

**CORPORATE LAW AND PRACTICE  
OF THE NETHERLANDS**

**Legal, Works Councils and Taxation**

**Second edition**

**by**

**Steven R. Schuit (Ed.)**

**CORPORATE LAW AND PRACTICE  
OF THE NETHERLANDS**

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# **CORPORATE LAW AND PRACTICE OF THE NETHERLANDS**

## **Legal**

by  
Steven R. Schuit

revised and updated by  
Barbara Bier

## **Works Councils**

by  
Leonard G. Verburg

## **Taxation**

by  
Jan A. Ter Wisch

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## **PREFACE**

This book was written to provide business executives, bankers, accountants and lawyers from other jurisdictions with a solid understanding of the intricacies of Netherlands' corporate law. Corporate law is an essential ingredient for most business and financing transactions. The differences for each country are many and can be extremely treacherous. Consequently, this book concentrates on these differences, with special focus on practical business implications. Since there are currently no other similar publications in the English language, this book has also been used increasingly not only by lawyers but by many others, such as academics, students from foreign countries and governmental organisations. For these users we have slightly adjusted the format of this book but without losing sight of its original objective, which is to provide concise and practical information about these areas of Netherlands' law.

Barbara Bier has revised and updated the corporate law chapters, which dated from 1998. She is a valued lecturer at several institutions, including the tough in-house course on corporate law for new Dutch Allen & Overy lawyers (Allen & Overy University). Her long experience as a practising deputy civil law notary and her excellent teaching capabilities formed an ideal background for the revision of these first 12 chapters. The other chapters on Works Councils and Taxation were revised by my partners Leonard Verburg and Jan Ter Wisch respectively.

This book inevitably contains some generalisations and should not be considered a substitute for legal advice in any particular circumstances.

This book states the law as of 1 May 2002.

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**Barbara Bier** graduated from Leiden University in both civil law and notarial law. She practised company law for many years at one of the major Dutch law firms. As such she advised clients from all over the world on mergers and acquisitions, on setting up Dutch holding and finance structures and on IPOs. Presently she is a lecturer at the Allen & Overy corporate university and various other institutions. She has several publications in her name. Also, she is writing her PhD thesis on the subject "Distributions on shares".

**Leonard G. Verburg** (has been a partner with Allen & Overy since January 2000. He was a partner with Benelux law firm Loeff Claey's Verbeke from 1987. He is head of the employment law department of the Amsterdam office. He graduated from Leiden University in 1979 and has experience of a wide range of employment law-related matters such as individual and collective dismissals, strikes, negotiation with unions and employment contracts (both in an advisory role and regarding litigation). In particular, he has ample knowledge and experience of works council issues. He is a member of the editorial board of two of the leading Dutch employment law reviews and of the standing advisory committee on employment law of the Dutch Bar Association. He is the author of various publications in the area of employment law and works councils.

**Jan A. Ter Wisch** is a partner of Allen & Overy Amsterdam. He was a partner of Loeff Claes Verbeke as from 1995 until its merger with Allen & Overy on 1 January 2000. He graduated from Erasmus University (Rotterdam) in Civil Law and obtained an MBA (1976) also from Erasmus University. He was an Inspector of Taxes with the International Department of the Dutch Revenue Services from 1976 - 1983 and an international tax partner with one of the Big 4 accounting firms (1983 - 1995). He specialises in International and Dutch tax law. He has advised many foreign multinationals with an emphasis on M&A transactions, several of them involving the world wide co-ordination of tax advice. He also acts as lead tax counsel on various high profile restructuring projects for European and US multinationals. He is a

frequent lecturer in North America and Europe and is a Dutch correspondent for Tax Notes International. He is a member of the Amsterdam Bar, the International Bar Association, the International Fiscal Association, the Dutch Bar of Tax Lawyers and the Dutch Foundation of Tax Science.





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## 1 GENERAL INTRODUCTION

### 1.1 General

During the last three decades Netherlands' law concerning business organisations and corporations has changed dramatically, developing characteristics unknown in many other countries.

The emphasis in legislative drafting during this period has been on fostering the interests of both employees and creditors. This higher degree of protection was achieved by reducing the power of shareholders (*see infra* Chapter 8), improving disclosure to creditors and to the public in general (*see infra* Chapter 12), adopting strict rules concerning capitalisation (*see infra* Chapter 4) and imposing liability on founders and directors in cases of abuse of the corporate form (*see infra* Chapter 9).

Although this development is most noticeable in the context of corporations, it has also left its mark on unincorporated business enterprises and branch offices of foreign corporations.<sup>1</sup>

This book describes the laws concerning incorporated and unincorporated business enterprises. Banks, securities and investment operations and insurance companies are covered by special legislation that is not discussed here. Matters concerning accounting and financial reporting are only superficially described.

The principal source of legislation concerning legal entities is Book 2 of the Dutch Civil Code. This is mandatory law, which cannot be deviated from in the articles, unless stated otherwise.

Specific rules may apply to any specific business that a corporation may carry on.

For listed Dutch corporations special rules will apply<sup>2</sup>.

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<sup>1</sup> Most notably with respect to provisions in the Wet op de ondernemingsraden [WOR] (Works Council Act), 1971 Staatsblad [S.] (Statute Book) 54, as amended, Wet op de formeel buitenlandse vennootschappen (Formal Foreign Entities Act) 1997 S. 697 and the Handelsregisterwet 1996 [HrW 1996] (Commercial Register Act 1996), 1996 S. 181, as amended, that apply to these entities.

<sup>2</sup> Reference is made to the following English language publication: N.R. VAN DE VIJVER, SECURITIES REGULATION IN THE NETHERLANDS, Allen & Overy Legal Practice, 2000, Kluwer Law International (The Hague, London, Boston).

## 1.2 Corporate Governance

One of the distinct characteristics of Dutch company law is a two-tier management structure comprising a management board and a supervisory board (see infra Chapter 8.1). This structure is mandatory for corporations which qualify as "large" companies. To these "large" companies a special set of mandatory rules, the "large company rules", apply. These rules will apply to a corporation which has made the required registration to that effect and subsequently, for a consecutive period of three years, meets the test of equity in excess of € 13 million, a Works Council imposed by law, and 100 or more employees in the Netherlands.<sup>3</sup> Under this mandatory two-tier structure the supervisory board has far-reaching powers, superseding to some extent those of the shareholders and the management board (see infra Chapter 8.2). Corporations which do not qualify as "large" companies have an option, the articles of association may provide that the corporation has a supervisory board.

A Works Council is a representative body of employees which is mandatory for enterprises with 50 or more employees in the Netherlands (see infra Chapter 13.1). On the basis of its statutory powers, a Works Council may exercise considerable influence on management decisions in such areas as mergers, acquisitions, takeovers and joint ventures, investments, split-ups and divestitures.<sup>4</sup>

These and other characteristics emanate from a social and economic environment that long ago accepted the notion that the management board is not subordinate to the shareholders,<sup>5</sup> and may even be allowed to take positions that are not in the best interests of shareholders.<sup>6</sup> The management board must protect the "interests of the

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<sup>3</sup> See Chapter 8.1 for a more detailed description regarding "large" companies.

<sup>4</sup> See Chapter 13.

<sup>5</sup> Judgment of 21 Jan. 1955, Hoge Raad [HR] (Supreme Court), 1959 Nederlandse Jurisprudentie [NJ] (Dutch Court Reporter) No. 43.

