NETHERLANDS

QUESTION 1

What is the legal framework for private pension plans in your country?

The Dutch pension system – general overview

As in many other European countries, the Dutch pension system consists of three pillars: (1) the state pension ("AOW"), (2) the supplementary collective pensions, and (3) the private individual pension products that individuals can arrange for themselves. These three pillars determine the pension amount that a person will receive after retiring, and can be summarised as follows:

First pillar: AOW

The AOW is governed by the Algemene Ouderdomswet (*General Old Age Pensions Act*). As compared to other countries, the Dutch state pension provides only a portion of the total amount of retirement benefits. The AOW provides basic income, the amount of which is linked to the statutory minimum wage and depends on the individual circumstances of the recipient (e.g. composition of family, dependants, home situation)[1]. Every person who has lived or worked in the Netherlands between the age of 15 and their retirement age has a state pension and a right to AOW benefits. The retirement age (the moment a person starts receiving the AOW benefits) has recently been raised from 65 to 67. For individuals born after 1 January 1955, the retirement age is 67. Beginning in 2022, the retirement age will be linked to the general life expectancy. AOW benefits are funded by contributions that are paid by people younger than the retirees (*pay-as-you-go*). AOW obligations and benefits are not addressed in this article.

Second pillar: supplementary collective pension

The second pillar consists of collective pension schemes, which are typically arranged between employees and their employer ("Employer"). Due to the relatively limited nature of the first pillar, the amounts received through the second pillar constitute an important part of the Dutch pension system.

Collective pension schemes in the Netherlands are most commonly administered by a pension fund or, alternatively, by an insurance company. Under Dutch law, pension funds are legal entities and operate separately and independently from the Employer. As a result, pension funds generally are not directly affected if an Employer faces financial difficulties.

There are three different types of pension funds: (i) sectoral pension funds *(bedrijfstakpensioenfondsen)*, which constitute approximately 75% of the pension assets in the Netherlands, (ii) company pension funds *(ondernemingspensioenfondsen)*, and (iii) occupational pension funds *(beroepspensioenfondsen)*, that is, pension funds that are mandatory for specific groups of independent professionals.

The second pillar is financed by capital funding: from the contributions that scheme members paid for in the past and from the investment return on those contributions. Collective pension schemes in the Netherlands are the subject of this article.

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1 For an indication of the cap on AOW benefits, see: http://www.svb.nl/int/en/aow/hoogte_aow/bedragen/index.jsp

Third pillar: supplementary individual pension

The third pillar is formed by individual pension products. Individual pensions are mainly used by the self-employed and by employees in sectors without a collective pension scheme. Employees may privately purchase products in the third pillar to meet their additional requirements, often taking advantage of tax benefits. Private individual products are not addressed in this article.

Collective pension schemes and the Dutch Pensions Act

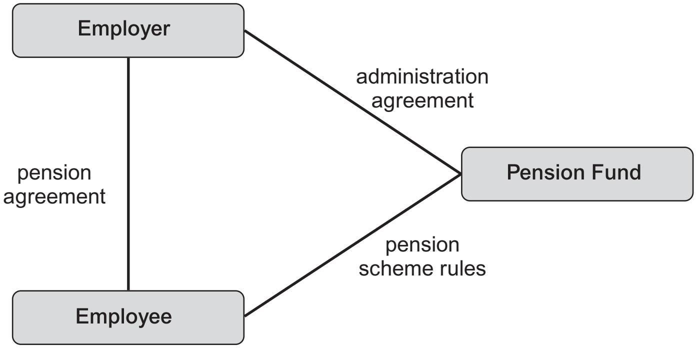
The Dutch Pensions Act (*Pensioenwet,* “Pw”) manages collective pension schemes that are governed by sectoral and company pension funds. This contribution focusses on the Pw. The Act concerning Compulsory Membership of an Occupational Pension Scheme (*Wet verplichte beroepspensioenregeling, “WVB”*) applies to occupational pension funds.[2]

The Pw’s primary goal is to preserve and secure the accumulated pension rights of employees. This goal is most clearly manifested in article 23 Pw, which stipulates that an Employer must transfer (*onderbrengen*) the pension rights of its employees to an external entity. Because of the obligation to transfer a pension scheme to a pension provider, the pension assets of former employees are shielded from the Employer’s entrepreneurial risk (*ondernemingsrisico*). With this, pension capital cannot be used by the Employer for purposes unrelated to pensions. Thus, capital intended for pension distributions, which has already been transferred to a pension fund, is usually not lost if an Employer becomes bankrupt.

