

Agricultural Law in The Netherlands: Overview

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AGRICULTURAL POLICY

1. Briefly outline recent agricultural policy and main developments in your jurisdiction.

EU Common Agricultural Policy (CAP)

In 1952, The Netherlands joined Belgium, France, Italy, Luxembourg and West Germany in establishing the European Coal and Steel Community (ECSC), the direct predecessor of the EU. From the start, The Netherlands has been closely involved in shaping European agriculture policy. As an EU member state, The Netherlands participates in the EU CAP.

On 2 December 2021, the agreement on reform of the CAP was formally adopted. The new legislation, which is due to begin in 2023, paves the way for a fairer, greener and more performance-based CAP.

Based on nine objectives, the CAP will continue to ensure access to high-quality food and strong support for the unique European farming model. The nine objectives of the CAP are:

- To ensure a fair income to farmers.
- To increase competitiveness.
- To rebalance the power in the food chain.
- Climate change action.
- Environmental care.
- To preserve landscapes and biodiversity.
- To support generational renewal.
- Vibrant rural areas.
- To protect food and health quality.

Each EU country will design a national CAP strategic plan, combining funding for income support, rural development and market measures. When designing their strategic plans, EU countries will contribute to the nine specific objectives through a toolbox of broad policy measures provided by the European Commission, which can be shaped around national needs and capabilities.

World Trade Organization (WTO)

The Netherlands is a party to the WTO (acceded on 1 January 1995). It had been a member of the WTO's predecessor, the General Agreement on Tariffs and Trade, since 1 January 1948.

Food and Agriculture Organization of the United Nations (FAO)

The Netherlands is a party to the FAO (acceded on 16 October 1945).

International Plant Protection Convention (IPPC)

The Netherlands is a party to the IPPC (acceded on 6 December 1951).

Office International des Epizooties (OIE)/World Animal Health Organization

The Netherlands is a party to the OIE (acceded on 25 January 1924).

Subsidies

2. Is there a system for subsidies or other support for agriculture in your jurisdiction? Briefly outline its main provisions.

As an EU member state, The Netherlands participates in the EU CAP. The EU provides farmers with income support or direct payments to:

- Function as a safety net and make farming more profitable.
- Guarantee food security in the EU.
- Assist farmers in the production of safe, healthy and affordable food.
- Reward farmers for delivering public goods not normally paid for by markets, such as taking care of the countryside and the environment.

Farmers generally receive income support based on their farm's size in hectares. All EU countries must offer a basic payment, a payment for sustainable farming methods (greening), and a payment for young farmers. As it is compulsory for EU countries to provide these payments, they are often referred to as obligatory payments.

The EU links the majority of income support for farmers to:

- The farmed hectares, not the quantities produced. Farmers must respond to market demands in order to increase profit.
- Respect for the environment, plant health, and animal health and welfare, contributing to sustainable agriculture. This is referred to as cross compliance. Farmers who do not comply with EU rules can see their payments reduced or stopped entirely.
- Under the new CAP adopted on 2 December 2021, changes will be made to the existing income support system, with measures being taken to ensure a fairer distribution of financial support for farmers and workers across the EU:
- **Redistribution of income support:** EU countries will have to dedicate at least 10% of their direct payments to the redistributive income support tool, to better address the income needs of smaller and medium-sized farms.

- **Active farmers:** the new legislation contains a mandatory but flexible definition of an active farmer to be established by EU countries, including the level of activities undertaken. Only active farmers may receive certain EU support.
- **Social conditionality:** CAP payments will be linked to the respect of certain EU labour standards and beneficiaries will be incentivised to improve working conditions on farms.
- **Convergence of payments:** in the new CAP, levels of income support will converge more, both within individual EU countries and between EU countries.
- **Supporting young farmers:** EU countries will have to distribute at least 3% of their direct payments budget towards young farmers, in the form of income or investment support or start-up aid for young farmers.
- **Improving the gender balance:** gender equality and increasing the participation of women in farming are, for the first time, part of the objectives for CAP strategic plans. EU countries must assess these issues and address the identified challenges.

Until 2023, current income support measures will continue, in line with the provisions of the CAP transitional regulation.

Environmental Issues

3. Do environmental issues form part of government support for agriculture in your jurisdiction? If yes, please give brief details.

The new CAP adopted on 2 December 2021, contains various policy reforms to support the transition towards sustainable agriculture and forestry in the EU. The new CAP supports agriculture in making a much stronger contribution to the goals of the European Green Deal:

- **Higher green ambitions:** CAP plans will be in line with environmental and climate legislation. In its CAP strategic plan, each EU country will be obliged to display a higher ambition on environment and climate action compared to the previous programming period and will be required to update the plan when climate and environmental legislation is modified.
- **Contribute to the EU Green Deal targets:** the national CAP strategic plans will contribute to the EU Green Deal targets.
- **Enhanced conditionality:** beneficiaries of the CAP will have their payments linked to a stronger set of mandatory requirements. For example, on every farm at least 3% of arable land will be dedicated to biodiversity and non-productive elements, with a possibility to receive support via eco-schemes to achieve 7%. Wetlands and peatlands will also be protected.
- **Eco-schemes:** at least 25% of the budget for direct payments will be allocated to eco-schemes, providing stronger incentives for climate- and environment-friendly farming practices and approaches (such as organic farming, agro-ecology, carbon farming and so on) as well as animal welfare improvements.
- **Rural development:** at least 35% of funds will be allocated to measures to support climate, biodiversity, environment and animal welfare.
- **Operational programmes:** in the fruit and vegetables sector, operational programmes will allocate at least 15% of their expenditure towards the environment (compared to 10% during the current programming period).
- **Climate and biodiversity:** 40% of the CAP budget will have to be climate-relevant and strongly support the general commitment to dedicate 10% of the EU budget to biodiversity objectives by the end of the EU's multiannual financial framework (MFF) period.

Regional Variations

4. Briefly outline how disadvantaged areas such as uplands are treated within agriculture.

The European Agricultural Fund for Rural Development (EAFRD) supports the EU policy on rural development. To this end, the EAFRD finances rural development programmes across member states and the regions of the EU. Programmes are designed through co-operation between the European Commission and the member states, taking into account the strategic guidelines for rural development policy adopted by the European Council and the priorities laid down by national strategy plans.