<sup>6</sup> E.J.J. VAN DER HEIJDEN, HANDBOEK VOOR DE NAAMLOZE EN DE BESLOTEN VENNOOTSCHAP [hereinafter HANDBOEK] § 231 (W.C.L. van der Grinten 12th ed. 1992), W.E.J. Tjeenk Willink (Zwolle); C. ASSER, 2, III VERTEGENWOORDIGING EN RECHTSPERSOON: DE NAAMLOZE EN BESLOTEN VENNOOTSCHAP [hereinafter ASSER-MAEIJER 2, III] § 16 (J.M.M. Maeijer, 2nd ed. 2000), W.E.J. Tjeenk Willink (Zwolle).

corporation",<sup>7</sup> which may include the interests of shareholders, employees<sup>8</sup> and, according to certain legal commentators, the corporation's business relations, as well as certain basic societal interests.<sup>9</sup>

If a corporation qualifies as a "large" company, this will result in a reduced power of shareholders, which is particularly noticeable in relation to the appointment of managing directors. The managing directors of corporations which do not qualify as "large" companies are appointed by the shareholders' meeting; while for "large" companies the management board is appointed by the supervisory board<sup>10</sup> and the supervisory board fills its own vacancies.<sup>11</sup> Shareholders and the Works Council can make recommendations and veto appointments that would cause the supervisory board to be not "properly constituted" or where the candidate is not suitable for appointment as a member of the supervisory board or where the proper procedure regarding the appointment has not been followed. A veto is subject to judicial review<sup>12</sup> (see *infra* Chapter 8.3.c.ii). This structure is in itself a strong defence against corporate raiders. Netherlands' law contains several other devices that have so far been highly effective in protecting the management board against unfriendly takeovers.<sup>13</sup> The same mechanisms may, however, have an impact in situations where no takeover is contemplated and where shareholders have a legitimate interest in making changes in the composition of the management board and the supervisory board.

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<sup>7</sup> The "interests" of the corporation are often defined in terms of its continued existence and growth, and thus its profitability. See ASSER-MAEIJER 2, III, *id.*, § 293.

<sup>8</sup> Judgment of 11 Nov. 1982, Gerechtshof [Ger.] (Court of Appeal) Amsterdam, 1983 NJ No. 30.

<sup>9</sup> HANDBOEK, *supra* p. 27 at note 6, § 231.

<sup>10</sup> Burgerlijk Wetboek [BW] (civil code) art. 2:162/272.

<sup>11</sup> BW art. 2:158(2)/268(2). See *infra* Chapter 8.c.ii regarding the new "large" company rules, as proposed.

<sup>12</sup> BW art. 2:158(6),(9)/268(6),(9).

<sup>13</sup> For an elaborate description in the English language and a legal analysis of friendly public offers and hostile offers in the Netherlands, see: S.R. SCHUIT AND J.E. JANSSEN, M&A IN THE NETHERLANDS. ACQUISITIONS, TAKEOVERS AND JOINT VENTURES. LEGAL AND TAXATION [hereinafter: M&A IN THE NETHERLANDS], 1996, Kluwer Law International (The Hague, London, Boston).

Only recently, shareholders, as stakeholders in the corporation, have received more attention both because of new emphasis in the Netherlands on the concept of shareholders' value and accountability of management to shareholders. A report on corporate governance in the Netherlands was released on 25 June 1997 by a committee established by the Amsterdam Stock Exchange. The report contains specific "best practice" recommendations concerning the supervisory board, the management board, the shareholders' meeting, compliance procedures and the auditors' review of internal control systems.

### 1.3 Harmonisation of European Company Law

Many changes in corporate law can be attributed to European Union (EU) authorities. The EC Treaty<sup>1</sup> provides for the progressive harmonisation of the economic policies of Member States in order to promote the proper functioning of the Common Market.<sup>2</sup> This includes the harmonisation of company law. Furthermore, the EC Treaty aims to abolish obstacles to the free movement of goods, persons, services and capital between Member States.<sup>3</sup>

An important principle embodied in the EC Treaty is the right of establishment. Under this principle, nationals of Member States have the freedom to establish themselves in the territory of other Member States under the same conditions that apply to the nationals of the host country.<sup>4</sup> This includes the right to pursue activities as self-employed persons, set up branch offices, incorporate companies, and carry on business according to the host country's law.<sup>5</sup> Member States are bound to eliminate

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<sup>1</sup> Treaty establishing the European Economic Community [EC Treaty] art. 2, 25 Mar. 1957, 1957 Tractatenblad [Trb.] (Treaty Book) Nos. 74, 91, as amended.

<sup>2</sup> EC Treaty arts. 2, 3(h).

<sup>3</sup> EC Treaty art. 3(c), Title I, Title III.

<sup>4</sup> EC Treaty art. 52 and Judgment of 9 Mar. 1999, European Court of Justice [ECJ], Jurisprudentie Onderneming & Recht [JOR] (Court Reporter Business and Law) 1999, No. 117.

<sup>5</sup> EC Treaty art. 52 (".... 'companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are

any existing restrictions and refrain from introducing new restrictions on the freedom of services or the right of establishment.<sup>6</sup>

Companies may prefer to establish themselves in the Member State with the most favourable company law: the so-called "Delaware effect". The divergence of company laws in different Member States is acknowledged by the EC Treaty, which provides for the legal basis for the harmonisation of company law. Community institutions are responsible for the harmonisation of company law "by co-ordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms with a view to making such safeguards equivalent throughout the Community".<sup>7</sup> Pursuant to article 220 of the EC Treaty, the Member States shall conclude agreements with respect to, inter alia, the retention of legal personality in the event of transfer of the seat of a company to another Member State.<sup>8</sup> Furthermore, certain regulations are based on articles 100 and 100a of the EC Treaty which call for directives on the harmonisation of statutory and administrative law provisions in the Member States that are of direct influence on the establishment and operation of the Common Market.

Harmonisation is realised by way of directives, treaties, and regulations which approximate the company laws of the Member States and delete important differences between them.

A directive must be implemented by national legislation by all Member States, by way of adoption of national statutes within a prescribed period.<sup>9</sup> Individuals may

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non-profit-making" (EC Treaty art. 58)).

<sup>6</sup> EC Treaty arts. 52, 53, 59, 62.

<sup>7</sup> EC Treaty art. 54(3)(g).

<sup>8</sup> EC Treaty art. 220 provides: "Member States shall...enter into negotiations with each other with a view to securing for the benefit of their nationals...the mutual recognition of companies or firms..., the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries...".

<sup>9</sup> Pursuant to EC Treaty, art. 189 "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

rely on the directive to have incompatible national legislation overruled if a Member State fails to implement a directive on time or does so incorrectly.<sup>10</sup>

However, in enforcing their rights against the government of a Member State, individuals may only rely on such provisions of the directive which are unconditional and sufficiently precise.

The signing and ratification of so-called Community conventions between the Member States is subject to the normal procedure for treaties under public international law. However, these Community conventions are generally prepared by Community institutions and are subject to interpretation by the Court of Justice of the European Communities.<sup>11</sup> These conventions can be regarded as law common to all Member States.<sup>12</sup>

Regulations constitute a truly uniform European company law and represent a new "European" legal regime.<sup>13</sup> Rather than requiring implementation by national legislatures, a regulation has direct effect, *i.e.*, it gives rise to rights which private parties may enforce before national courts.<sup>14</sup>

**a     The First Directive:**<sup>15</sup> Disclosure of Essential Information and the Protection of Bona Fide Third Parties. This directive provides that certain information on the internal governance of companies must be made available to the public through public registers and national gazettes. The information includes the articles of association,

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<sup>10</sup>                     The Becker Case, Court of Justice of the European Communities 1982 Report of Cases Before the Court of Justice and Court of First Instance of the European Communities [E.Comm. Ct.J.Rep.] 53.

<sup>11</sup>                     Submission of preliminary questions to the ECJ by national judges (EC Treaty art. 177) guarantees the uniform interpretation of Community laws and regulations.