Typically, collective pension schemes are employment-based and as such, they are arranged between Employer, employee and an independent external pension fund. The legal basis of a collective pension scheme consists of a pension agreement (*pensioenovereenkomst*) in which the Employer and employee agree upon the conditions of the pension. The pension agreement is commonly included in individual employment agreements or in the collective bargaining agreement (*collectieve arbeidsovereenkomst*). Only rarely will the pension agreement be a separate agreement. After entering into a pension agreement with the employee, the Employer delegates the execution of the pension agreement to a pension provider (article 23 Pw). Arrangements between the Employer and the pension provider about the execution of the pension plan (premium contribution, indexation, etc.) are included in the administration agreement (*uitvoeringsovereenkomst*). The relationship between the pension provider and the employee is governed by the pension scheme rules (*pensioenreglement*), which in turn are determined by the provisions in the pension agreement and the administration agreement. The pension scheme rules stipulate the individual pension rights and pension obligations of an employee in regard to the respective pension fund.

2 Due to the limited role of occupational pension funds in the Dutch pension system, the WVB will not be expanded upon separately.

This triangular relationship can be depicted as follows:



Three forms of pension agreements

As stipulated by article 10 Pw, three types of pension schemes are possible and their differences are characterised by whether they focus on defined benefits, capital or contributions.

In the first type of plan, the defined benefit scheme (*toegezegd-pensioen-regeling*), the employer and employee agree upon a benefit of a defined amount that the employee will receive as from a defined age. The defined benefit plan places both the investment risk and the risk of a change in life expectancy with the pension fund. For defined benefit plans, a final pay scheme (*eindloonregeling*) used to be the norm in the Netherlands. However, today the career average system (middelloonregeling) is the most common type of defined benefit plan.

In the second type of scheme, the defined capital scheme (*toegezegd-kapitaal-regeling*), only the amount of capital that will be available on the date of retirement is defined. On the date of retirement, the defined capital will be converted into pension benefits against rates determined at that time. A defined capital scheme places the investment risk with the pension fund. However, during this period of accumulation, this risk of a change in life expectancy remains with the employee, as only at the retirement date does the conversion rate become known.

The third type of scheme, the defined contribution scheme (*toegezegde-bijdrage-regeling*), places both the investment and life expectancy risk with the employee. In this type of agreement, only the amount of the contribution is determined and, as a result, the amount of the final pension benefit is unknown. As a result, the employee bears the entire risk. Different varieties of defined contribution plans exist where some or all of this employee risk is insured.

Defined benefit schemes are currently being phased out of the Dutch pension system. Defined capital is already a rare occurrence. Defined contribution schemes currently make up the bulk of pension agreements of the current working population. However, as far as the current generation of (soon-to-be) retirees is concerned, a substantial part of these pensions is accumulated under defined benefit schemes.

Interaction with the Dutch tax regime

As previously stated, in the Netherlands an Employer must transfer the pension rights of his employees to a pension fund. Pension funds are legally independent entities and operate separately from the Employer. Pension funds are treated as separate taxpayers from Employers; as a result, a pension fund's (negative) investment performance cannot result in any Employer tax deductions. Further, Dutch pension funds have a preferred tax position and effectively are tax exempt in the Netherlands (or, more precisely, are taxed against a zero percent rate).

However, as the Dutch government encourages accumulation of pension through tax incentives, general tax advantages do exist for employee pension contributions. Within a scheme's specific limits (see below), the accumulation of pension is tax exempt. This means that tax is not levied on an Employee's contribution towards his or her pension, or on the growth of his or her pension via the pension fund's investment performance (article 11:1(c) of the Wage Withholding Tax Act 1964, *Wet op de loonbelasting 1964*). Pension benefits are only taxed when they are paid out and received as income by a retiree. This is called the reversal rule (*omkeerregel*). Income received after retirement is taxed at a lower rate than the rates that apply to income earned during working life, thus making the accumulation of pension funds financially attractive.