The EAFRD budget for 2021 to 27 amounts to EUR95.5 billion, which includes an injection of EUR8.1 billion from the next generation EU recovery instrument to help address the challenges posed by the COVID-19 pandemic.

5. Is agriculture governed at national and local level? Briefly outline any regional framework and variations if applicable.

Within the EU, the agricultural policy is mainly determined by the EU CAP (see *EU Common Agricultural Policy (CAP)* and *Question 2*).

The CAP leaves some room to individual EU member states for enacting their own agricultural policies. The implementation of the CAP and national agricultural policies is partially delegated to the 12 provinces of The Netherlands. The provinces are actively involved in preparing a national strategic plan as contemplated by the new CAP.

AGRICULTURAL BUSINESS VEHICLES

6. What business vehicles are typically used in the agriculture sector? Are specific forms such as co-operatives used and are they open to foreign investment?

Most farms are family-owned or partnerships. About 50% of farms are sole proprietorships and about 40% are partnerships (often within families).

The Dutch agriculture sector has a relatively high percentage of co-operatives (*coöperaties*). A large number of farms are members of one or more co-operatives. While the number of farmers has gradually declined over the last 50 years, agricultural production has remained stable. Only 53,000 farms remained in 2021, while the total added value generated by agriculture, food processing and distribution continues to be EUR50 billion. Co-operatives take responsibility for a major share of this added value.

In the last few decades, there has been strong consolidation between co-operatives, leading to only a few or even just one co-operative per sector. Several agricultural co-operatives operate internationally or are multinational, and belong to the world's largest co-operatives.

A co-operative is a legal entity able to enter into agreements and own assets. Co-operatives have members rather than shareholders. The profits of the joint enterprise can be distributed to the members. The co-operative can be organised to limit or exclude the liability of members for losses remaining after its dissolution.

Dutch co-operative law is flexible with regards to internal governance and attracting equity from members or third parties. This has led to a large number of structures implemented in the by-laws of co-operatives to suit their strategic needs. This often includes a legal separation between the co-operative association

and the co-operative firm. As a co-operative does not have a capital divided into shares, it cannot be acquired as such. However, its assets and its individual member firms are open to investment and can be acquired.

Dutch co-operatives and their members are open to foreign investment.

7. Is the acquisition of domestic agricultural business vehicles by foreign investors subject to special prior government approval(s)? If yes, set out the approval procedures and authorities involved.

The Dutch agriculture sector is world renowned and is a cornerstone of the Dutch economy, to which it contributes about 7% of its GDP. Second only to the US for agrifood exports worldwide (about EUR95,6 billion in 2020, 1% up from 2019), The Netherlands has just under 54,000 companies (2019) in this key sector, from farm to fork. 12 of the world's largest agrifood companies have major production or R&D sites in Holland, including Cargill, Heinz, Monsanto, Unilever, Mead Johnson, ConAgra, and Mars.

The acquisition of agricultural companies by foreign investors is not subject to special prior government approval. General approval rules, including competition clearance, apply equally to the acquisition of companies by foreign and domestic investors.

Further to the COVID-19 crisis, MPs in the Dutch Parliament have called for more protection of Dutch companies in strategic sectors (such as medical care, food and infrastructure) against unwanted foreign takeovers and investments.

8. Is there a specific competition (anti-trust) law regime for the agriculture sector? Briefly set out the aspects of the competition regime that are most relevant to agriculture (for example, restrictive agreements and practices and merger control).

EU and national competition rules apply to all food products at all levels of the food supply chain, from the production of raw agricultural products to grocery retail. The same rules apply to all food products, except agricultural products, as for any other sector.

The Treaty on the Functioning of the European Union (TFEU) and its predecessors have granted specific treatment to agricultural products. Agricultural products are defined in Annex I to Regulation (EU) 1308/2013 establishing a common organisation of the markets in agricultural products (CMO Regulation). Under Article 42 of the TFEU, the legislator can modify the standard competition rules when applying them to agricultural products, taking into account the CAP objectives set out in Article 39 of the TFEU (that is, increasing productivity of agricultural production, ensuring a fair standard of living for agricultural communities, stabilising markets, assuring supplies, and ensuring reasonable prices for the consumer). The legislator has therefore adopted specific rules for farmers, associations of farmers, producer organisations, and interbranch organisations in so far as they produce or trade in agricultural products.

The competition rules for agricultural products (other than fisheries products) are set out in:

- The CMO Regulation.
- Regulation (EU) 2017/2393 (known as the Omnibus Regulation).

The principle is that standard competition rules (defined in Articles 101 to 106 of the TFEU) apply to agricultural products subject to

CAP derogations set out in the CMO Regulation (*Article 206, CMO Regulation*).

One general CAP derogation allows joint activities by agricultural producers provided that the following conditions are met:

- There is no obligation to charge an identical price.
- There is no exclusion of competition.
- This does not jeopardise the CAP objectives.

Another general CAP derogation allows certain agreements and concerted practices of recognised interbranch organisations regrouping producers and other levels in the supply chain. For example, the derogation allows under certain conditions a dialogue between actors in the supply chain on certain topics, the promotion of best practices, and some market transparency.

Another exemption from general competition rules allows agreements on quantities and joint sales by agricultural producers in all sectors, provided that they ultimately jointly sell processed agricultural products that they have processed jointly.

In addition, there are product-specific CAP derogations.

**ACQUIRING AND HOLDING AGRICULTURAL LAND
Ownership**

9. Are there restrictions on the acquisition of agricultural land? Consider any restrictions on local and foreign investors, and on legal entities and natural persons.

There are no restrictions on the acquisition of agricultural land (or usage rights) by a foreign party in The Netherlands. However, a buyer of agricultural land must take into account provisions on zoning, land use and supervision.