<sup>12</sup>                     In the field of company law no Community convention has yet been concluded. An initiative from the Member States for a convention on cross-border mergers was superseded by the proposal of the Commission for a directive (see infra Chapter 1.3.j.)

<sup>13</sup>                     Pursuant to the EC Treaty art. 189: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States".

<sup>14</sup>                     A regulation can be considered as "self-executing". See Van Gend en Loos, 1963 E.Comm. Ct.J.Rep. 3.

<sup>15</sup>                     First Council Directive No. 68/151, 11 Official Journal of the European Communities [O.J. Eur. Comm.] (No. L65) 8 (1968), as amended.

names of the board members and the corporate agents, subscribed capital and, in the case of public companies, the annual financial results. The directive contains detailed provisions on the termination of the existence of a corporation.<sup>16</sup> In addition, this directive limits to a great extent the ultra vires defence against bona fide third parties (see infra Chapter 3.5). This directive has been implemented in Netherlands' law.

**b      The Second Directive:**<sup>17</sup> Minimum Disclosure Requirements, the Formation of Public Limited Liability Companies and the Maintenance, Increase and Reduction of Capital.<sup>18</sup> Companies must disclose their corporate form, name, objects, registered office, share capital, classes of shares and the composition and powers of the various bodies of the company. The directive provides that the minimum issued capital for public companies must exceed € 45,000. It restricts distributions to shareholders that erode the capital of a company and its statutory reserves. A corporation may therefore only distribute its free reserves. Redemption of capital is restricted and capital may only be reduced in compliance with certain disclosure requirements in order to protect creditors. Moreover, shareholders of a public company have a pre-emptive right in the case of the issue of new shares. Finally, this directive contains an important provision for leveraged acquisitions: a company may not grant loans or security for the acquisition of shares in its own capital (see infra Chapter 4.3.g). The Netherlands has implemented this directive.

**c      The Third Directive:**<sup>19</sup> Mergers of Public Limited Liability Companies within one Member State. This directive deals with statutory mergers within a Member State. The directive provides for the protection of the interests of shareholders, creditors, and employees. In a statutory merger the assets and liabilities of the acquired company are transferred to the acquiring company by operation of law (see Chapter 10.3.b). The shareholders of both the acquiring

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<sup>16</sup> This directive applies to both the N.V. and the B.V.  
<sup>17</sup> Second Council Directive No. 77/91, 20 O.J. Eur. Comm. (No. L26) 1 (1977), as amended in 1992.

<sup>18</sup> This directive is only applicable to the N.V. However, Netherlands' legislation has voluntarily adopted the relevant provisions for the B.V. as well.

<sup>19</sup> Third Council Directive No. 78/855, 21 O.J. Eur. Comm. (No. L295) 36 (1978).

and acquired company receive a proportional interest in the merged company. This right is secured by requiring valuation of the share exchange ratio by an independent expert. This directive has been implemented in the Netherlands. Presently, under Netherlands' law only a merger between two Dutch legal entities of the same kind is possible. The directive helps to pave the way for cross-border mergers, provided for in the proposed tenth directive (see infra Chapter 1.3.j).

- d    The Fourth Directive:**<sup>20</sup> Company Accounts. This directive contains detailed requirements for the preparation of balance sheets, profit and loss statements, and annual reports. The accounts that are required to be maintained in accordance with the directive must give a true and fair view of the assets, liabilities, financial position and results of the company. The directive applies to both private and public companies. Special accounting rules apply to banks and insurance companies.<sup>21</sup> Certain small and medium-sized enterprises specified in national legislation are exempt from the most stringent publication requirements. This directive has been implemented in the Netherlands.
  
- e    Proposal for a Fifth Directive:**<sup>22</sup> Company Structure and Management. This proposed directive deals with the structure and administration of public companies and the powers and obligations of their corporate bodies. It allows for both a two-tier management structure (management board and supervisory board) and a one-tier management structure (one board composed of executive and non-executive directors). If the directive were enacted in its current form, it would have a significant impact on Netherlands' corporate law.<sup>23</sup> However,

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<sup>20</sup> Fourth Council Directive No. 78/660, 21 O.J. Eur. Comm. (No. L222) 11 (1978), as amended.

<sup>21</sup> For the rules concerning accounts of banks and other financial institutions, see 29 O.J. Eur. Comm. (No. L372) 1 (1986). For the rules concerning accounts of insurance companies, see, 34 O.J. Eur. Comm. (No. L374) 7 (1991). These directives have been implemented in Netherlands' law.

<sup>22</sup> Proposal for a Fifth Council Directive, 15 O.J. Eur. Comm. (No. C131) 49 (1972); as amended: 26 O.J. Eur. Comm. (No. C240) 2 (1983); 34 O.J. Eur. Comm. (No. C7) 4 (1991); 34 O.J. Eur. Comm. (No. C321) 9 (1991).



there has been European-wide opposition to this proposal since it was first drafted in 1972.

- f    The Sixth Directive:**<sup>24</sup> Split-up of Public Limited Liability Companies. This directive covers the divisions of public corporations in which all assets and liabilities are transferred by operation of law to two or more corporations in exchange for shares in the recipient corporations, whereby the dividing corporation ceases to exist. This directive has been implemented in the Netherlands introducing the demerger (whereby the demerging corporation does not cease to exist) as well as a separate form of a division (see infra Chapter 11.4). The statute will be applicable to all legal persons. By implementing the directive, a mirror of the statutory merger (see Chapter 11.3) was introduced, offering a relatively straightforward procedure for the restructuring of business enterprises and for structuring joint ventures. The procedure for a division or demerger mirrors to a great extent the procedure for the statutory merger, including requirements for a division proposal, a fairness opinion and protection of creditors' and employees' interests.
- g    The Seventh Directive:**<sup>25</sup> Consolidated Accounts. This directive deals with consolidated annual accounts for groups of companies. The directive complements the Fourth Directive concerning individual company accounts. Consolidated annual accounts are required where a holding corporation has (i) the majority voting rights in its subsidiary; (ii) the right to appoint or remove a majority of voting rights in its subsidiary; (iii) the right to appoint or remove a majority of the members of the administrative, management or supervisory

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<sup>23</sup> The proposal in its current form limits the issuance of protective preference shares (see infra Chapter 5.1.c) to 50 per cent. of the issued capital and prohibits, inter alia, limitations on voting rights with respect to ordinary shares (see infra Chapter 7.3), and qualified majorities for ballots to appoint or remove managing directors or supervisory directors (the latter prohibition would only apply to public limited companies where these rights accrue to the shareholders, i.e., not to "large" N.V.s (see infra Chapter 8.3.c.ii).

<sup>24</sup> Sixth Council Directive No. 82/891, 25 O.J. Eur. Comm. (No. L378) 47 (1982).

<sup>25</sup> Seventh Council Directive No. 83/349, 26 O.J. Eur. Comm. (No. L193) 1 (1983), as amended.

board of the subsidiary; or (iv) the contractual right to exercise a decisive influence over its subsidiary. Where a holding corporation of a group is located outside the Community, Member States have the option not to require consolidation if the consolidated annual accounts are prepared in conformity with the requirements laid down in the directive or their national equivalents. The administrative burden for small and medium-sized enterprises has been reduced. Since 1 January 1990, all groups of companies established within the Community must prepare consolidated annual accounts. This directive has been implemented in the Netherlands.

