

INTRODUCTION

The paper describes two recent legislative developments in the Netherlands that to some extent are indicative of the changing climate for shareholder rights in the Netherlands. The first part deals with a proposed amendment of certain rules governing the corporate governance of large companies in The Netherlands. The second part deals with the incorporation in the Dutch securities legislation of rules governing public bids.

Part I: PROPOSED AMENDMENT OF THE DUTCH RULES RELATING TO THE LARGE COMPANY REGIME

Following recent advice from the Social Economic Council (*Sociaal Economische Raad*), the Dutch government has proposed a new act that, if brought into force, will bring about substantial changes to the Large Company Regime (*Structuurregime*) applicable in the Netherlands. The proposed act (hereafter: the “Proposal”), however, also provides for broader powers of shareholders of companies that are not subject to the Large Company Regime, whether they are public companies with limited liability (*naamloze vennootschappen*, or “NV’s”), or private companies with limited liability (*besloten vennootschappen met beperkte aansprakelijkheid*, or “BV’s”) established under Netherlands law. In addition, the Proposal gives holders of depository receipts (*certificaten van aandelen*) for shares issued with the co-operation of the company more influence over matters concerning the company.

The Proposal is still subject to discussion among lawmakers in the Netherlands. The contents of any final law made in furtherance to the Proposal may therefore not be in line with the contents of this memorandum.

A. General rules

a.1. The Shareholders meeting

Under the laws of the Netherlands as they presently stand, it is doubtful whether a decision to transfer all, or a substantial part of a company’s business requires a shareholder vote. If the transfer relates to an enterprise in its entirety, it is generally believed that prior shareholder approval is required, since as a result of such transfer the ‘identity’ of the company changes. The Proposal clarifies this issue by requiring shareholder approval for board decisions to:

- transfer all, or a substantial part of a company’s business;
- enter into, or terminate a long-lasting co-operation between the company, or a subsidiary, and a third party, if such entering into, or termination has a material effect on the company;
- acquiring, or divesting an interest in another enterprise, with a value of at least one third of the amount of the total assets reflected in the company’s annual accounts, by the company, or a subsidiary of the company.

a.2. Agenda for shareholders meetings

Shareholders and holders of depository receipts for shares issued with the co-operation of the company (*houders van met medewerking van de vennootschap uitgegeven certificaten*; hereafter: "Depository Receipt Holders") representing at least one percent (1%) of the issued capital will have the right to request the inclusion of additional items on the agenda of shareholders meetings. In case of listed companies, shareholders or Depository Receipt Holders representing an aggregate capital of at least fifty million Euro will also have the right to make such a request. If the company has important reasons not to address the suggested items, they do not have to be included in the agenda. Also, the request must be made sixty days prior to a meeting of shareholders of public companies with limited liability, or thirty days prior to a meeting of shareholders of private companies with limited liability. Under Dutch law, shareholders meetings may be called upon giving at least fifteen days notice. If a proposal cannot be taken into account for a meeting previously scheduled within the applicable sixty, or thirty day time period, the items must be addressed at the subsequent meeting.

a.3. Relationship between the management board and supervisory board

The present Articles 2:141 and 2:251 of the Dutch Civil Code provide that the management board shall provide the supervisory board in a timely manner with such information as the latter requires to fulfill its tasks. The Proposal adds to this requirement that the management board must inform the supervisory board at least once every year in writing of the headlines of the company's strategic policy, the general and financial risks involved in the operation of the company's business, as well as on management and control issues with respect to the company and its business.

a.4. Appointment and re-appointment of members of the supervisory board

The Proposal provides that proposals to appoint, or re-appoint members of the supervisory board must – also in case of companies that are not subject to the Large Company Regime – be duly justified. In case of re-appointments, consideration should be given to the manner in which the relevant member has fulfilled his/her tasks as supervisory board member in the past.