Land Tenure and Usage Rights

10. Briefly outline the main ways that agricultural land is held. What usage rights are typically granted over agricultural land (for example, leases)? Are there restrictions (such as a maximum length of lease terms)? Consider any restrictions on local and foreign investors, and on legal entities and natural persons.

Most agricultural land usage rights in The Netherlands are acquired through a specific agricultural lease (*pacht*) regulated by Book 7 of the Dutch Civil Code. There is a distinction between establishing the lease and transferring the lease. Establishing the lease requires approval of the lease contract by the Agricultural Tenancies Authority (*Grondkamer*). The lessee can transfer the lease to direct family members (that is, spouse or (grand) children) without the consent of the lessor on application to the agricultural tenancies division of the district court (*Pachtkamer*).

An agricultural lease agreement must in principle be concluded for a definite period of time, being 12 years for farms and homesteads and six years for separate land or buildings (*Article 7:325(1), Civil Code*). This basic rule intends to offer the lessee a degree of protection, as the pre-determined term will allow the lessee to plan his/her business accordingly. Lease agreements for longer terms are allowed, but only if a clear termination date is included in the agreement (*Article 7:325(2), Civil Code*).

Special Acquisition Procedures

11. Are there any compulsory tendering or prior approval procedures required for a sale of agricultural land? Briefly set out these procedures and any approvals

required. Are there mandatory minimum land prices if the government sells agricultural land?

There are no compulsory tendering or prior approval procedures required for a sale and purchase of agricultural land.

There are no mandatory minimum land prices if the government sells agricultural land.

12. In which circumstances can the government authorities expropriate agricultural land?

The circumstances under which government authorities can expropriate (agricultural) land are set out in the Expropriation Act (*Ontheigeningswet*). Expropriation is only allowed if it serves the public interest and meets certain conditions. Additionally, the financial position of the landowner cannot be adversely affected as a result of the expropriation.

Water Controls

13. Is the abstraction of water controlled by licence or quantities? Briefly set out the main provisions, legislation and regulatory authorities.

The Netherlands has 21 regional water authorities. The origin of the water authorities goes back to medieval times. The first dikes and water control structures were built and maintained by those directly benefiting from them, mostly farmers. As the structures got more extensive and complex, the first water boards began to emerge and councils were formed from people with a common interest in the control of water levels on their land. Originally, these often controlled only a small area, a single polder or dike. Overtime, these have merged into the 21 regional water authorities existing today.

The regional water authorities are responsible for water management at a regional and local level. The concept of water governance can be described as public care that relates to flood protection, the water regime (surface water and groundwater in both the quantitative and qualitative sense) and the waterways. Water authorities hold elections, levy taxes and function independently from other government bodies.

Regional water authorities can make decisions that are binding on citizens and, for example:

- Adopt regional bye-laws with mandatory and prohibitory provisions.
- Grant or refuse permits.
- Levy taxes.

The regional water authorities are responsible for the management of the quantity of water in the bodies of water that are of regional and local interest. Therefore, the regional water authorities can make the abstraction of water subject to a permit or prohibit the abstraction of water in the event of droughts and shortages.

Tax

14. Which taxes apply to the sale and transfer of land ownership or usage rights?

Income Tax

An agricultural enterprise can be run as an unincorporated personal enterprise or as a company. The determination of taxable

income (for an unincorporated personal enterprise) or taxable profit (for a company) is the same. The rate of taxation differs:

- An individual is subject to progressive income tax rates up to 49.5% (after various allowances and exemptions).
- A company is subject to corporate income tax at a rate (2022) of 25.8% (15% over the first EUR395.000).

Agricultural land is considered to be an asset that does not lose its value; it can therefore not be depreciated for tax purposes. If the land used in an agricultural enterprise is sold, there is an exemption for the gains realised (*landbouwvrijstelling*). No tax is due on the gain of the seller if the gain relates to an increase in value between the time of purchase and the time of sale, provided the agricultural use of the land is continued by the buyer.

The Netherlands Court of Audit recently concluded that the agricultural exemption no longer serves a purpose. Therefore, repeal of the agricultural exemption in the foreseeable future cannot be ruled out.

A seller of agricultural land can defer the taxation of the gain under the reinvestment reserve facility (*herinvesteringsreserve*). This facility ensures that no tax is due on the gain, provided that the gain is re-invested in a similar asset within three book years after the book year in which the reinvestment reserve was created.

Lessees that buy the land from their lessors sometimes pay a price that is lower than the market value. This benefit (*pachtersvoordeel*) is taxed when the lessee later sells the land.

Property Transfer Tax

Property transfer tax of 6% of the sale price is payable by the buyer on the sale and transfer of immovable property other than residential property.

However, exemptions are available. In particular, the sale and transfer of agricultural land is exempted from property transfer tax if the land will continue to be used for agricultural purposes for a period of ten years following the transfer. If this period of ten years is not completed, the buyer will in principle be liable for the property transfer tax. Certain exemptions apply, for example when an enterprise has to be moved due to government policy and the government purchases land for this reason. For farmhouses, a property tax of 2% applies and for barns and greenhouses, 8%.

Taking Security

15. How is security over agricultural land typically created and perfected to raise finance?

Mortgaging agricultural land/rights is no different from mortgaging other immovable property in The Netherlands. A mortgage must be created by a notary (through a mortgage deed signed by the mortgagee and the mortgagor), who must then register the mortgage in the public land register.

CROP SEED BUSINESS

16. State the approvals/licences that are required to import new plant species or varieties and crop growing technologies. Briefly outline the approval process, legislation and regulatory authorities.

Laws and Regulations

The following domestic laws regulate the crop and seed industry:

- Pesticides and Biocides Act (*Wet Gewasbeschermingsmiddelen en biociden*).
- Plant Diseases Act (*Plantenziektenwet*).

The phytosanitary import and export requirements are directly based on the EU plant health regime, most notably the Plant Health Regulation ((EU) 2016/2031), applicable from 14 December 2019).

From 14 December 2019, all plants (including living parts of plants) must be accompanied by a phytosanitary certificate to enter into the EU, unless they are listed as exempted from this general requirement in Commission Implementing Regulation (EU) 2018/2019.