- h    The Eighth Directive:**<sup>26</sup> Statutory Auditors. This directive contains minimum requirements for the educational and professional qualifications of auditors and requires Member States to ensure the independence of such auditors. Netherlands' law is in conformity with this directive.
- i    Draft Proposal for a Ninth Directive:**<sup>27</sup> Groups of Companies. The object of this draft proposal is to create a legal structure for the unified management of a public limited liability company which is controlled by another enterprise, whether owned by an individual or a corporate entity. Such group could be formed by a "control contract" or by a "unilateral declaration of control". The directive would protect creditors of a company that is subordinate to a parent by introducing liability of the parent for the debts of its subsidiaries. At present, no formal proposal has been published by the Commission.
- j    Proposal for a Tenth Directive:**<sup>28</sup> Intra-Community Cross-Border Mergers. This proposal purports to remove difficulties in realising a cross-border merger between Member States and purports to avoid "forum-shopping", i.e., cross-border mergers in one Member State in order to avoid certain mandatory laws

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<sup>26</sup> Eighth Council Directive No. 84/253, 27 O.J. Eur. Comm. (No. L126) 20 (1984).

<sup>27</sup> A preliminary draft for a proposal was circulated informally to the Member States in December 1984.

<sup>28</sup> Proposal for a Tenth Council Directive, 28 O.J. Eur. Comm. (No. C23) 11 (1985), as amended.

in another Member State.<sup>29</sup> However, the principle obstacles for a true cross-border merger are in the taxation area, which is not covered by the proposed Tenth Directive.

- k The Eleventh Directive:**<sup>30</sup> Disclosure of Information by Branch Offices. This directive limits the information to be disclosed by branches of companies. It is intended to harmonise the disclosure requirements for branch offices in Member States. A branch only needs to disclose basic information, such as its name, address, and activities, as well as the name of its parent company. The directive permits a branch to submit consolidated annual accounts and annual reports rather than its own accounts, as long as they are prepared in accordance with the Fourth and Seventh Company Law Directives (see supra Chapter 1.3.d and g). If the parent company is registered outside the Community, the accounts must nonetheless be prepared in conformity with these directives or their equivalent. Netherlands' law is in conformity with this directive.
- l The Twelfth Directive:**<sup>31</sup> Single-Member Limited Liability Company. This directive ensures the legal recognition of single-member private limited liability companies throughout the Community. The directive applies both to companies whose shares have been held by one shareholder since their incorporation, and to companies whose shares have subsequently come to be held by a single shareholder. The single shareholder involved may be either a natural person or a legal entity. The directive is intended both to protect third parties dealing with such companies and to encourage sole proprietors to incorporate. Matters not regulated by the directive are governed by the company laws of individual Member States. Netherlands' law is in conformity with this directive.

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<sup>29</sup> The proposal provides, inter alia, for minimum requirements with respect to employee participation, provisions with respect to the supervision of mergers and publication requirements.

<sup>30</sup> Eleventh Council Directive No. 89/666, 32 O.J. Eur. Comm. (No. L395) 36 (1989). A preliminary draft for a revised proposal was circulated informally to the Member States in 1996.

<sup>31</sup> Twelfth Council Directive No. 89/667, 32 O.J. Eur. Comm. (No. L395) 40 (1989).

**m Proposal for a Thirteenth Directive.**<sup>32</sup> Takeover Bids. The latest draft of this proposal, dated 11 November 1997, aims to be a "framework directive" instead of a detailed harmonisation. It consists of certain basic principles of a limited number of general requirements which Member States must implement through more detailed rules. The directive would apply to corporations which are wholly or partly listed on an official stock exchange in the Community, but Member States may extend the applicability of this directive. Member States would be obliged to designate a supervisory authority which would be empowered to supervise the takeover rules. The general requirements focus on the protection of minority shareholders, the necessary degree of information and disclosures to shareholders and the role that the management board of the target should play during the offer. Many developments have occurred since the latest version of the directive. On 4 July 2001 the vote of the European Parliament resulted in a tie. Therefore, this directive, as proposed, was rejected.

**n Proposals for a Regulation and a Directive concerning the European Company.**<sup>33</sup> The regulation concerning a statute for a public limited liability European company ("Societas Europaea" or "SE") together with a complementary directive on the role of its employees was adopted on 20 December 2000. The Regulation intends to offer companies in the Community the opportunity to form a new corporate entity for cross-border co-operation. The original idea of a European company (SE) was to create a European company with its own set of European rules, to be as far as possible, independent from national legislation. However this was found to be too far fetched.

Therefore, in many respects, the SE will be governed by national legislation. It will be possible to transfer its seat from one Member State to

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<sup>32</sup> Proposal for a Thirteenth European Parliament and Council Directive, 32 O.J. Eur. Comm. (No. C64) 8 (1989); amended: 33 O.J. Eur. Comm. (No. C240) 7 (1990); 39 O.J. Eur. Comm. (No. C162) 5 (1996).

<sup>33</sup> Proposal for a Council Regulation on the Statute for a European Company, 32 O.J. Eur. Comm. (No. C263) 41 (1989), as amended: 34 O.J. Eur. Comm. (No. C176) 1 (1991); and proposal for a Council Directive complementing the Statute for a European Company with regard to the involvement of employees in the European Company, 32 O.J. Eur. Comm. (No. C263) 69 (1989), as amended: 34 O.J. Eur. Comm. (No. C138) 8 (1991).

another. The consultation rights of the employees will be regulated in a directive.

In order to meet the requirements of the different jurisdictions involved, Council Regulation provides for an option to choose for a one- tier or two-tier board system.

The purpose of the SE is to enable corporations established in various Member States to merge cross-border or to establish a cross border joint venture company. For that purpose, a SE may be established as a newly incorporated SE or an existing "naamloze vennootschap" may be converted into a SE. It is expected that both the Council Regulation and the Council Directive shall come into force on 8 October 2004. The Council Regulation has direct effect. Nevertheless, it requires all Member States to implement it by separate legislation.

**o The Regulation on the European Economic Interest Grouping.<sup>34</sup>**

The regulation on the European Economic Interest Grouping (EEIG) (Europees Economisch Samenwerkingsverband) took effect on July 1, 1989, and provides for a new separate legal person capable of cross-border co-operation in different Member States. An EEIG may be formed by two or more companies based in the Community, and is analogous to a joint venture in the way it is managed by its members. An EEIG is formed through the execution of a contract or notarial deed that is then registered in the Member State in which it maintains its head office. The EEIG's purpose must be to facilitate and develop its members' economic activities, rather than to pursue its own separate activities. The Dutch Parliament has adopted an implementing statute, which contains further rules for EEIGs to be formed in the Netherlands (see infra Chapter 2.5.c).

**p The Directive on the Notification of Major Holdings.<sup>35</sup>** This directive requires that a significant holding in a company listed on a stock exchange must

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<sup>34</sup> Council Regulation No. 2137/85, 28 O.J. Eur. Comm. (No. L199) 1 (1985).

be reported if certain specified thresholds of the voting rights of the outstanding shares are exceeded. In the event such shareholding falls below these levels, this must also be reported. Subsequently, the company or the competent authority will disclose the information to the public in each Member State where shares of the company are listed. This directive has been implemented in the Netherlands (see infra Chapter 1.4).

- q The Directive for the European Works Council.**<sup>36</sup> This Directive applies to companies or groups of companies in the Member States (which for the purpose of this directive is defined to exclude the United Kingdom but to include Norway, Iceland and Liechtenstein) with 1,000 or more employees of which 150 employees or more are employed in two different Member States. This directive encourages such company or group of companies to negotiate with the employees' representatives as to how its information and consultation obligations should be fulfilled. It allows for both a negotiated European Works Council as well as a negotiated procedure that fulfils these obligations. If negotiations fail, a mandatory European Works Council, with its powers listed on the annex to the directive, must be formed. These powers are rather limited compared with the powers of a Dutch Works Council, which remain unaffected upon the formation of a European Works Council whether negotiated or mandatory. The directive has been implemented in the Netherlands (see infra Chapter 13.3).