B. Depository Receipts for shares of listed companies

b.1. Voting rights for holders of depository receipts

The Proposal in principle provides for voting rights for Depository Receipt Holders. Upon their request, the custodian (*administratiekantoor*) holding the shares for which the depository receipts were issued, must issue voting proxies to Depository Receipt Holders. Once issued, a proxy will not be limited by, for instance, a limitation of a Depository Receipt Holder's right to exchange the depository receipts for shares.

The custodian may decide not to issue the proxy, and may decide to cancel a previously issued proxy in case (a) a hostile bid has been made or announced, or it is reasonably expected that such bid will be announced in the near future, (b) a person (or group of persons) has taken control of 25% of the issued capital, or Depository receipts, and (c) in the opinion of the

custodian, issuing voting rights to holders of depository receipts contravenes the interests of the company and the business operated by it. It should be noted, however, that the right to receive voting proxies may only be limited by the custodian, if the majority of the board of the custodian is independent from the relevant company, which in practice will almost always be the case.

b.2. Responsibility of the management board of the custodian

It should be noted that since in a number of the aforementioned circumstances a determination whether to issue proxies or not is made by the board of the custodian, that board will be given a responsibility that it presently does not have. Also, members of the board of the custodian that are 'connected' to the issuer of the relevant depository receipts will not have voting rights on matters concerning the issuance of voting proxies, or on how the shares held by such custodian that are represented by such depository receipts are voted.

C. Companies subject to the Large Company Regime

c.1. Present structure

The Large Company Regime is applicable to companies that for three consecutive years (a) had combined issued capital and reserves that equal at least a certain amount set by applicable rules¹, and (b) are required to establish, and have established a works council, and (c) regularly employ at least 100 employees in the Netherlands. Upon expiration of the three year term and assuming proper registrations have been filed with the Trade Registry in the Netherlands, the articles of association of the company must be amended to incorporate certain mandatory provisions relating to the Large Company Regime described in more detail below.

The company must have a supervisory board with at least three members. Under the present rules of the Large Company Regime, the supervisory board appoints the members of the management board and adopts the financial accounts of the company, whereas the shareholders meeting retains the power to approve such financial accounts. Certain decisions of the management board require the prior approval of the supervisory board.

Members of the supervisory board are elected by the supervisory board itself. Both the works council and the shareholders' meeting may recommend persons for appointment and may object to appointment of persons suggested by the supervisory board. If the shareholders meeting or works council objects, the relevant person may nonetheless be appointed if the Enterprise Chamber of the Amsterdam Court of Appeals (*Ondernemingskamer*) finds the objections to be unfounded. Objection to appointment may be made on the grounds that the relevant person is unfit to properly fulfill his tasks, or that following the appointment, the supervisory board would not be properly composed.

¹ The threshold amount presently equals Euro 13 mio for both the NV and BV.

Companies that qualify as 'dependent' (*afhankelijk*) of a company subject to the Large Company Regime are themselves exempt from the rules relating to the Large Company Regime. A company qualifies as 'dependent' of another entity, if such other entity provides at least 50% of the capital of such company.

c.2. Profile

Under the Proposal, each supervisory board of a company subject to the Large Company Regime must prepare a profile in relation to its size and composition. The number of members of a supervisory board should be at least three. When preparing the profile, consideration must be given to the business conducted by the company, and the desired knowledge and prior experience of the members of the supervisory board. The profile, as well as any amendments thereto must be discussed with the shareholders meeting and works council.

c.3. Appointment of members of the supervisory board by the shareholders meeting

The present manner of appointing members of the supervisory board, as set out under c.1, above, shall not be continued. Instead, members of the supervisory board shall be appointed by the shareholders meeting, subject, however, to nominations drawn up by the supervisory board itself. Nominations must be reasoned and will be made available to the works council and shareholders meeting. Companies that have many different shareholders may provide that information in the notice for a shareholders meeting.

