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Legislative Proposal on management and supervision

September 2012

Introduction

On 31 May 2011, the Dutch Senate adopted a legislative proposal on management and supervision (hereinafter: the Legislative Proposal). On 2 September 2011 a legislative proposal to close loopholes in the act on management and supervision was submitted to the Dutch House of Representatives and after that a number of amendments to that proposal. The legislative proposal to close loopholes and the amendments were adopted by the Dutch House of Representatives on 5 July 2012 but have not yet been debated in the Dutch Senate. The Legislative Proposal is expected to enter into force on 1 January 2013, together with the legislative proposal to close loopholes in the act on management and supervision.

The Legislative Proposal introduces a regulation which makes it possible for one corporate body to be comprised of both executive directors and non-executive directors. In other words, the one tier board will be given a legal basis. The Legislative Proposal also includes new rules with regard to situations where a director or a supervisory director has a conflict of interest with the company. Additionally, the Legislative Proposal provides for a limitation of the positions as supervisory director that a director of a large NV, BV or foundation may hold. Finally, a number of other subjects are regulated. Below, we discuss the most important proposals.

Clarification of the division of tasks among the directors

The present law permits that within the board of directors, a certain division of tasks is made. The permissible extent of such division is however unclear. It is further unclear what the exact consequences of a division of tasks are for the decision taking, duties and liabilities. The Legislative Proposal explicitly provides for the possibility of the division of tasks.

The Legislative Proposal states that the tasks of a director include all managerial tasks that have not been assigned to another director, meaning that all directors are charged with the tasks that have not been assigned. A division of tasks can be included in the articles of association. Alternatively, a division can be made by means of the adoption of internal rules, or through a resolution of the board of directors.

A division of tasks does not change the joint responsibilities. Each director shall remain responsible for the performance of the duties by the board of directors and for the resolutions that have been adopted by the board of directors. The Legislative Proposal rules that each director shall be responsible for the general course of business. What is to be regarded as 'the general course of business', is however not entirely clear.

The principle of collective management has the result that all directors are severally liable for mismanagement, even if the relevant task was assigned to a specific director. There is however the possibility of individual exculpation. Exculpation is possible if a director, considering among other things the division of tasks, was not seriously at fault and, additionally, was not negligent in taking, or failing to take, measures to prevent the consequences of the acts that constituted mismanagement. Therefore, under the new legislation, the directors should also be aware of the performance of duties by their co-directors and, if necessary, should take the appropriate measures, regardless of the division of tasks.

The new regulation with regard to the division of tasks shall apply to all legal entities as referred to in Book 2 of the Dutch Civil Code.

Statutory regulation one tier board

Pursuant to the present law, the NV and the BV have two mandatory corporate bodies: the general meeting and the board of directors. The institution of a supervisory body, i.e. a board of supervisory directors, is optional for companies that are not subject to the dual-board regime. The present law is based on the dualistic management model, with a board of directors and a separate board of supervisory directors. At present, it is possible nonetheless to constitute a one tier board by means of a division of tasks.

The Legislative Proposal introduces a legal basis for the one tier board for the NV and the BV, i.e. a board of directors consisting of executive and non-executive directors. Also companies that are subject to the dual-board regime may opt for a one tier board.

The one tier board is founded on a division of tasks. The executive directors are engaged with the day-to-day management of the company and the enterprise connected with it. The non-executive directors supervise the performance of duties by the directors. The tasks that have not been assigned to specific directors belong to the board of directors as a whole, thus to the executive and non-executive directors jointly.

A division of tasks is subject to a number of limitations. The task to supervise the performance of duties by the directors, cannot be taken from the non-executive directors. The chairmanship of the board of directors, making nominations for the appointment of directors and establishing the remuneration of the executive directors cannot be assigned to an executive director. In addition, an executive director shall not participate in the decision taking in respect of the establishment of the remuneration of the executive directors. Finally, the new act rules that the non-executive directors, like the supervisory directors in a dualistic management model, should be natural persons.

The non-executive directors shall, even more than supervisory directors, be actively involved in the general policy making of the company. After all, they participate in and are directly responsible for the decision taking in respect of the general lines of policy. The non-executive directors run a higher liability risk than supervisory directors in a dualistic management model.

New regulation on conflicts of interest

The present regulation with regard to conflicts of interest is designed as a rule of representation. Such regulation therefore has external effect. The regulation has the result that in all situations where one or more directors have an interest that conflicts with the interests of the company, the company should be represented by the supervisory directors. In that case, the directors have no power to represent the company. If a board of supervisory directors is lacking, the company shall be represented by one or more persons that are designated for that purpose by the general meeting.

The articles of association may include a different arrangement. It may even be stipulated that the directors remain empowered to represent the company. However, the general meeting always remains authorised to designate one or more persons for that purpose. If there exists a conflict of interest and the company is represented by a director who is not authorised to represent it, the company, or in case of a bankruptcy, the bankruptcy receiver, may invoke the lack of representative power vis-à-vis the other party, provided that the other party knew or should have known that the director was not authorised. This promotes legal uncertainty for the company and the other party.