#### **1.4 Major Holdings Disclosure Act**

The Major Holdings Disclosure Act 1996 (the WMZ 1996) places an obligation on an actual or potential holder of a direct or indirect interest (in terms of shares or voting rights or both) in the capital of an N.V. to disclose its holding if it reaches certain thresholds. These thresholds are set at percentages of 5, 10, 25, 50 and 66<sup>2</sup>/<sub>3</sub>.<sup>37</sup>

<sup>35</sup> Council Directive No. 88/627, 31 O.J. Eur. Comm. (No. L348) 62 (1988).

<sup>36</sup> Council Directive No. 94/95, 37 O.J. Eur. Comm. (No. L254) 64 (1994).

<sup>37</sup> The percentages for investment corporations with a variable capital (BW art. 2:76a) are set at 25, 50 and 66 2/3.

The WMZ only applies to N.V.s incorporated under Netherlands law whose shares or depository receipts are officially listed on a securities exchange located and operating in a European Economic Area (EEA) Member State.

Each time one of the thresholds has been reached, the shareholder must forthwith notify the corporation concerned and the Netherlands Authority for the Financial Markets (the Authority-FM) (Autoriteit Financiële Markten). Upon receipt of any such notice, the Authority-FM must publish this message within nine days in a national newspaper in every EEA Member State in which the corporation is listed.<sup>38</sup>

The WMZ 1996 covers holdings in terms of voting rights attached to shares and capital interest (i.e., shares in respect of which the shareholder does not necessarily have any voting rights). It also covers voting rights which are vested in the pledgee or beneficiary of a life interest (vruchtgebruik) in shares when a right of pledge or life interest is created on the shares. The WMZ contains specific provisions for holdings in corporations by professional intermediaries (e.g., securities underwriting and securities lending) and in case of an initial public offering.

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<sup>38</sup>

WMZ 1996 art. 7.

## 2 SELECTION OF BUSINESS ORGANISATIONAL FORM

### 2.1 General

**a Foreign or Dutch Corporate Law.** Any individual, partnership or corporation, whether Dutch or foreign, resident or non-resident, can do business in the Netherlands without being required to adopt a particular legal form. However, a foreign legal entity may be required to comply with certain rules of Dutch company law if it qualifies as a Formal Foreign Entity, (see infra Chapter 2.2.a). The foreign owner must therefore first determine whether he wants the business in the Netherlands to be conducted through a corporation, a partnership, or a branch (filiaal) of the foreign unincorporated business. This raises the question whether as to the corporation or the partnership should be established under Netherlands' or foreign law.

**b Representative Office.** Many foreign business organisations are represented in the Netherlands by an agent. If that agent is operating from within that foreign organisation, it may keep its representative offices in the form of a Dutch branch of that foreign organisation (see infra Chapter 2.2) or adopt a Dutch corporate form, usually a B.V. corporation (see infra Chapter 3.2.a). The choice is highly dependent on the nature of the business, the agent's tax position, and the tax status that the foreign organisation is willing to accept in the Netherlands.

**c Legal Entities.** In order to qualify as a Dutch legal entity, a legal entity must be incorporated under the laws of the Netherlands (see infra Chapter 3.3) and must have its statutory seat in the Netherlands. It is not required to have its head office or any business in the Netherlands. This demonstrates that the Netherlands applies the incorporation principle, and not the real seat theory which prevails in certain other European countries.



The law<sup>1</sup> stipulates which private legal forms can claim legal personality, *i.e.*, can be called a "legal entity": Associations (Verenigingen), Co-operatives (Coöperaties), Mutual Insurance Associations (Onderlinge Waarborgmaatschappijen), Foundations (Stichtingen), Corporations (N.V.s and B.V.s) and EEIGs.<sup>2</sup> A Dutch legal entity has its domicile at its statutory seat, *i.e.*, the seat of the entity as provided for in its articles.<sup>3</sup> A legal entity comes into existence by a deed executed by a civil law notary. For an N.V. and B.V. a certificate of no-objection by the Minister of Justice (*see* Chapter 3.3)<sup>4</sup> is required as well. General and limited partnerships created under the laws of the Netherlands have no legal personality.<sup>5</sup> A legal entity is (in respect of the laws of property, contract, tort and succession) equivalent to a natural person, unless the law stipulates otherwise.<sup>6</sup> A legal entity formed under the laws of the Netherlands can have its principal place of business outside the Netherlands. Netherlands' law recognises the existence of foreign legal entities which are governed by foreign law.<sup>7</sup> In this book, certain aspects of legal entities have been described in the context of Netherlands' corporate law only.

## 2.2 Branch Office of a Foreign Corporation

**a General.** If a foreign individual or legal entity or its Dutch business has not adopted a Dutch legal form, the Dutch business will be treated as part of the foreign owner's assets and liabilities. These liabilities include all responsibilities and obligations of that business which may arise under Netherlands' law.

If the Dutch business is wholly owned by a non-resident foreign legal entity, it is considered a branch office (filiaal or nevenvestiging). In the event that a foreign

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<sup>1</sup> BW art. 2:3.

<sup>2</sup> Act of 28 June 1989, art. 3(1), 1989 S. 245.

<sup>3</sup> BW art. 1:10.

<sup>4</sup> BW art. 2:4(1).

<sup>5</sup> See infra Chapter 2.4.b.iv..

<sup>6</sup> BW art. 2:5.

<sup>7</sup> Wet conflictenrecht corporaties [GLCA] (Governing Law on Corporations Act) 1997 stb 699.

legal entity with capital divided into shares operates business in the Netherlands while this business has no real connection with the state under which laws it is incorporated, this entity qualifies as a Formal Foreign Entity as defined in the Pseudo Foreign Entity Act<sup>8</sup> (Wet op de formeel buitenlandse vennootschap).

If a foreign entity qualifies, managing directors must file with the Commercial Register:

- (a) an official copy of the deed of incorporation and the articles;
- (b) the registration details of the corporation at its domestic commercial register;
- (c) if the shares are held by one person or entity, information about this single shareholder;
- (d) a statement of a registered accountant (registeraccountant) that the equity of the corporation equals at least the mandatory minimum share capital for a Dutch B.V. corporation.

The qualifying foreign entity is under the same obligation as Dutch corporations with respect to orderly bookkeeping and has to comply with the mandatory provisions regarding the preparation and form of annual accounts and reports. The management board of the qualifying foreign corporation must prepare the annual accounts within five months following the end of a financial year, and shall file these accounts within 13 months following the financial year with the Commercial Register.

Certain provisions of this act do not apply to entities established within the European Economic Zone.

Managing directors of qualifying foreign entities may be held liable in the same way as Dutch managing directors in the event of bankruptcy, improper filings and publication of misleading financial figures (see infra Chapter 9.3.a). Branch managers of qualifying legal entities may be held equally liable as managing directors.

A business in the Netherlands can also be jointly owned by two or more corporations or individuals and be established under foreign law. These joint ventures frequently take the form of a general or limited partnership (see infra Chapter 2.4). The directors of the foreign legal entity and the persons in charge of the business operations in the Netherlands may be also liable for "apparent negligence" in the event of a bankruptcy

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<sup>8</sup> In force as per 1 Jan. 1998, 1997 S. 697 [PFEA].

in the Netherlands (see Chapter 9.2.d)<sup>9</sup> if the legal entity is subject to Dutch corporate income tax.

**b Power to Represent the Branch Office.** The power to represent a foreign corporation is subject to the laws of the country or state of incorporation. The Commercial Register Act 1996 and the implementing Commercial Register Decree 1996, however, requires the branch office of a foreign corporation, whether or not it qualifies as a Formal Foreign Entity under the Pseudo Foreign Entity Act to register with the Commercial Register (see infra Chapter 12). The information registered is binding upon the foreign corporation, even if the registered data is in conflict with the charter or by-laws of that foreign corporation or the laws under which that foreign corporation was formed. Third parties may therefore rely on the registration with the Commercial Register in all respects. The Commercial Register Act 1996 requires the designation of one or more persons who can legally represent and bind the corporation. It is prudent to be fully aware of the limitations on this authority.<sup>10</sup> Registration is often made by the branch manager. If he states that he has unlimited power to represent the branch, he may, as a practical matter, by operation of the Commercial Register Act 1996, have a much wider express authority than even the chief executive officer of the foreign corporation.