Before the supervisory board decides on the persons it intends to nominate, both the shareholders meeting and works council may make recommendations. The works council and shareholders meeting must be informed of their right to make recommendations, as well as of the applicable profile for the relevant potential candidates.

c.4. Recommendations made by the works council

The works council will have the right to make recommendations for at least one third of the total number of members of the supervisory board. The supervisory board may only decide not to adopt such recommendations on the grounds that the relevant person is unfit, or that upon the appointment, the supervisory board shall not be properly composed. As to the latter, the profile prepared by the supervisory board will play an important role. Should the supervisory board, upon discussion with the works council, adhere to its objections, the Enterprise Chamber will decide.

c.5. Decision taken by the shareholders meeting

If upon fulfillment of all formalities, a nomination has been drawn up by the supervisory board, such nomination may be overruled by the shareholders meeting by two thirds of the votes cast, representing at least one third of the issued and outstanding capital. Upon such nomination being overruled, the nomination process starts anew.

c.6. Shareholders committee

Pursuant to the Proposal, the shareholders will retain their right to delegate their powers to a shareholders committee.

c.7. Collective dismissal

The shareholders may by a majority of at least two thirds of the votes cast, representing at least one third of the issued and outstanding capital, dismiss the supervisory board in its entirety for reasons of lack of confidence. The Enterprise Chamber may appoint one or more temporary members.

c.8. A different manner of appointment

It is remarkable that the articles of association may provide for a different manner of appointment for members of the supervisory board, subject to the prior approval of the supervisory board and the consent of the works council. Adoption of a different manner of appointment will also require shareholder approval. Such a different manner may, for instance, provide for a system of 'controlled' co-optation, as presently applies for the Large Company Regime, described under c.1., above. The Proposal goes even further, allowing for any method of appointment, as long as certain requirements are complied with, such as the provisions relating to preparing a profile, and the provisions relating to collective dismissal.

c.9. Supervisory board members appointed on behalf of governments

Pursuant to the Proposal, the possibility to have government appointed members of a supervisory board will no longer exist.

c.10. The annual accounts

Under the present laws, the supervisory board adopts the annual accounts, whereas the shareholders meeting approves the accounts. Following entry into force of the Proposal, the supervisory board will lose this adoption right; the annual accounts will be adopted by the shareholders meeting.

c.11. Family-owned companies

The Proposal allows for a mitigated system for family-owned companies that would otherwise be subject to the Large Company Regime. For such companies, members of the management board will no longer be appointed by the supervisory board, but instead they will be appointed by the shareholders meeting. The definition of 'family-owned company' is noteworthy; these are companies that are wholly owned by one single individual, or by more individuals pursuant to an arrangement made between them. Such 'individuals' include spouses and registered partners (*geregistreerde partners*), as well as descendants in the first degree. This mitigated system shall also apply to companies the shares or depository receipts of which are owned by an association (*vereniging*), or foundation (*stichting*) that is not a custodian (*stichting administratiekantoor*), or a governmental entity.

D. Consequences of certain exemptions

d.1. 'Dependent' company exemption

If a company is subject to the Large Company Regime, such rules need not be applied if it qualifies as a company that is 'dependent' of a company subject to the Large Company Regime (for the meaning of the term 'dependent' see c.1.). This exemption equally applies to a company that is subject to the rules of the Large Company Regime the moment such company *becomes* 'dependent' of a company to which the rules of the Large Company Regime already apply.

d.2. Exemptions in an international context

A company to which the requirements of the Large Company Regime apply may be exempt if it qualifies as an 'international holding company'. This is the case if such company limits itself to providing 'holding company services' and the majority of its employees, and the employees of its subsidiaries are employed outside of the Netherlands. Subsidiaries of a company that is exempt as an 'international holding company' may themselves qualify for the Large Company Regime. Due to the 'international' character of the group, such subsidiaries qualifying for the Large Company Regime, will qualify for the 'mitigated regime', which provides that members of the management board will not be appointed by the supervisory board, but instead by the shareholders meeting.

