compensation of transition fee:
The long anticipated compensation of the transition fee for employers who have dismissed an employee after two years of illness, will come into force on 1 April 2020. The compensation will apply retroactively to dismissals as from 1 July 2015, but the compensation for historical dismissals needs to be requested within six months after 1 April 2020.

PSD II & SCA:
On 16 October 2019, the European Banking Authority (EBA) published an opinion concerning the migration to strong customer authentication under the revised Payment Services Directive (PSD II) which is to be completed by the end of 2020. In the opinion, the EBA acknowledged the challenges for several European market actors to timely implement the changes that are required, and allowed the national competent authorities to extend the SCA migration deadline for card-issuing and acquiring payment services providers (PSPs) to 31 December 2020.
AMLDS:
On 2 July 2019, a legislative proposal was submitted transposing a large part of the provisions of the Anti-Money Laundering Directive (AMLDS) into Dutch law. The legislative proposal will come into force on a date determined by Royal Decree. The legislative proposal will inter alia bring virtual currency service providers within the scope of the Dutch Money Laundering and Terrorist Financing (Prevention) Act. In addition, the proposal regulates the exchange of information between supervisory authorities and it imposes further restrictions on the use of anonymous prepaid payment instruments. Finally, the proposal introduces a register containing information about the ultimate beneficial owner (UBOs) of companies and other legal entities established in the Netherlands. The legislative proposal is in line with the trend of financial institutions (in their role as gatekeepers of the financial system) coming under increased scrutiny to comply with AML legislation.

Bank Data Retrieval Port Act:
On 1 July 2019, the legislative proposal for an Act on Bank Data Retrieval Portal (BDRP) was submitted to the Dutch Parliament. The BDRP is an electronic system that allows certain Dutch authorities (such as the Public Prosecutor’s Office, the Financial Intelligence Unit Netherlands and the Dutch tax authority) to request certain identifying client data that needs to be included in the BDRP by banks and payment service providers.

Banking Package:
CRR2, CRDVO, BRRD2 and SRM2 were published in the Official Journal in June 2019 adopting important changes to the EU rules on the prudential regulation of banks and on bank resolution. Some provisions (such as the EU’s implementation of the international standard on total loss absorbing capacity (TLAC) for global systemically important banks) apply immediately, though most new rules will not take effect until 2021. The EU is working on the next round of amendments to the Capital Requirements Regulation and Directive, aiming to present draft laws to implement Basel III standards in the second half of 2020.

Brexit:
The UK is due to leave the EU at 11.00pm on 31 January 2020. If the Withdrawal Agreement (WA) is ratified, the UK will enter a transition period during which the UK will for most purposes be treated as a member of the EU. The UK government has pledged not to extend the transition period beyond the end of 2020. Negotiations on new trading arrangements between the EU and UK as outlined in the Political Declaration will take place during the transition period.

Modernising rules of evidence in civil proceedings:
It is expected that a draft bill which simplifies and modernises the rules on the collection of information and evidence prior to and during civil proceedings will be submitted in 2020. The different types of evidence transactions will be brought more into line with each other and the judge will have more control over evidence issues in the proceedings.

Statutory ban on non-assignment and non-pledge clauses:
A Bill has been submitted to the Dutch Parliament aimed at nullifying most non-assignment and non-pledge clauses agreed between commercial parties (to the extent that the relevant receivables are to be used in certain financing arrangements).

Review of the EU Market Abuse Regulation:
The European Commission will be conducting a review of the EU Market Abuse Regulation. An initial consultation by the European Securities and Markets Authority indicates that the review may cover extending the scope to Spot FX contracts, amending the definition of inside information and extending the restriction on dealings in closed periods. Read more… here and here.

Implementation of anti-hybrid mismatch rules (ATAD 2):
ATAD 2 addresses structures in which associated entities (or entities in a “structured arrangement”) avoid taxes by abusing qualification differences in tax systems of states, so-called ‘hybrid mismatches’, which result in either deduction without inclusion or double deduction. The tax effect of these hybrid mismatches will be neutralised. Similar rules apply in case of ‘reverse hybrids’, i.e. entities transparent in their jurisdiction of incorporation and non-transparent in the residence jurisdiction(s) of their participants. In addition, distributions by such hybrid entities will become subject to Dutch dividend withholding tax. ATAD 2 will apply to book years starting on or after 1 January 2020. The reverse hybrid rule will apply to book years starting on or after 1 January 2022.

Implementation of the Mandatory Disclosure Directive (DAC 6):
DAC 6 introduces an obligation for intermediaries, extended intermediaries, and taxpayers to report certain cross-border (tax planning) arrangements to the relevant tax authority of the EU Member States. The reporting obligation will take effect as of 1 July 2020. However, all reportable arrangements of which the first step of implementation has been taken on or after 25 June 2018 but before 1 July 2020 should be reported to the relevant tax authority as well. Read more…

Corporate income tax rates:
The corporate income tax rate for profits up to and including EUR 200,000 will be lowered from 19% to 16.5% in 2020 whereas the rate for profits exceeding EUR 200,000 remains at 25%.

Sustainable finance:
Climate risks and resilience are likely to be brought into the heart of financial decision-making. The Dutch Central Bank (DNB) has started a consultation aimed at finding out whether DNB’s good practices regarding climate related risks are sufficiently clear and whether they actually offer banks the required tools for further integration of climate related risks in their governance, risk management and disclosure. Furthermore EU measures on ESG are likely to be phased in.

EMIR:
Further changes will be phased in under the EMIR REFIT Regulation, including mandatory reporting by FCs for their NFC counterparties. EMIR 2.2 is expected come into force early in 2020 with changes to EU CCP supervision and delegated legislation expected relating to the new “tiering” of third country CCPs, comparable compliance and fees.

Interest rate reform:
The transition from LIBOR to risk-free rates is expected to continue with a shift towards the practical implementation of new risk-free rate products. ISDA is expected to publish a supplement to the 2006 ISDA Definitions and a protocol to support amendment of legacy transactions.

Modernising Dutch insolvency law:
Several amendments of the Dutch Insolvency Act have recently been implemented (notably as part of efforts to modernise the existing legal framework). Bills are currently pending which further this process by introducing (i) a statutory framework for pre-pack arrangements and the appointment of a silent administrator prior to the commencement of formal insolvency proceedings; and (ii) the introduction of a pre-insolvency scheme. The latter initiative draws substantially on various elements of the UK scheme of arrangement and Chapter 11 proceedings in the United States. The Bill provides for a (cross-class) cram down mechanism in respect of dissenting and non-participating creditors and/or shareholders.
What now?

Your contacts

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.

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