A branch office of a foreign corporation may enter into a wide variety of agreements, thereby binding the foreign corporation. Certain agreements will by their nature be governed by Netherlands' law. To the extent that enforcement of agreements that purport to be governed by foreign law is sought in the Netherlands, Dutch conflict of law rules apply.

**c Name.** A branch office may operate under the name of its head office, its owners, or almost any other name, provided that the name does not confuse the public or infringe the name<sup>11</sup> or trademark rights<sup>12</sup> of third parties (see infra Chapter 3.3.c.ii). Regardless of the name used in the Netherlands, third parties can ascertain

<sup>9</sup> GLCA art. 5 (2) ASSER-MAEIJER 2, III, supra p. 23 at note 6, § 334.

<sup>10</sup> For the applicable theory concerning agents and their authority, see infra Chapter 7.2.d.iv.

<sup>11</sup> Handelsnaamwet [Handelsnaamw.] (Tradename Act) arts. 5, 5a, 5b, 1921 S. 842, as amended.

the name and business of the foreign owner from the Commercial Register (see infra Chapter 12).

**d No Discrimination against Foreigners.** A foreign enterprise (corporation, EEIG, partnership or sole proprietorship) is treated on an equal basis with Dutch enterprises. Netherlands' law is essentially non-discriminatory towards foreigners, but there are exceptions with regard to the legal form by which the business must be conducted, as well as the formalities to be complied with, most notably as regards exchange controls, securities trading, banking and insurance, oil and gas and small retail trade. Residency or EU nationality requirements apply for the shipping,<sup>13</sup> aviation<sup>14</sup> and defence industries.

**e Mandatory Rules.** A business enterprise in the Netherlands, regardless of its legal form, must comply with certain requirements of Netherlands' law, including registration with the Commercial Register, establishment of a Works Council if it has 50 or more employees (see infra Chapter 13.1), the Merger Code if it is involved in takeovers or mergers,<sup>15</sup> and rules governing registration for various taxes.

## 2.3 Choice between Branch and Subsidiary

**a Legal Aspects.** Apart from tax aspects, which are generally decisive (see infra Chapter 2.3.b), the choice between setting up a branch office of a foreign legal entity or a subsidiary established under Netherlands' law involves a number of considerations. The financial background and reputation of the head office determine the creditworthiness of the branch. A subsidiary will, from a legal point of view, be judged on its own financial standing. A subsidiary possesses the attribute of limited

<sup>12</sup> Eenvormige Beneluxwet op de merken [BMW] (Uniform Benelux Trademark Law) art. 13, 1962 Trb. 58, as amended.

<sup>13</sup> Wetboek van Koophandel [WvK] (Commercial Code) art. 311, 1835 S. 44, as amended.

<sup>14</sup> Luchtvaartwet (Act on Aviation) art. 16, 1958 S. 47, as amended. The airline industry is organised on the basis of bilateral agreements pursuant to the 1944 Chicago Convention (1947 Trb. 165) and Council Regulation No. 2407/92 on licensing of air carriers 35 O.J. Eur. Comm. (No. C240) 1 (1992)).

<sup>15</sup> See infra Chapter 11.3.a.iii.

liability, thereby limiting the legal responsibility of the head office, i.e., the parent of this subsidiary. A branch, being a part of the foreign corporation, acts directly on behalf of the head office. To mitigate the liability of the head office for the debts of the branch, the head office may consider establishing a subsidiary in its country of residence which acts as a special purpose vehicle for its branch in the Netherlands. In that case, the liability will be limited to the amount of share capital of the special purpose vehicle.

Under Netherlands' law the management of a subsidiary in the Netherlands has its own responsibilities and is entitled to a certain degree of independence from the parent (see infra Chapter 8.2.a.i). The management of a branch is completely subject to the control of the head office. If a subsidiary is a Dutch corporation, it is subject to certain auditing and public filing requirements.

With the exception of registration with the Commercial Register and disclosure required by the Commercial Register Act (see infra Chapter 12.2), no Dutch auditing or publication requirements exist for branches except for those engaged in banking and insurance, provided they do not qualify under the Pseudo Foreign Entities Act (see supra Chapter 2.2.a).

In the absence of contractual restrictions, shares in a subsidiary company can be sold or otherwise disposed of by their owner. If the subsidiary is set up in the form of a B.V., the transfer of shares is at all times subject to a certain blocking restriction in the articles of association (see infra Chapter 5.4.c). However, if the subsidiary is wholly owned by one parent company, the practical effect is nil. A branch is not a legal entity separate from the head office, and can therefore be sold only by way of an asset transaction. Obviously, where a special purpose vehicle is used to establish the branch, the shares of this special purpose company can be sold in order to sell the branch.

A Dutch subsidiary gives a certain substance to the local presence. From a practical point of view it can be important to have the appearance of being Dutch, for instance, in regard to customer relations, marketing and labour relations.

Branches sometimes suffer from "red tape" requirements imposed by government agencies or contractual parties to prove their authority to enter into agreements or to make certain filings. On the other hand, branches have a fairly unrestricted legal structure. Netherlands' law regarding corporations is considerably more complex.

It takes very little time to establish a branch. As such a branch would operate a business enterprise it should be registered with the Commercial Register and the appropriate tax filings (VAT number etc.) must be made. The formation of a Dutch corporation, on the other hand, normally will usually take several weeks (see infra Chapter 3.3.b.iv).

Costs for setting up a branch are minimal. (For the costs of corporate formation, see infra Chapter 3.3.d.)

**b     Taxation.** Not only do the legal aspects mentioned above play a role in determining the form of the enterprise in the Netherlands, but there are also major tax implications involved in the decision. These are caused by the different tax treatment of the two business forms.

There is no difference in principle between the taxation of a branch or a subsidiary. Both are covered by the Corporate Income Tax Act. Both are also covered by the concept of sound business practice (see infra Chapter 14). There are, however, differences between the treatment given to the two business forms. Although both the branch and the subsidiary are presumed to be independent of the foreign business organisation, certain aspects of the presumed independence of the branch meet resistance from the tax authorities. Consequently, interest and royalties, and often other intercompany charges, such as management expenses, are not chargeable to a branch, based on the premise that these charges cannot be made to oneself. However, this is different if the head office itself has to pay interest or royalties. In such a case, the interest or royalties can be charged to the branch. There is a tendency in case law of the Dutch Supreme Court towards a more independent treatment of branches under the direct method of taxation by which the tax treatment comes closer to that of subsidiaries. For a subsidiary, these charges are possible, provided they are made on an arm's length basis. In cases where the direct method of taxation cannot be applied, a ruling may be granted that taxation be based on other methods, such as a percentage of sales.

A subsidiary is a Dutch resident taxpayer and as such is subject to tax on its worldwide income. A branch, being a permanent establishment of a non-resident taxpayer, is taxed only on certain specifically stated Dutch-source income. As a non-resident taxpayer, a branch is not entitled to the benefits a Dutch resident

subsidiary enjoys under Netherlands tax treaties, nor of those under the Decree for the Avoidance of Double Taxation,<sup>16</sup> which are available only to resident taxpayers.

The participation exemption<sup>17</sup> (see infra Chapter 14.2.c) applies to both a branch and a subsidiary. However, it is more difficult in the case of a branch to establish that the investments involved belong to the branch.