The exemptions referred to under d.1. and d.2., above, will not change following the entry into force of the Proposal.

d.3. Influence of the shareholders meeting upon qualifying for an exemption

Under the existing rules, companies may voluntarily accept to be subject to the rules of the Large Company Regime. In practice this is often done by listed companies, so as to ensure that members of their management board are appointed by the supervisory board rather than the shareholders meeting. Effectively this provides an anti take-over defense. Under present law, a company may also voluntarily adopt the Large Company Regime even though it qualifies for the 'international holding company' exemption.

The Proposal will change this practice to the effect that the management board must propose to the shareholders meeting to amend the articles of association of the company if and when the international holding exemption becomes available. The shareholders meeting can then decide to amend the articles to implement the exemption with a normal majority, notwithstanding any provision in the articles of association providing that amendments of the articles require a larger majority. If the shareholders meeting decides to rely on the applicable exemption and do away with the Large Company Regime, but does not resolve to amend the articles of association accordingly, the Enterprise Chamber may amend the articles.

d.4. Exemptions that have become applicable in the past

If after January 1, 1997 an exemption has become available to a company that is subject to the Large Company Regime, but such company has nonetheless voluntarily continued to apply the Large Company Regime rules, the company will need to propose to its shareholders to terminate applicability of the Large Company Rules, and to apply the exemption. The same proposal should also be submitted to the shareholders if in the meantime the company is allowed to apply the mitigated Large Company Regime, where members of the management board are appointed by the shareholders, and the company still applies the 'normal' rules of the Large Company Regime. The matter need, however, not be proposed to the shareholders, if upon the exemption having become available in the past, the company decided to continue to submit itself to the rules of the Large Company Regime, upon approval of the shareholders meeting and the supervisory board.

Part II: PUBLIC BIDS IN THE NETHERLANDS

Introduction

On September 5, 2001 new rules for public bids for securities (the 'Bidding Rules') came into effect in The Netherlands. The Bidding Rules replace the non-statutory rules applicable to public bids in The Netherlands, previously laid down in the SER Merger Code (the 'Merger Code'), and will be incorporated in the existing Act on the Supervision of Securities Trade 1995 (Wet toezicht effectenverkeer 1995; the 'Securities Act'). The Merger Code was not enacted as law, and was therefore - formally - non-binding. The Bidding Rules were the result of a broad discussion and review of the rules governing public bids for securities in The Netherlands. This review takes place in two phases. The first phase provides for the transfer of the substantive public bid rules from the - non binding - Merger Code to the Securities Act and the existing Regulation on Securities Trade (Besluit toezicht effectenverkeer; the 'Regulation'). The second phase may result in an amendment of the substantive public bid rules as such. With the Bidding Rules coming into effect, the first phase is now completed. At present there is no indication as to the timing for completion of the second phase.

Part One of this memorandum outlines the scope of the Bidding Rules, as well as the role of the Dutch Securities Board (Stichting Toezicht Effectenverkeer; the 'Securities Board'). Part Two of this memorandum provides a summary of the most relevant substantive Bidding Rules.

Part One - Scope of the Bidding Rules Securities Board

Scope of the Bidding Rules

The most relevant section of the Bidding Rules provides that no public bid shall be made for securities that are either listed on Euronext in Amsterdam, or are regularly traded in The Netherlands, unless (i) in connection with such bid, an offering memorandum is prepared in accordance with the Regulation, and (ii) all announcements made in relation to the public bid

contain a reference to such offering memorandum. The Bidding Rules evenly apply to securities issued by Dutch and foreign issuers, as long as such securities are listed on Euronext or are regularly traded in The Netherlands. The Securities Board, which is entrusted with the enforcement of the Securities Act, has issued a directive (*beleidsregel*), in which it further defines the scope of the Bidding Rules. In this directive, the Securities Board indicates that a public bid for securities that are not listed on Euronext, but are regularly traded in The Netherlands will only be subject to the Bidding Rules, when such bid is aimed at the Dutch securities market and the investors active on such market. This is deemed to be the case if the public bid is actually directed to The Netherlands and/or the public bid is made for securities issued by an entity incorporated under Netherlands law. The Securities Board lists certain indicators to determine whether a public bid is actually directed to The Netherlands, which include:

- (a) the absence in the offering memorandum of a list of countries where the public bid is made;
- (b) the absence in the offering memorandum of selling restrictions;
- (c) the use in the offering memorandum of the Dutch language;
- (d) the provision in the offering memorandum of information on Dutch legal and/or tax issues.