General limits on second pillar pension plans

The reversal rule effectively results in a government subsidy and, as such, it is somewhat politically controversial. This has resulted in placing limits on the advantages of second pillar pension accumulation.

Today, the aim of collective pension schemes in the Netherlands is for an employee to accumulate 75% of his or her career-average wage as a second pillar pension (aside from what is possible in first pillar AOW benefits) in a forty-year time span. For the most part, the limits on the accumulation of collective pension schemes are of a fiscal nature. As longs as a pension scheme stays within these limits, no tax is levied on the accumulation of pension.

The maximum accumulation rate differs according to the type of pension scheme the employee participates in. It should be noted that the maximum accumulation rates have been lowered as of 1 January 2015 (Witteveen regime). Generally, the total accumulated pension rights cannot surpass an employee's final earned wage. Additionally, as of 1 January 2015, the fiscal benefits on pension accumulation are limited to a pensionable wage with a maximum of EUR 100,000.

We stress that these limits apply only to the part of an employee's wage from which he or she derives second pillar pension contributions. This portion excludes the part of an employee's wage from which his or her pay-as-you-go contributions towards the first-pillar AOW are collected. This excluded amount is known as the AOW-franchise.

QUESTION 2

Are the plans regulated by a government authority or any other independent authority?

Two regulatory bodies exist in the Dutch pension system: the Dutch Central Bank (*De Nederlandse Bank,* "DNB") and the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten,* "AFM"). DNB and AFM are supervising authorities and do not adjudicate individual disputes (article 152 Pw).

DNB and requirements regarding financial position of pension funds

DNB examines the financial position of pension funds (*prudentieel toezicht*). DNB assesses whether pension funds are financially healthy and whether they can be expected to fulfil their financial obligations in the future.

The requirements for the financial position of pension funds in the Netherlands are set out in the Financial Assessment Framework (*Financieel Toetsingskader,* "FTK"), which is part of the Pw (articles 125a-150). In keeping with the FTK, a pension fund must always have sufficient assets available to pay out the accumulated pension benefits of its contributors.

Additionally, the FTK sets criteria for pension funds' coverage ratio (*dekkingsgraad*), that is, the ratio between the assets of a pension fund and the pension benefits to be paid out in the future (obligations). Under the FTK, a pension fund must value its assets and liabilities at fair value. Importantly, the FTK stipulates that liabilities must be discounted at the risk-free interest on the capital markets (*ultimate forward rate*). For each pension fund liability, there is a "dot" on the swap curve that matches the duration of that particular liability. If the discount rate decreases, a pension fund needs more assets today in order to be sure it can generate sufficient investment returns to pay a projected amount of benefits in the future. Since 2008, the risk-free rate has decreased to a historically low level of currently around 1.7% (2015).

In the case of a funding shortfall (as outlined in article 132 Pw), a pension fund must notify DNB and submit a recovery plan (article 138 Pw). In the recovery plan, the fund should explain how the coverage ratio will regain the required level within ten years. Recovery plans have to be actualised every 12 months.

Lastly, article 134 Pw provides an emergency "safety valve", on the basis of which pension claims can be cut back. If, in light of the applicable FTK, a pension fund has inadequate assets compared to its current obligations and this situation has not improved after the recovery period, the pension fund can decrease pension rights to bring pay-outs into line with its existing capital. This ensures that at any given time, a pension fund does not have more obligations than it can fulfil with its existing capital. Therefore, it is generally believed in the Netherlands that pension funds are not susceptible to bankruptcy.

Conduct supervision

The AFM monitors the conduct of pension funds (article 151 Pw). The obligation of pension funds to periodically inform employees on the accumulation and growth of their pension rights is supervised stringently (articles 38-51 Pw).

QUESTION 3

How are the plans governed?