Benefits passed on by a head office to a subsidiary or by a subsidiary to a head office based on their relationship with shareholders are treated for tax purposes as informal capital and distributions, respectively. Informal capital contributions must be eliminated from the business profits of the subsidiary, whereas distributions must be added to its business profits. They will, however, attract capital contributions tax or dividend withholding tax. In the framework of a branch, any such non-arm's length benefits receive the same tax treatment, but will not attract capital contributions tax or dividend withholding tax, since the former is applicable only to corporations, and branch profits may be repatriated without any withholding tax. Under Netherlands' tax law no branch profits tax is levied, although some tax treaties concluded by the Netherlands allow a branch profits tax on profits distributed by the branch.

The fiscal unity<sup>18</sup> (see infra Chapter 14.2.e) is only available to a subsidiary established under Netherlands' law and resident in the Netherlands. The Dutch Supreme Court ruled that a corporation which is established under Netherlands' law but is resident outside the Netherlands, can be part of a fiscal unity. As a result of this case law the Deputy Minister of Finance issued a regulation<sup>19</sup> on the eligibility of corporations established under foreign law for fiscal unity treatment. Under this regulation foreign corporations which are resident in the Netherlands may be included in a fiscal unity (either as a parent or as a subsidiary) if they are sufficiently comparable to a Dutch limited liability corporation.

For an elaborate discussion on Netherlands tax law, see infra Chapter 14.

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<sup>16</sup> Besluit voorkoming dubbele belasting (Decree for the Avoidance of Double Taxation), 1989 S. 574, as amended.

<sup>17</sup> Wet op de vennootschapsbelasting [Vpb] (Corporate Income Tax Act), art. 15(a), 1969 S. 445, as amended.

<sup>18</sup> Vpb art. 15.

<sup>19</sup> 10 Aug. 1994.

## 2.4 General Partnership and Limited Partnership

**a Introduction.** For the establishment of a business venture under Netherlands' law (other than bank or insurance companies), the basic choices are a sole proprietorship (eenmanszaak), a general partnership (vennootschap onder firma), a limited partnership (commanditaire vennootschap), a European Economic Interest Grouping (Europees Economisch Samenwerkingsverband), or a corporation (vennootschap). A private partnership (maatschap) is used in order to exercise a profession rather than a commercial business and is often used by professionals such as lawyers, accountants, tax consultants and architects, although under Netherlands' law it can be the business form for all business enterprises. However, if the private partnership conducts business that is not the business of professionals but more business for profit, and conducts this business under a common business name, the rules of a general partnership apply by operation of law. The main characteristics of the general and limited partnership forms available under Netherlands' law are described below. A sole proprietorship is similar to a general partnership, except that there is only one owner, and consequently no need for a partnership agreement.

### **b General Partnership (Vennootschap onder Firma).**

**i General.** A general partnership established under Netherlands' law is based on an agreement between two or more partners, which may be individuals or legal entities. It is not a legal entity separate from its owners.

None of the partners need to be Dutch or resident in the Netherlands. A partnership can hold property,<sup>20</sup> sue and be sued, and contract in its own name. Third parties may hold the partners jointly and severally liable for the partnership's debts (see infra iv). The purpose of the partnership must be co-operation in order to make a profit. By law, the partners must contribute either cash, property, labour, or goodwill. A contribution of business relations with third parties or know-how is also acceptable.<sup>21</sup>

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<sup>20</sup> In the form of a joint ownership by the partners.

<sup>21</sup> C. ASSER, 5, V BIJZONDERE OVEREENKOMSTEN: MAATSCHAP, VENNOOTSCHAP ONDER FIRMA EN COMMANDITAIRE VENNOOTSCHAP [hereinafter ASSER-MAEIJER 5, V] § 37 (J.M.M. Maeijer, 6th ed. 1995), W.E.J. Tjeenk Willink (Zwolle).



ii Commercial Register. General partnerships must be registered with the Commercial Register.<sup>22</sup> The registration requires the disclosure of, *inter alia*, the names of the partners, their nationality and signatures, and a description of the partnership's business.<sup>23</sup>

iii Partnership Agreement. A written partnership agreement is recommended, although not mandatory.<sup>24</sup> It should cover the partnership's name, the partnership's purposes or objects, the authority of the partners to bind the partnership (the scope of authority is determined by the partners), the manner in which profits and losses are to be distributed among the partners, the capital contribution of each partner, the consequences of the resignation and expulsion of a partner, and the dissolution of the partnership.

The partnership will not necessarily be dissolved if one of the partners resigns. The remaining partners may continue the business and keep the assets if this is provided for in the partnership agreement. The agreement should be drafted with a view to its tax consequences (*see infra* vi).

iv Liability of the Partners. Details of the partnership's purposes and the authority of the individual partners to represent the partnership should be disclosed with the Commercial Register.<sup>25</sup> In the absence of proper registration, third parties may hold all partners jointly and severally liable for any action performed by any partner on behalf of the partnership, whether or not this action falls within the partnership's objects.<sup>26</sup> A proper entry in the Commercial Register ensures that the unlimited personal liability of each of the partners can only be invoked to the extent the liability is incurred by a partner acting within the scope of his authority as disclosed.<sup>27</sup>

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<sup>22</sup> WvK art. 23.

<sup>23</sup> HrW 1996 art. 8, Handelsregisterbesluit 1996 [HrB 1996] (Commercial Register Decree 1996) arts. 9(1), 12, 1997 s. 147.

<sup>24</sup> The existence of a general partnership may be demonstrated by all possible means. Judgment of 28 Nov. 1997, HR, 1998 NJ No. 167.

<sup>25</sup> HrW 1996, art. 8(1), HrB 1996, arts. 9(1), 12.

<sup>26</sup> WvK art. 29.

<sup>27</sup> WvK arts. 17,18; HrW 1996 art. 18.

As the equity of the partnership forms a joint ownership, creditors of the partnership may choose to recover their claims vis-à-vis the partnership either on the equity of the partnership or from the partners individually. Private creditors of the partners may not recover private debts on the equity of the partnership (see infra ix).

v Annual Accounts. The annual accounts of the partnership need not be disclosed to the public or filed with any register or agency. If a general partnership has only foreign partners which are foreign corporations with capital divided into shares, the general partnership<sup>28</sup> is subject to the Dutch rules concerning annual accounts and the annual report (see infra Chapter 7.1.b).

vi Tax Treatment of Profits and Losses. For tax purposes, the partnership's income flows through to the individual partners. It is treated as income of the partners in the manner set out in the partnership agreement and is reported on their individual income tax returns. Non-residents are subject to Netherlands' income tax only on certain sources of income, such as business income derived through a permanent establishment (see infra Chapter 14.2.g.ii). The profit share of a non-resident partner qualifies as Dutch taxable income.

vii Distribution of Profits and Losses. Profits can be distributed according to the partnership agreement. If the profits are retained, they must be included in the income statement submitted by each partner for tax assessment. Netherlands' law does not permit the establishment of a partnership in which a partner is liable for all losses or specific losses, without having a share in the profits.<sup>29</sup>

viii Capacity to Sue. Although it is not a separate legal entity separated from its owners, the partnership can sue or be sued.<sup>30</sup>

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<sup>28</sup> BW art. 2:360(2).

<sup>29</sup> ASSER-MAEIJER, 5, V, supra p. 45 at note 21, § 70.

<sup>30</sup> Wetboek van Burgerlijke Rechtsvordering [Rv] (Code on Civil Procedure) art. 4(4), 1828 S. 14, as amended; BW art. 7A:1682.

ix Position of Creditors. In the event of bankruptcy of the partnership, which will also imply the bankruptcy of partners, the claims of the business creditors of the partnership have priority over those of the creditors of the individual partners, with respect to the assets of the partnership.<sup>31</sup>

x Partnership Shares. The partnership agreement may provide for the transfer of partnership shares. Shares in the partnership may even be in the name of a bearer of a share certificate. The use of this legal device may, however, have far-reaching negative tax implications.