In the Bidding Rules, a public bid is defined as an offer, or solicitation of an offer for securities, made through a public notification and outside of a closed circle, where the offer or intends to acquire such securities. The 'public notification' requirement is intended to ensure that the Bidding Rules only apply if the offer is directed at the public at large. It also serves to make clear that regular trades, whether or not effected through Euronext, do not qualify as a public bid for these purposes.

The reference to the *closed circle* seems obsolete in light of the public notification requirement, but it primarily serves to make the provision consistent with another provision of the Securities Act, which generally prohibits offering securities in or from The Netherlands outside of a closed circle, unless (i) an exemption applies, or (ii) an appropriate prospectus has been issued in connection with such offer. The Bidding Rules provide that the rules relating to public bids shall be complied with by the bidder, the target company and their responsible officers (members of their management boards, supervisory boards, if any, and others with authority to represent the bidder, or target company). The definition of bidder refers to the person, or entity that is ultimately responsible for making the public bid, if different from the person or entity actually making the public bid.

General Exemptions and Individual Dispensations

The Securities Act provides that general exemptions may apply to, or individual dispensations may be granted from the rules relating to public bids. Individual dispensations may be granted on a case by case basis by the Securities Board. An individual dispensation will only be granted when consistent with the main objective of the Securities Act, i.e. to safeguard proper functioning of the securities markets and the position of investors operating on such markets. General exemptions are provided for in the Exemption Regulation on the Act on the Supervision of Securities Trade 1995 (*Vrijstellingsregeling Wet toezicht effectenverkeer 1995*) and include public bids: (i) on non-voting securities, other than non-voting securities that may be converted into

voting securities and other than depositary receipts for shares (*certificaten*); (ii) made by the issuer of the securities to which such bid relates. Exemption (ii) will be under scrutiny during phase two of the review of the public bid rules.

Dutch Securities Board

As previously indicated, the Securities Board is entrusted with the enforcement of the provisions of the Bidding Rules. In connection with such task, the Securities Board has certain powers and authorities, including obtaining such information as it deems necessary from the bidder, the target company and their management board members, or supervisory board members, if any. The Securities Act does not require that the contents of the offering memorandum to be issued in connection with a public bid, are approved by the Securities Board in advance. However, such offering memorandum must be provided to the Securities Board at least ten days prior to making any announcement about when it will become publicly available. Upon review, the Securities Board may provide binding instructions as to the contents of the offering memorandum. In practice, therefore, the contents of the offering memorandum will be discussed with the Securities Board, prior to making any announcement of the availability of an offering memorandum to be published in connection with a public bid. The Securities Board may impose penalties in case of non-compliance with the Securities Act. Also, non-compliance with certain provisions may lead to criminal liability. Most decisions of the Securities Board taken pursuant to the Securities Act may be appealed with the appropriate courts in The Netherlands.

Part Two - Summary of certain substantive bidding rules

General

In summary, the substantive Bidding Rules include rules relating to public announcements concerning a public bid and rules relating to the contents of the offering memorandum to be made publicly available in connection with a public bid. The Bidding Rules make a distinction between a firm offer, a partial offer, and a tender offer, depending on (i) whether the consideration offered is set by the offeror (firm offer, partial offer), or the offeree (tender offer), or (ii) whether the offeror aims to acquire all, or part only (partial offer) of the securities of the relevant class of securities. A partial offer may only be aimed to acquire a maximum of thirty percent of the securities of the relevant class of securities. Hereafter, we will provide a brief summary of the most relevant Bidding Rules. As partial and tender offers are rare, we will not discuss Bidding Rules governing these types of public bids. We will also not discuss rules relating to the contents of an offering memorandum to be made publicly available in connection with a public bid, as these are detailed and spelled out in the Regulation.