Pension funds are separate entities in the Netherlands and are governed by their own independent boards. As of 1 July 2014, the Pw (as amended based on the *Wet versterking bestuur pensioenfondsen,* "Pension Fund Governance Act"), provides for five types of governance models: the joint model, the independent model, and three mixed one-tier board models.

Joint and independent models

In the joint model, the board consists of representatives from the three stakeholder groups: (i) the Employers, (ii) employees, and (iii) pension beneficiaries. The employee and beneficiary representatives together hold the same number of seats as the employer representatives. It is possible to add two seats on the board for one or two independent directors who do not directly represent stakeholders in the fund. In the joint model, the supervision of the board is exercised by a permanent supervisory board consisting of independent members. For a sectoral pension fund, the supervisory board is mandatory; a company pension fund may instead opt for annual visitation by a visitation committee.

In the independent model, the board includes at least two independent professional board members. They are ''independent'' in that they do not directly represent any pension fund stakeholders. In this model, supervision is structured in the same way as in the joint model.

Mixed models

The mixed board models are all varieties of a one-tier board model, where both executives and non-executives have seats on the board. There are three types: (i) the independent mixed board, with both the executive and the non-executive members being independent (not directly representing stakeholders), (ii) the joint mixed board, where the executive directors are representatives of the three stakeholder groups (again, plus the option of one or two external directors) and the non-executive directors are independent persons, and (iii) the inverse mixed model, where the executive directors are independent professional directors, and the non-executive directors are representatives of the three stakeholder groups.

In each type of the mixed board model, there are at least three non-executive directors. These directors are charged with the supervision of the executive directors. The chairman has to be a non-executive director. In addition, in the inverse mixed board, the chairman may not be a representative of the pension fund stakeholders; this means that the number of non-executive directors in the inverse mixed model is at least four.

The joint mixed board model and the inverse mixed model have an accountability body (*verantwoordingsorgaan*) which fulfils the external supervisory role. The board is accountable to this body with regard to the board's policy and how the policy is conducted, and the accountability body may express its views on this. The accountability body also has advisory rights, and it may initiate appeals and corporate inquiry proceedings before the Enterprise Chamber of the Amsterdam Court of Appeal. The accountability body consists of employee and pensioner representatives, and – if all stakeholder groups agree – employer representatives. As the three stakeholder groups are not represented on the board in the independent mixed board model, this model also includes a stakeholder body (*belanghebbendenorgaan*). The powers of the stakeholder body are similar to those of the accountability body, but the range of issues in which they may advise is wider. In addition, the stakeholder body is granted certain rights of consent, which the accountability body lacks.

QUESTION 4

Is there a compensation fund for pension benefits?

The Dutch government believes pension funds should not be susceptible to bankruptcy, which is reflected in the stringent financial framework pension funds have to comply with, and their options in case of a shortfall (see Question 2). Considering this stringent regulation and strict supervision, there is no compensation or guarantee fund for pension liabilities in the Netherlands.

However, the Dutch government could face member state liability under European Union law, more precisely Directive 2008/94/EC. According to article 8 of the Directive 2008/94/EC, member states must ensure that the necessary measures are taken to protect the interests of (former) employees at the date of the onset of the Employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits. In its 2007 Robins-ruling, the European Court of Justice ("ECJ") declared that, in light of article 8 Directive 2008/94/EC, national provisions of an EU member state in which a minimum of 49% of all accumulated pension rights are not safeguarded do not adequately protect these rights[3]. Subsequent to the Robins case, in 2013 the ECJ decided in the Hogan case that the Irish government had inadequately protected the interests of (former) employees when merely 16 to 41 percent of the accumulated pension remained after the insolvency of an Employer[4].

As stated above, it is unlikely that an employee in the Netherlands would face a pension deficit of more than 50%. Nevertheless, it can still be concluded that the outcome of Directive 2008/94/EC and its case law provides a theoretical minimum for employees with a pension that falls under the Dutch pension regime.

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3 ECJ 25 January 2007, C-278/05 (Robins v Secretary of State for Work and Pensions), paragraph 57.

4 ECJ 25 April 2013, C-398/11 (Hogan v Minister For Social And Family Affairs, Ireland), paragraph 53.

QUESTION 5

How are pension rights enforced in an insolvency of the employer / sponsor?