In the Legislative Proposal, the regulation with regard to conflicts of interest is designed as a rule of decision taking. Such regulation therefore has only internal effect. The new regulation rules that a director may not participate in the deliberation and the decision taking if he, in respect of the relevant subject matter, has a direct or indirect personal interest that is in conflict with the interest of the company and the enterprise connected with it. If for that reason the resolution of the board of directors cannot be adopted, the resolution shall be adopted by the board of supervisory directors. If a board of supervisory directors is lacking, the resolution shall be adopted by the general meeting, unless the articles of association provide otherwise. A similar regulation shall apply to the supervisory directors.

When the Legislative Proposal comes into effect, the present regulation of conflicts of interest shall cease to be effective. Provisions included in articles of association based on the old regulation shall become invalid. In case prior to the moment at which the Legislative Proposal has come into effect, a NV or a BV was represented by the board of directors or a director while there was a conflict of interest with one or more directors, the general meeting may ratify the representative acts by designating the representative or representatives after the moment at which the Legislative Proposal has come into effect.

Legal relationship between director and listed company no longer an employment contract

Usually a twofold legal relationship exists between a director and the company: on the one hand the director is part of the company, and on the other hand the director has a contractual relationship with the company. Usually, the contractual relationship qualifies as an employment contract or contract for professional services.

When the Legislative Proposal has come into effect, the legal relationship between a director and a listed company shall no longer be regarded as an employment contract. For directors of listed companies this shall mean that their legal protection as employee shall come to an end. Existing employment contracts shall however be respected.

Instead of an employment contract, the director and the company could enter into a contract for professional services. Another possibility is entering into an employment contract with a group company of the listed company.

Limitation of supervisory positions of directors and supervisory directors

The Legislative Proposal intends to limit the number of supervisory positions of directors and supervisory directors of NV's, BV's and foundations that qualify as a large legal entity. A legal entity is a large legal entity if it meets at least two of the following criteria:

(a) the value of the assets according to its balance sheet with explanatory notes, amounts to more than EUR 17.5 million on the basis of the acquisition or production price;

(b) the net turnover over the financial year amounts to more than EUR 35 million;

(c) the average number of employees over the financial year amounts to 250 or more.

If hereinafter reference is made to a 'large legal entity', this shall be understood to be a large NV, BV or foundation.

Pursuant to the Legislative Proposal, a person cannot be a director of a large legal entity if he holds two positions as supervisory director with large legal entities or is the chairman of the board of supervisory directors or of a one tier board of a large legal entity. A supervisory director of a large legal entity cannot be a person who holds five or more positions as supervisory director with large legal entities. In such cases, the position of chairman shall be calculated as two positions.

A 'position as supervisory director' shall mean a seat in the supervisory board, but also a position as non-executive director in a one tier board. Pursuant to the Legislative Proposal, a person who holds a position in a supervisory body instituted by the articles of association of a legal entity, shall be regarded as a supervisory director.

The relevant person's supervisory positions with group entities of the large legal entity, shall not be taken into account. Nor shall supervisory positions with foreign legal entities.

The Legislative Proposal shall be applicable to appointments and designations that have taken place after the date at which the act has come into force. Positions accepted prior to such date, shall however be taken into account for appointments and designations that have taken place after such date.

Change of rules on binding nominations for the appointment of directors and supervisory directors

Pursuant to the present law, a binding nomination for the appointment of a director or supervisory director should include the names of at least two candidates. This requirement shall lapse. Additionally, the regulation on the voting procedure in respect of the appointment of a candidate who is placed on a binding nomination, shall be simplified. If a nomination includes only one candidate for the position to be filled in, the resolution on the nomination results in

the candidate being appointed. This is only different if the nomination is deprived of its binding effect.

Balanced division of positions among women and men

The Legislative Proposal introduces target figures for the participation of women in boards of directors and boards of supervisory directors of NV's and BV's that qualify as large legal entity. What legal entities should be regarded as large legal entities is explained above.

According to the Legislative Proposal, a balanced division shall mean that the positions in the board of directors and the board of supervisory directors are held for at least 30% by women and for at least 30% by men, if the positions are filled in by natural persons.

Within a large legal entity, an attempt should be made as much as possible to balance the position among men and women in terms of:

(a) the appointment and nomination of directors;

(b) the adoption of a profile for the size and composition of the board of supervisory directors; and

(c) the designation, appointment and recommendation of supervisory directors and non-executive directors.

If the company is managed by one or more legal entities, the obligation shall be applicable to the directors of such legal entities, regardless of whether they qualify as a large legal entity. In case these legal entities, in their turn, are managed by one or more legal entities, this obligation shall apply to their directors.

If a large NV or BV does not meet these target figures, it shall explain in its annual report in what way it has made an attempt to balance the positions and in what way it envisages to realise a balanced division of positions. The validity of this regulation is limited in time; it shall cease to have effect as per 1 January 2016. Thereafter, the Dutch House of Representatives and the Dutch government shall reconsider the regulation.

Evaluation

According the Minister, at the beginning of 2015, e.g. three years after the act has come in to force, the entire act shall be evaluated.

Further information

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