Public announcements and offering memorandum

Each of the bidder and target company shall make a public announcement, if and when required to assure a fair market trading of each of the companies' listed securities. Such circumstances include, but are not limited to: (i) circumstances where it can be expected that a bidder and target company reach agreement on terms and conditions of a public bid; (ii) in circumstances other

than those described under (i): a bidder's notification to a target company - as required by the Bidding Rules - that it shall make public the consideration it intends to offer for the relevant securities in connection with the public bid; (iii) a price fluctuation, or other circumstance which suggests that an anticipated public bid is known to others, who may use this information to their benefit; (iv) a bidder's determination of the consideration to be offered in connection with a public bid; (v) a bidder's determination not to make a public bid; (vi) a target company's issuance of (rights to acquire) securities to third parties of a kind at which the public bid will be aimed; and (vii) a public notification of a third party, indicating that it intends to make a public bid for the same securities. Depending on the circumstances, the Bidding Rules prescribe the nature of the information that must be included in the public announcement. Such requirements are aimed at making public, inter alia, the identity of the bidder and target company, the consideration to be offered in connection with the offer, and the target company's views in relation to a prospective public bid. Except where agreement on the terms of the public bid between the bidder and the target company may be expected (i.e. a hostile bid), prior to making the public notification regarding final consideration referred to under (iv) above, the bidder must contact the target company in order to discuss the bid within seven days upon receipt of notice to the target company to that extent. The outcome of such discussion, if any, will determine whether the bid will be friendly, or hostile. We note, however, that the Bidding Rules evenly apply to friendly and hostile public bids. Each of the bidder and target company must notify the Securities Board of all transactions effected by it in securities of the class at which the public bid will be directed, after the initial announcement concerning a public bid is made. Within thirty days following a public announcement indicated under (i), or (ii) above, the bidder must either (i) announce the consideration to be paid in connection with the bid, (ii) announce that it will not make the bid, or (iii) announce that no announcement regarding the consideration payable can be expected within the thirty day period, setting forth the reasons, as well as the date on which an announcement can be expected. The bid shall be made through an offering memorandum, which shall be made available within six weeks after the date of public announcement of the consideration payable. The Bidding Rules provide for detailed rules relating to the contents of the offering memorandum. As indicated above, we will not deal with those rules in this memorandum. The bidder may request the Securities Board to extend both the thirty day, and six-week periods.

Further rules relating to public bids

The period during which the public bid remains open for acceptance (the '*Acceptance Period*'), may not start prior to the date of announcement that the offering memorandum has become publicly available, and may not be more than twenty days (in case of a friendly offer), or thirty days (in case of a hostile bid). Under certain circumstances, the Acceptance Period may be extended. Target companies incorporated in The Netherlands must call a shareholders meeting, to be held after the date of announcement that the offering memorandum has become publicly available, and at least eight days before the end of the Acceptance Period. The shareholders of the target company must, prior to such shareholders meeting, be provided with its financial information, as well as its management board's views on the offer. A firm offer may be made subject to conditions, fulfillment of which may not solely be at the discretion of the bidder. Such



conditions, if any, should be made public at the time of publicly announcing the consideration the bidder intends to provide. Ultimately on the fifth business day following the end of the Acceptance Period, the bidder will publicly announce whether the offer shall be consummated or not. The Bidding Rules provide that during a period of three years following the consummation of a public bid, the bidder shall not acquire securities of the class at which the public bid was aimed, under conditions more favourable to the holders than those that accepted the public bid. The Exemption Regulation on the Act on the Supervision of Securities Trade 1995, referred to above, provides, inter alia, for a general exemption for ordinary transactions effected through Euronext. It furthermore provides for a general exemption for transactions effected by the original bidder in a follow-up public bid, where consummation of the first transaction has not resulted in acquisition of all outstanding securities of the relevant class, and where another public bid on such remaining securities is being made by a third party.

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