The Plant Health Regulation increases prevention measures against the introduction of new pests via imports from third countries. Commission Implementing Regulation (EU) 2018/2019 establishes the list of high-risk plants that cannot be introduced on the EU territory until a full risk assessment has been carried out.

Dutch implementing legislation includes the:

- Regulation on Import, Export and Transfer of Plants (*Regeling invoer, uitvoer en verkeer van planten*), which was last amended on 13 November 2019.
- Regulation on Classification of Dangerous Organisms 1998 (*Regeling aanwijzing schadelijke organismen 1998*).

Regulatory Authorities

The crop and seed industry is regulated at national level by the:

- Netherlands Food and Consumer Product Safety Authority (*Nederlandse Voedsel- en Warenautoriteit*) (NVWA). The NVWA partly operates under the Ministry of Health, Welfare and Sport (with regard to food and product safety issues) and the Ministry of Economic Affairs and Directorate-General for Agriculture and Rural Development (with regard to phytosanitary issues, veterinary inspections and certification, and also partly food safety issues).
- Plant Protection Service of the NVWA (*Plantenziektenkundige Dienst*).
- Board for the Authorisation of Pesticides and Biocides (*College voor de toelating van gewasbeschermingsmiddelen en biociden*).
- Dutch General Inspection Service for Agricultural Seed and Seed Potatoes (*Nederlandse Algemene Keuringsdienst voor zaaizaad en pootgoed van landbouwgewassen*) (NAK), which operates under the Ministry of Economic Affairs.
- Netherlands Inspection Service for Horticulture (*Stichting Nederlandse Algemene Kwaliteitsdienst Tuinbouw*) (NAK Tuinbouw), which operates under the Ministry of Economic Affairs.
- Flower Bulbs Inspection Service (*Stichting Bloembollenkeuringsdienst*) (BKD), which operates under the Ministry of Economic Affairs.

Import/Export Control Measures

The national phytosanitary (plant health) import requirements are directly based on the Plant Health Regulation.

Imports. From 14 December 2019, the Annexes of Directive 2000/29/EC, which list the regulated pests, plants, plant products and other objects and the plant health import and internal movement requirements, have been replaced by Implementing Regulation (EU) 2019/2072, with the following effects:

- **Regulated plants.** From 14 December 2019, all plants (including living parts of plants) must be accompanied by a phytosanitary certificate to enter the EU, unless they are listed in Annex XI, Part C, of Implementing Regulation (EU) 2019/2072 as exempted from this general requirement (not requiring to be accompanied by a phytosanitary certificate). Currently, the list of plants exempted from the obligation to

carry a phytosanitary certificate from 14 December 2019 are pineapples, coconuts, durians, bananas and dates.

- **High risk plants.** The Plant Health Regulation increases prevention measures against the introduction of new pests via imports from third countries. Commission Implementing Regulation (EU) 2018/2019 establishes the list of high risk plants the introduction of which into the EU territory will be provisionally prohibited from 14 December 2019 until a full risk assessment has been carried out.
- The rules concerning the procedure to be followed in order to carry out the risk assessment of high risk plants are detailed in Commission Implementing Regulation (EU) 2018/2018.
- **Priority pests.** Article 6(2) of the Plant Health Regulation empowers the Commission to establish a list of priority pests. Published in the *Official Journal* on 11 October 2019, Commission Delegated Regulation (EU) 2019/1702 lists 20 quarantine pests as priority pests whose economic, environmental and social impact on EU territory is the most severe, including *Xylella fastidiosa*, the Japanese beetle, the Asian long-horned beetle, Citrus greening and Citrus Black Spot.
- For these specific pests, member states must adopt enhanced provisions: information campaigns to the public in case they are present in their territory, implement annual surveys, prepare contingency plans, simulation exercises and action plans for eradication.

For specific cases where there is little experience in trade of certain plants or plant products and where related pest risks are still unknown, the EU Plant Health Regulation sets out the possibility to introduce temporarily phytosanitary import restrictions or even a prohibition until more scientific information becomes available.

Importers are regularly inspected by the Plant Protection Service. Inspections must take place at a location approved by the Plant Protection Service, usually the place of delivery. The inspection criteria apply to both exit and entry inspections.

Exports. A separate phytosanitary export regime applies to crop seeds. The exact requirements depend on the country of destination and are listed in the Country Overview on the NVWA website.

If the country of destination requires an import licence, the NVWA can be requested to grant an instruction for import permit (*instructie voor invoervergunning*). The NVWA then assesses whether the applicant complies with the norm requested by the country of destination.

Exit inspections are conducted on all plant varieties for which inspection is required (as determined in the Country Overview). A shipment that is to be inspected must be:

- Completely free of organisms specified in the Register of Quarantine Organisms (based on the EU Plant Health Regulation).
- Completely free of organisms specified in the country information listed in the Country Overview.
- Compliant with all basic standards specified in the Overview Basic Standards (based on the Plant Health Regulation).
- Practically free of other organisms that are not specified further.

However, not all crop seeds are subject to inspections and the certificate requirement. This depends on the product and the country of origin. Trade of crop seeds within the EU is exempt from border control if the seeds have a plant passport.

IPPC Compliance

Since The Netherlands is a WTO member, restrictions on the import of plant (materials) must be based on international

standards or justified on a scientific basis under the WTO Agreement on the Application of Sanitary and Phytosanitary measures (see www.wto.org/english/tratop_e/sps_e/sps_e.htm). The international phytosanitary (plant health) standards are developed by the Secretariat of the IPPC (see www.ippc.int/standards).

The IPPC has stated that, in principle, The Netherlands implements the IPPC and its standards. For certain standards there are aspects that are not applicable, not workable in specific situations, or are still being implemented.

17. Briefly outline any additional approvals/licences that are required for:

- **Setting up R&D centres and test plots for new crops.**
- **Crop seed production.**
- **Commercial crop production.**
- **Distribution of seeds or crops (wholesale, retail and e-commerce).**

R&D Centres and Test Plots for New Crops

The Netherlands plant health regime does not have specific licence/permit requirements for laboratories.