In the Netherlands, employees receive their pension rights regardless of the insolvency of a (former) Employer, as their contributions have been transferred to an independent pension provider, which is separate from the Employer. The Pw also stipulates that all claims must be fully funded. The combination of these factors means that under Dutch law, in principle, accumulated pension rights are protected from Employer bankruptcy.

As regards the Employer's unfulfilled former and future obligations, in "inability of payment" (*betalingsonmacht*) situations, the Dutch Employee Insurance Agency (*Uitvoeringsorgaan Werknemersverzekeringen*, "UWV") will take over some of the Employer obligations and will continue to pay wages for a designated period of time. This also includes the Employer's obligation to pay pension contributions.
Under article 61 in conjunctions with article 64 of the Unemployment Benefits Act (*Werkeloosheidswet,* "WW") an employee whose Employer has been declared bankrupt is entitled to payment of any outstanding amounts relating to the employment relationship between the Employer and the employee that are owed to third parties.
In a situation where the employee loses pension claims because of the Employer's non-payment of the pension fund contribution, the UWV will fund these pension contributions. UWV will make payments relating to outstanding / unpaid amounts as described above that relate to a period of no longer than one year prior to the inability of payment. It is currently unclear whether the UWV's obligation to take over outstanding contributions includes contributions that have been withheld by an Employer from wages, but have not been paid to the pension fund. If and in as far as the UWV pays out amounts to employees, it subrogates to the claims of the employees against the employer, including the right to be preferred to other creditors.

Finally, the WW, the statute that stipulates these guarantees, does not only apply to bankruptcy proceedings. It also applies to suspension of payment proceedings and situations in which the Employer can demonstrate severe financial difficulties.

Consequences of non-payment of pension contributions

If pension contributions cannot be paid from the insolvent estate, the absence of pension contributions has no effect on the pension if the pension plan is being administrated by a pension fund. The "no contribution, no pension" principle does not apply to pension funds. As long as the pension fund has resources, an employee's accumulated pension rights will stay intact. If the pension plan is administrated by an insurance company, the build-up claims can be reduced. In that case, the rules for conversion into a paid-up policy (after notification of payment arrears) as set out in articles 29 Pw and article 39 WVB apply.

QUESTION 6

Are there special priorities for pension deficits in an insolvency?

The bankruptcy of an Employer in itself does not release it from its obligations, contractual or otherwise, to make employer contributions and fulfil its pension obligations towards its employees. Contributions have to be made until a pension plan is terminated or until employees of the bankrupt entity are dismissed. In the case of bankruptcy proceedings, most employment agreements are usually terminated by the bankruptcy trustee. Generally, termination of an employment agreement leads to termination of participation in the pension scheme[5]. As described earlier, under Dutch law it is rare for a major pension rights deficit to remain through bankruptcy. However, it is possible for some claims to exist.

Typically, two types of claims remain in bankruptcy: (i) a claim from the employee against the Employer with respect to the outstanding payment of the employee's contribution to the pension fund, which has already been withheld from wages, and (ii) the claim from the pension fund against the Employer with respect to the Employer's unpaid contribution. The claim mentioned under (i) is considered back wages and is therefore a preferred claim as stipulated by article 3:288(e) of the Dutch Civil Code (*Burgerlijk Wetboek*). The claim mentioned under (ii) does not constitute back wages and, thus, is not a preferred, but an ordinary claim.

Furthermore, if an Employer is declared bankrupt, a distinction is made between (i) claims dating from the period leading up to the date of the bankruptcy, and (ii) claims dating from after the adjudication of the bankruptcy. The claims under (i) are, in principle, claims that can be submitted in the bankruptcy proceedings (*verifieerbare vorderingen*), which can be preferred or ordinary claims. The claims mentioned under (ii) are in principle claims on the bankrupt estate (*boedelvorderingen*).

From the date bankruptcy is declared, the wages and the Employer contribution debts (*premieschulden*) related to the employment contract become estate claims, as long as the employment agreement continues after bankruptcy (art. 40 Bankruptcy Act). The contribution debts include the payable Employer pension contributions.