Crop Seed Production

The Netherlands plant health regime does not have specific licence/permit requirements for crop seed producers, aside from the requirements for import and export (see *Question 16*) and trade/distribution of crop seeds (see *below, Distribution of Seeds or Crops*).

Commercial Crop Production

The Netherlands plant health regime does not have specific licence/permit requirements for commercial crop producers, aside from the requirements for import and export (see *Question 16*) and trade/distribution of crop seeds (see *below, Distribution of Seeds or Crops*).

Distribution of Seeds or Crops

Seed trade is subject to quality and variety control in accordance with EU regulations. The compliance framework consists mainly of:

- Plant variety recognition (see *Question 18*)
- Quality control.
- Phytosanitary control through the issue of a EU plant passport (see *Question 16*).

E-commerce is subject to Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, which has been implemented into Dutch law.

PLANT VARIETY RIGHTS

18. What are the legal conditions to obtain a plant variety right (PVR) and which legislation applies?

The Netherlands became a member of the International Convention for the Protection of New Varieties of Plants 1961 (UPOV Convention) on 10 August 1968 and is party to the latest Act of 1991. The UPOV 1991 Act has been implemented into national law through the Seeds and Planting Materials Act 2005 (*Zaaizaaden plantgoedwet 2005*) and further implementing decrees.

Regulation (EC) 2100/94 on Community plant variety rights establishes a system of EU PVR for its member states.

A clear distinction is made between:

- Granting a PVR.
- The right to place propagation material on the market (trading).

PVR

The Community PVR system exists in parallel with national systems. If a national PVR (*kwakersrecht*) is granted for a new variety, it is added to The Netherlands Register of Varieties (*Nederlands Rassenregister*).

A PVR can be obtained for plant varieties that are all of the following:

- Novel.
- Distinct.
- Uniform.
- Stable.

The Plant Variety Board's experts establish whether these requirements are met through a preliminary examination, which can include testing.

Once the national right has been obtained, the applicant can apply for a Community PVR with the Community Plant Variety Office (CPVO) in Angers, France. If a Community PVR is granted and registered in the EU Common Catalogue, the national PVR will become "dormant" for the period the Community PVR is in force.

Trading of New Plant Variety Propagating Material

Trading of new plant varieties (agriculture crops, forestry, fruit and vegetables) may require prior admission to the National Plant Variety Register (*Nationale rassenverkeerslijst*). Registration on this list may be subject to a Value for Culture and Use (*Cultuur- en Gebruikswaarde Onderzoek*) test. This test is required for most agriculture crops, but not for fruit and vegetables.

Once a variety has been admitted to the National Plant Variety Register, the Dutch Plant Varieties Board will notify the EU and other member states and the propagation material can be freely traded in the EU.

Horticulture plant varieties can be traded without registration in the National Plant Variety Register.

19. How is a PVR obtained in your jurisdiction?

An application for a Dutch PVR must be filed with the Plant Varieties Board. The most important details to provide include:

- The proposed name of the plant variety.
- Characteristics of the plant variety.
- A detailed description of the distinctive characteristics.

Additionally, the Plant Varieties Board can request the applicant to provide it with plant materials for testing and verification.

The name of a plant variety is important, as propagating material of a registered plant variety can only be brought into the market under this name. For example:

- The proposed name will only be accepted by the Plant Varieties Board if it is suitable to identify the plant variety. In particular, it must be sufficiently different from names of other (existing) plant varieties registered in any of the UPOV member states, and must not be confusingly similar to existing trade marks or trade names.
- The proposed name cannot have been registered as a trade mark.

- The applicant must waive its existing rights to the name for the same or similar goods in any of the UPOV member states.

For qualifying plant varieties bred or discovered and developed outside The Netherlands, a Dutch PVR will only be granted to a non-Dutch national (natural person or legal entity) if either:

- The non-Dutch national originates from a UPOV member state.
- The plant variety is eligible for protection in both the country where it has been bred and in The Netherlands.

A priority right of one year is granted for applicants who have already applied for a PVR in one of the other UPOV member states.

A successful application for a PVR in The Netherlands results in the registration and recording of the grant in The Netherlands Register of Varieties.

20. How long does PVR protection last? Are there restrictions on the rights of the PVR holder or exemptions, such as farmer's privilege?

Term of protection

The regular term of protection of a Community PVR and Dutch PVR is 25 years.

Under Regulation (EU) 2021/1873 of the European Parliament and of the Council of 20 October 2021, the term of protection of the Community PVR for varieties of the species *Asparagus officinalis* L. and of the species groups flower bulbs, woody small fruits and woody ornamentals has been extended by five years, from 25 to 30 years.

Extent of Protection and Restrictions on the Rights of the Holder

A Dutch PVR gives its holder the exclusive right to:

- Produce, or further propagate, propagation material of the protected variety.
- Treat such propagation material for the benefit of propagation.
- Place such propagation material on the market.
- Export or import such propagation material.
- Keep such propagation material in stock for one of the above purposes.
- Have the above acts performed on its behalf.

Propagation material is defined as including plants or plant parts that are destined and de facto used for the cultivation or propagation of crops, such as consumption material of potatoes, grain and pulses.

The following acts do not infringe the rights of the PVR holder:

- Private acts that are not committed in a commercial capacity.
- Acts in the interest of scientific research.
- Acts that are considered a farmer's privilege (see below, *Farmer's privilege*).
- Acts carried out for the breeding of other varieties (breeder's exemption).

Farmer's Privilege

A farmer's privilege is the right of a grower to use harvested materials within the premises of their company for propagation purposes. This privilege only applies to crops in sectors in which the use of own seeds and seed materials is customary (for example, grain and potato crops). In this respect, the grower must:

- Inform the PVR holder of the details of his/her company and the use of the seeds and seed materials.
- Pay a reasonable licence fee for the use of the harvested materials. Generally, 60% of the licence fee that is due in trade for use of that variety is considered reasonable.

21. Which legal actions are available to owners of PVR in the event of PVR infringements?

The holder of a Dutch PVR can enforce its exclusive rights (see *Question 20*) against any person who is infringing the PVR, or any person who assists in the infringement by offering services used to infringe the PVR.

The holder can also enforce its rights against any person who obtains harvested materials of a variety, plants and plant materials through the unauthorised use of propagation material, unless the PVR holder could have reasonably enforced its rights at an earlier stage in relation to the propagation material. This right extends to products directly derived from the harvested materials.

The holder also has an action against the use of varieties derived from its protected plant variety, except when the protected plant variety is in fact a derivation. A variety (for example, B) is considered to be derived from another variety (for example, A) if all of the following apply:

- B is mainly derived from A, or from another variety derived from A.
- Based on the test of distinctiveness, B is clearly distinct from A.
- B is similar to A in terms of essential characteristics arising from the genotype or combination of genotypes of A, except for derivations resulting from acts of derivation.

The exclusive rights of the PVR holder extend to a variety:

- Derived from the protected variety that is not clearly distinct from the protected variety.
- For which, each time it is bred, the protected variety is required.

A claimant who is not resident or does not have a registered office in the EU must obtain a domicile in The Netherlands (for example, at the address of a legal representative).

GENETICALLY MODIFIED (GM) CROPS

22. Set out the legislation and regulatory authorities in relation to genetically modified (GM) crops. Has your jurisdiction ratified the Cartagena Protocol on Biosafety 2002? What is your government's policy in relation to GM crops?

Domestic laws regulating GM crops implement EU GMO legislation, including:

- The GMO Release Directive 2001 (*Directive 2001/18/EC*).
- Regulation (EC) 1829/2003 on genetically modified food and feed.
- Regulation (EC) 1830/2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms.
- Directive 2009/41/EC on the contained use of genetically modified micro-organisms (Recast)
- The Cultivation of GMO Directive ((EU) 2015/412).

These main pieces of legislation are supplemented by a number of implementing rules as well as recommendations and guidelines on more specific aspects.

Dutch implementing legislation includes the:

- GMO Decree 2013 (*Besluit genetisch gemodificeerde organismen Milieubeheer 2013*).
- GMO Regulation (*Regeling genetisch gemodificeerde organismen 2013*).

The Netherlands ratified the Cartagena Protocol on Biosafety 2002 on 8 January 2002, and the Protocol entered into force on 11 September 2003.

The Netherlands has made use of the possibility granted under the Cultivation of GMO Directive to prohibit the cultivation of EU-approved GM crops in The Netherlands. This means that no GM crops are currently cultivated in The Netherlands.

23. Set out the permit/licensing requirements and prohibitions in relation to GM related activity and the key legislation and regulatory authorities.

A permit is required for the following activities involving GM crops:

- Experiments in containment (contained use): these include experiments in a laboratory or greenhouse.
- Experiments involving deliberate release into the environment, for example field tests of GM crops.
- Cultivation, production, import or export of new GM crops (market authorisations).

Applications for permits are handled by the GMO Bureau (*Bureau Genetisch Gemodificeerde Organismen*), a department of the Ministry of Infrastructure and Environment (MIE). Applications for market authorisations take longer, as these are reviewed by the GMO Bureau, the European Commission, and all other EU member states.

The applicant must conduct an environment risk analysis before applying for any of these permits, focusing on the risks of the proposed use for humans and the environment. This risk analysis must include:

- Possible undesired side effects.
- The risk that these side effects will occur.
- Measures proposed to decrease this risk.

The MIE checks the risk analysis and only grants a permit if the identified risks are negligible. The MIE is advised by the Committee on Genetic Modification (*Commissie Genetische Modificatie*) (Cogem).

Applications for large-scale contained use or deliberate release permits are partially public, as decisions are only made after a special administrative law preparatory procedure has been completed.

Applications for market authorisations at the MIE follow EU procedures. The European Commission ultimately determines whether a GM crop can be introduced into the EU market. After receipt and a first review of the application, the MIE will therefore forward it to the European Commission. The application will then be sent to all other EU member states for consultation. The European Food Safety Authority (EFSA) conducts the risk assessment of a particular GM crop. For The Netherlands, additional risk assessments are carried out by Cogem and RIKILT, which is part of the University of Wageningen.

The Human Environment and Transport Inspectorate (*Inspectie voor de Leefomgeving en Transport*) continuously monitors permit holders. If new facts occur that could have important consequences for the risks involved with the permitted use of GM crops, the MIE can order the permit holder to temporarily or permanently cease certain activities, or change the permit requirements.

ANIMAL AND ANIMAL WELFARE ISSUES

Importing Animals

24. Briefly outline the import/export control measures for animals and related genetic resources.

Imports

Import control measures for animals and products of animal origin from outside the EU include the following:

- All animal imports require a health certificate from the country of origin by the competent authority, specifying that the animals fulfil the basic animal health requirements as set out in the relevant EU directives.
- On arrival in the EU, the animals and the accompanying certificates must be verified and checked by EU official veterinarians at a designated Border Control Post.
- Random checks on the animals at the final destination.

Regulation (EU) 2016/1012 on zootechnical and genealogical conditions for the breeding, trade in and entry into the Union of purebred breeding animals, hybrid breeding pigs and the germinal products thereof (Animal Breeding Regulation) became applicable from 1 November 2018.

The Animal Breeding Regulation provides a single legal framework for the breeding, trade and entry into the EU of breeding animals of the bovine, porcine, ovine, caprine and equine species and their germinal products. Requirements under the Animal Breeding Regulation include:

- Controls on activities of recognised breed societies, including periodic inspections by the Animal and Plant Health Agency (APHA).
- A new zootechnical certificate for cattle, pigs, sheep and goats and a new equine certificate.
- The obligation for all breeding organisations to create and publish a breeding programme for each breed they support.

Breed societies and studbooks that are officially recognised by the Netherlands Enterprise Agency (*Rijksdienst Voor Ondernemend Nederland*) (RVO) must meet zootechnical rules and standards to trade purebred breeding animals and germinal products on preferable terms. This means that animals and germinal products from recognised breed societies in one EU member state are treated in the same way in other EU member states and some non-EU countries, such as the US and Australia.

The NVWA has established a list of temporary measures against countries where the risk of zoonotic transmission of pathogens exists. Imports of animals from these countries are restricted accordingly.