QUESTION 7

Are remedies to collect in respect of pension deficits available against parties or entities other than the employer?

Should the matter be in regards to a sectoral pension fund, Dutch law provides for specific grounds for directors' liability for unpaid pension premiums (article 23, *Wet verplichte deelneming in een bedrijfstakpensioenfonds 2000,* Sectoral Pension Funds (Obligatory Membership) Act 2000, "Wet Bpf. 2000"). The managing board of the employer that is participating in a sectoral pension fund must report any expected inability to pay pension contributions to the sectoral pension fund. Should the managing

[5] The conditions of an individual employee's pension scheme (as set out in the pension agreement) is leading and can stipulate whether the scheme can be voluntarily continued by the Employer which, if so, is responsible for making the required contributions.

board timely report this inability to pay, the board members are in principle only liable if it can be assumed that the inability to pay the premium is the consequence of manifestly improper management occurring within the three years prior to the notification of the inability to pay (article 23, section 3 Wet Bpf. 2000). Should the managing board fail to do so in a timely manner, it is presumed that non-payment is attributable to the directors. This presumption can only be rebutted by a director who plausibly demonstrates that the absence of a timely notification / report of the inability to pay cannot be attributed to him (article 23, section 4 Wet Bpf. 2000). Liability based on article 23 Wet Bpf. 2000 is a liability towards the sectoral pension fund. If the relevant pension fund is not a sectoral pension fund – but, for example, a company pension fund – director liability does not apply.

Liability for pension deficits can also be based on different, more general, grounds such as guarantees issued by the shareholder or unlawful acts by the directors and / or shareholders. In practice, director liability towards employees has been assumed if the company (employer) has deducted pension premium from the employee's salary, but has not made the related contributions to the pension fund.

QUESTION 8

Are there any cross-border features of your pension regime?

The Dutch pension regime has many cross-border features, of which a part is based on the EU Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision (the "Pensions Directive 2003")[6]. This includes provisions regarding: the law applicable to the pension agreement and the administration agreement (and the applicability of national social and labour legislation), outsourcing, execution and regulatory supervision. We do not elaborate on these types of cross-border features, as they fall outside the scope of this book.

As described in Question 7, the Dutch pension regime has legislation imposing director's liability for unpaid pension premiums under certain circumstances. The Pw has special provisions regarding the joint and several liability for contributions regarding unpaid pension premium by employers located outside the Netherlands, with respect to sectoral pension funds. This legislation provides that either of the following is jointly and severally liable for such contributions: (i) the "leader" (*leider*) of a permanent establishment in the Netherlands, (ii) the permanent representative of such "leader" located in the Netherlands, or (iii) the person in charge of the business conducted in the Netherlands (article 22 Wet Bpf. 2000).

We note, perhaps superfluously, that since pension funds in the Netherlands are separate legal entities, the Dutch pension regime does not need and has thus not implemented any long-arm legislation that imposes liability on foreign corporate group members for the pension deficits of companies located in the Netherlands, as is the case in, for example, the United States and England.

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[6] Part of the Pension Directive 2003 was modelled after the Dutch pension regime, for which reason implementation did not require drastic amendments to the Dutch pension regime.

QUESTION 9

Discuss the state of defined benefit plans in your country

In 2013, many pension funds had to lower the pensions of participants. In order to prevent this from happening again and to create more certainty with respect to pensions, new legislation was implemented in 2015. Although pension funds are struggling to maintain sufficient buffers, partially due to low interest rates, retirement income security is generally considered to be secure.

The State Secretary for Social Affairs and Employment (*staatssecretaris van Sociale Zaken en Werkgelegenheid*) has announced that further steps in pension reform will follow, and progress is being made with respect to the draft bill general pension fund (*wetsvoorstel algemeen pensioenfonds*), which aims at implementing a general pension fund (*algemeen pensioenfonds,* "APF") in the Netherlands. An APF is a new type of pension fund. The characteristic of the APF is that it can split off separate capital for the diverse pension schemes administered by the fund. With this, the Dutch legislature would accept an exception to the "prohibition on ringfencing" as meant in article 123 Pw.