Exports

The export of animals is subject to requirements relating to identification of animals, animal health condition, certification, and transportation.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES) lays down the lists of species that are protected and cannot be imported or exported. The Netherlands is party to CITES. In addition, the Nature Protection

Act (*Wet natuurbescherming*) provides a list of protected animal species that cannot be imported or exported.

OIE Compliance

Since The Netherlands is a WTO member, restrictions on the import of animals and genetic resources must be based on international standards, or justified on a scientific basis under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. The international sanitary standards for animals are developed by the OIE (www.oie.int). For animals, these are the Terrestrial Animal Health Code and The Manual of Diagnostic Tests and Vaccines for Terrestrial Animals.

There is currently no information available on The Netherlands' adoption of OIE standards.

Animal Welfare

25. Briefly outline the regulatory regime for animal welfare.

Laws and Regulations

At the EU level, the European Convention for the Protection of Animals kept for Farming Purposes 1976 lays out general conditions for all the species of animals kept for the production of food, wool, skin, fur or for other farming purposes. This Convention:

- Requires that animals must be housed and provided with food, water and care that are appropriate to their physiological and ethological needs (*Article 3*).
- Protects the freedom of movement of animals (*Article 4*).
- Regulates the lighting, temperature, humidity, air circulation, ventilation and other environmental conditions (*Article 5*).

Based on the European Convention, Directive 98/58/EC on the protection of animals kept for farming purposes imposes general rules for the protection of animals of all species kept for the production of food, wool, skin or fur or for other farming purposes, including fish, reptiles and amphibians. This Directive:

- Requires that all animals whose welfare depends on frequent human attention must be inspected at least once a day (*Article 2*).
- Protects animals' freedom of movement (*Article 7*).
- Provides that breeding procedures (natural or artificial) likely to cause suffering or injury must not be practised, subject to certain exceptions (*Article 10*).
- Provides that no animal must be kept for farming purposes unless it can reasonably be expected, on the basis of its genotype or phenotype, that it can be kept without detrimental effect on its health or welfare (*Article 27*).
- In addition, specific EU directives have been enacted for pigs (Directive 2008/120/EC), broiler chickens (Directive 2007/43/EC), egg-laying hens (Directive 1999/74/EC) and dairy cattle and calves (Directive 2009/119/EC). These have been implemented into Dutch law.
- On 21 April 2021, Regulation (EU) 2016/429 on transmissible animal diseases (Animal Health Regulation) became applicable. Overall, the Animal Health Regulation supports the EU livestock sector in its quest towards competitiveness and safe and smooth EU market of animals and of their products, leading to growth and jobs in this important sector.

The Netherlands is a leading country with regards to animal welfare in Europe. The Animals Act 2011 (*Wet dieren*) is the main piece of legislation in the country for animal welfare. This Act, applicable to kept animals, with some general articles applicable to all animals, formally recognises animal sentience and the intrinsic value of animals. The intrinsic value of animals is defined

as the recognition of the integrity and well-being of animals being sentient beings (*paragraph 2, Animals Act 2011*). In addition, animal care must be based on the principles of the Five Freedoms of Animal Welfare as adopted by the OIE (*paragraph 3, Animals Act 2011*). The full spectrum of animal sentience, including expressing natural behaviours and not simply a recognition of pain and suffering, is formally recognised by Dutch law. The Act applies to animals that are kept except where the context requires otherwise, but it appears that the recognition of sentience extends to all categories of animals (including wild animals).

The Animals Act 2011 recognises the welfare of animals used in farming as a separate issue, in line with leading legislation worldwide. To increase awareness and standards of farmed animal welfare, extensive secondary legislation in the form of decrees sets out minimum standards for animals permitted to be used in production.

The Animal Health Regulation has resulted in amendments to the Dutch Animals Act 2011. The most important amendment is to the prohibition to inflict pain or injury on an animal or to harm its health or welfare without a reasonable purpose or in excess of what is permissible to achieve such a purpose. A reasonable purpose does not include the ability to keep animals in a particular system of animal husbandry or a particular type of accommodation. This amendment was adopted on proposal of the Party for the Animals (a Dutch political party). It is not yet clear what practical consequences this amendment will have on becoming effective in 2023.

Transport

At the EU level, welfare provisions for animal transport are laid out in Regulation (EC) 1/2005 on the protection of animals during transport and related operations. This Regulation defines the responsibilities of all actors involved in the transport chain of live animals entering or leaving the EU. Article 3 (General Conditions) provides that no person should transport animals or cause animals to be transported in a way likely to cause injury or undue suffering to them. Article 7 forbids long journeys (that is, exceeding eight hours) unless the means of transport has been inspected and approved under Article 18(1).

Slaughter

At the EU level, welfare provisions for animals at the time of slaughter are laid out in Regulation (EC) 1099/2009 on the protection of animals at the time of killing, which provides that:

- Animals must be spared any avoidable pain, distress or suffering during their killing and related operations (*Article 3*).
- Animals must be stunned before being slaughtered, and the loss of consciousness and sensibility must be maintained until the death of the animal (*Article 4*).
- Workers must check whether animals do not present any signs of consciousness in the period between the end of the stunning process and death (*Article 5*).

Annex I to the Regulation lists all the authorised stunning methods. Annex II sets out the requirements regarding the layout, construction and equipment of slaughterhouses.

26. Does the law of your jurisdiction allow for patentability of livestock genes on the grounds of isolating and purifying them? Is there legal protection for animal breeding know-how and a resulting animal nucleus?

Article 2A(2) of the Dutch Patent Act 1995 (*Rijksoctrooiwet 1995*) only allows the patentability of biological material on the ground of isolating and purifying it if a technical process is involved.

Patent protection of biological material with specific characteristics extends to any biological material derived from it through

propagation or multiplication in an identical or divergent form with those same characteristics.

The following are not patentable:

- Inventions the commercial exploitation of which is contrary to public policy or public morality.
- Whole plant or animal varieties.
- Essential biological processes.

27. Are there legal or practical restrictions on the introduction of new breeds/species, the breeding of certain animal species or certain breeding practices?

The NVWA is responsible for supervising the welfare of animals kept for commercial purposes. The NVWA has the authority to prohibit certain animal species or breeding practices.

A permit is required to both:

- Adjust the genetic material of an animal beyond the natural barrier of propagation and recombination.
- Apply biotechnological processes on an animal or embryo.

Breeding techniques can only be applied as long as the animal will not unnecessarily suffer pain, injury, stress or any other discomfort. Breeding practices such as cloning and electro-ejaculation are prohibited in The Netherlands.

AGRICULTURAL SAFETY AND PRODUCT LIABILITY Standards

28. Summarise the system of food safety standard setting, the main regulator(s) and regulations. If industry input on the standards is possible, indicate how this is conducted.

Legislation

The main EU legislation in the area of food safety is Regulation (EC) 178/2002 on the general principles and requirements of food law and establishing the European Food Safety Authority (General Food Law Regulation). The General Food Law Regulation is the foundation of EU food safety law.

One of the basic principles of the General Food Law Regulation is that the responsibility for food safety is placed on the food and feed operators (including agricultural companies), as they are in the best position in the production chain to ensure compliance with all relevant safety regulations.

In addition, there is a large and diverse body of EU legislation on various topics. Some legislation prescribes general rules for all products (horizontal legislation). The scope of other legislation is limited to specific products or product groups (vertical legislation).

Likewise, Dutch food safety laws include a variety of acts of parliament, local regulations, ministerial orders, and regulations of semi-public trade organisations. The Commodities Act (*Warenwet*) acts as a framework law.

Regulatory Authorities

Compliance with, and enforcement of, product quality/food safety regulations in all parts of the production chain (for example, imposing fines) is largely the responsibility of the NVWA.

FAO Compliance

As The Netherlands is a WTO member, restrictions on the import of food must be based on international standards or justified on a scientific basis under the WTO Agreement on the Application of

Sanitary and Phytosanitary measures. The international standards for food safety are set out in the Codex Alimentarius of the FAO (www.codexalimentarius.org/about-codex/en) (Codex Standards), which applies in The Netherlands. The delegate's office was not able to provide precise figures on the adoption of Codex Standards in the EU, or an overview of the implementation of Codex Standards into EU legislation.

Liability

29. Set out the legal requirements to establish the liability of producers and suppliers for defective or contaminated food ingredients that cause damage, in relation to tort and product liability.

Product liability is regulated by Articles 6:185 to 6:193 of the Civil Code. These implement Directive 85/374/EEC on liability for defective products (Product Liability Directive). Originally, the Product Liability Directive did not apply to agricultural products, but this was amended by Directive 99/34/EC.

The basic principle of product liability law is that a producer bears strict liability (*risicoaansprakelijkheid*) for a defective product, as the producer is able to take measures to prevent or minimise the chances of a product being defective and causing damage. For liability to arise, the consumer must prove:

- The existence of damage.
- That the damage was caused by the product.
- That the product is defective.

If the consumer succeeds, the producer's liability is established. This liability is mandatory and cannot be contractually excluded by the producer.

The term producer includes:

- Producers of end products.
- Producers of raw materials or components.
- All other persons that present themselves as producers.

Without prejudice to the liability of the producer, any person that imports a product into the EU for sale, hire, lease, or any form of distribution is equated with the producer, and bears the same strict liability as the producer.

If the original producer cannot be identified, liability passes to the supplier of the defective product. However, this liability can be avoided if the supplier reveals the identity of the producer within a reasonable time (which should be possible if traceability requirements have been met). There is no product liability for the supplier based on negligence.

As with product liability, in a tort action a consumer must prove that he/she has suffered damage caused by an unlawful action (the defective product) of the producer.

30. Which defences are available to the producer and/or supplier to avoid liability? For instance, is market-entry prior government approval a legal defence against product liability and under which conditions?

The main defences in the Product Liability Directive (including liability for agricultural products) include the following:

- The producer did not put the product into circulation on the market.
- The defect that caused the damage did not exist at the time when the product was put into circulation on the market.

- The producer did not manufacture the product for sale or distribution for an economic purpose, or the producer did not manufacture or distribute the product in his or her professional practice or business.
- The defect is due to compliance with mandatory regulations of the authorities.
- The defect could not have been discovered at the time when the producer put the product into circulation, due to the state of scientific and technical knowledge at that time.
- In the case of a producer of an ingredient or component, the defect is attributable to the design of the product in which the component or ingredient has been fitted, or the instructions given by the manufacturer of the product.

31. Which types of damage are generally compensated by civil courts in food safety liability cases? For instance loss of value, reparation costs, loss of revenue, and personal injury. Are punitive damages available?

Damage that is eligible for compensation under the Product Liability Directive, as implemented into Dutch law, is limited to:

- Death and bodily harm (including medical costs).
- Damage to personal items for daily use.

Any other damage must be claimed through tort actions, or actions based on breach of contract.

Under Dutch civil law, the basic principle is that the injured party must be placed in the same situation as he or she would have been if the event causing the damage had not taken place.

Damages must generally be paid in money. However, reparation of damages in kind is available on request of the injured party.

Under Dutch law, damages include both actual losses and loss of profit (*Article 6:96, paragraph 1, Dutch Civil Code*).

The following can be claimed as damages:

- Reasonable costs to prevent or mitigate damages that could be expected as a result of the event giving rise to liability.
- Reasonable costs incurred in assessing the nature and scope of the damage and liability.
- Reasonable costs incurred in obtaining extra-judicial payment.

(*Article 6:96, paragraph 2, Dutch Civil Code*.)

Punitive damages are not recognised under Dutch law.

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Publications

- *Agricultural Law in China, Global Practice Guide, General Editor, Thomson Reuters, London, 2022.*
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- *Plant Variety Rights Versus Plant Patents: Legal Developments and Frictions in a Regional Perspective, IBA Business Law International, May 2019, Vol 20, page 95 – 136.*
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Publications

- *Agricultural Law in The Netherlands, Global Practice Guide, Thomson Reuters, London, 2022.*

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