**c Limited Partnership (Commanditaire Vennootschap)**

i General. A limited partnership is similar to a general partnership, but has one or more limited partners, referred to in Dutch as "silent" partners (stille vennoten), whose liability is limited to the amount of their capital contributions.<sup>32</sup> A limited partnership is not a legal entity<sup>33</sup>.

ii The Managing Partners. A limited partnership has one or more managing partners whose liability is that of a general partner, i.e., unlimited. To avoid the adverse effects of unlimited liability, the managing partner may be a limited liability corporation, the shares of which may be held by the limited partners.

iii Management by Limited Partners. If a limited partner is involved in management (directly or by proxy) or if his name is disclosed, his liability will be unlimited (even if third parties know of his status as a limited partner).<sup>34</sup>

iv No Shares. A limited partnership by shares is no longer permitted.<sup>35</sup>

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<sup>31</sup> Judgment of 26 Nov. 1897, HR, W7074.

<sup>32</sup> WvK art. 20(3).

<sup>33</sup> The equity of the partnership forms a joint ownership.

<sup>34</sup> WvK art. 21.

<sup>35</sup> Statute of 28 May 1975, 1975 S. 277.

v Tax Treatment of Profits and Losses. For tax purposes, a limited partner is treated as a general partner (see supra Chapter 2.4.b.vi).

vi Annual Accounts. The strict rules for the auditing, format, adoption and publication of annual accounts and the annual report that apply to a corporation (see infra Chapter 7.1.b<sup>36</sup>) apply to limited partnerships only if all general partners liable for the partnerships' debts are foreign corporations with capital divided into shares.<sup>37</sup>

## 2.5 Other Legal Forms of Doing Business

### a The Association (Vereniging) and its Qualified Forms.

i General. An association in its general form is prohibited from having as its purpose the making of profits for distributions to its members.<sup>38</sup> For this reason, an association in its general form is not a desirable form for doing business. There are, however, sub-categories of the legal form of an association that may be used for specific business purposes and that can distribute profits to their members:<sup>39</sup> the co-operative and the mutual insurance association (see infra). For a conversion of any association to an N.V. or B.V., see infra Chapter 11.5. An association in its general form cannot own real property, and its managing directors are jointly and severally liable for the actions of the association if the articles of association (the articles) are not drawn up in notarial form, and do not comply with certain mandatory rules.<sup>40</sup> An association with articles drawn up before a civil law notary must register with the Chamber of Commerce (see infra Chapter 12).<sup>41</sup>

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<sup>36</sup> BW arts. 2:300, 2:360 (3).

<sup>37</sup> BW art. 2:360(2).

<sup>38</sup> BW art. 2:26(3).

<sup>39</sup> BW art. 2:53a.

<sup>40</sup> BW art. 2:30. The management board may register such association with the Commercial Register, with the effect that the board members will be liable for the debts of the association only to the extent that the third party may prove that the association will not be able to meet its obligations, BW art. 2:30(4).

<sup>41</sup> BW art. 2:29(1) and HrW 1996 art. 4 (1).

- ii The Co-operative (Coöperatie).<sup>42</sup> A co-operative is a popular organisational form for agricultural businesses. Several co-operatives in the Netherlands own considerable business operations. One of the largest banks, Rabobank, largely geared to the agricultural business, is a co-operative.
- iii The Mutual Insurance Association (Onderlinge Waarborgmaatschappij).<sup>43</sup> The legal form of a mutual insurance association (a mutual) is used only in the insurance industry, in which case the policy holders are the members of the association.
- iv Limitation of Liability. The co-operative and the mutual are basically subject to the same rules. The initials W.A., B.A. or U.A. are usually part of the name, and indicate the extent of the members' liability. U.A. stands for uitgesloten aansprakelijkheid, i.e., an absolute limitation of the liability of the members and former members for the actions by the co-operative or the mutual.<sup>44</sup> B.A. stands for beperkte aansprakelijkheid, i.e., the restricted liability of the members, as determined in the articles and disclosed at the Commercial Register. W.A. stands for wettelijke aansprakelijkheid, i.e., the personal liability of the members, each for an equal part.
- v Commercial Register. Both the co-operative and the mutual must file registrations with the Commercial Register similar to the registrations required for corporations (see infra Chapter 11).
- vi Executive Powers. The co-operative and the mutual must each have a management board, and may have a supervisory board.<sup>45</sup> If the co-operative or the mutual qualifies as "large" for more than three consecutive years, it must have a supervisory board.<sup>46</sup> The test for this qualification is similar to the test for a corporation to qualify as a "large" company (see infra Chapter 8.1.b.ii). Many

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<sup>42</sup> BW art. 2:53(1).

<sup>43</sup> BW art. 2:53(2).

<sup>44</sup> BW art. 2:56(1).

<sup>45</sup> BW art. 2:57.

<sup>46</sup> BW arts. 2:63f, 2:63c.

decisions of the management board of a "large" co-operative or mutual require prior approval by the supervisory board.<sup>47</sup> The duties of board members and the rules concerning the personal liability of managing directors of corporations (see infra Chapter 9) apply similarly to managing directors of co-operatives and mutuals, as do the rules concerning the powers of the managing directors of a corporation (see infra Chapter 8.2).<sup>48</sup>

vii Annual Accounts. Strict rules concerning auditing, the prescribed format, adoption and publication of annual accounts and the annual report, apply to co-operatives and mutuals (see infra Chapter 7.i.b).<sup>49</sup> Associations in their general form that conduct a business enterprise having a net turnover of at least € 7 million must also comply with these rules.<sup>50</sup>

**b The Foundation (Stichting).** A stichting<sup>51</sup> has certain similarities to a foundation in the United States. Unlike its US counterpart, however, a stichting is not necessarily limited to charitable purposes. To the extent that the legal concept of a trust is recognised under Netherlands' law, a stichting functions in much the same way as a common law trust. It has no members, and cannot make distributions to its managing directors or its founders. Any distributions to third parties must have a charitable or non-commercial purpose.<sup>52</sup> The purposes of a stichting can include commercial activities. For a conversion of a stichting to an N.V. or B.V., see infra Chapter 11.5. There are several stichtingen with large business enterprises. The legal form of a stichting is often used for the issuance of depository receipts by a corporation (see infra Chapter 5.5) and for the exercise of control by the management board over the shareholders by use of priority shares and preference shares (see infra

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<sup>47</sup> BW art. 2:63j.

<sup>48</sup> BW arts. 2:53a, 2:44, 2:45.

<sup>49</sup> BW art. 2:58.

<sup>50</sup> BW arts. 2:49 and 2:360(3). The minimum turnover threshold may be altered by Royal Decree to conform to EC legislation (BW art. 2:398(4)).

<sup>51</sup> BW art. 2:285(1).

<sup>52</sup> BW art. 2:285(3).

Chapter 5.1.c). A stichting can be formed only by a notarial deed.<sup>53</sup> It is a legal entity, separate from its founders or managing directors. It can own property, contract in its own name, and sue or be sued. The stichting must register with the Chamber of Commerce (see infra Chapter 12).<sup>54</sup> Foundations that conduct a business enterprise having a net turnover of at least € 7 million must comply with the strict rules for the auditing, format, adoption and publication of annual accounts and the annual report<sup>55</sup> that apply to corporations.

**c European Economic Interest Grouping.** The EC Regulation<sup>56</sup> concerning the creation of the European Economic Interest Grouping (EEIG, see supra Chapter 1.3.o) has been implemented into Netherlands' law by a separate statute.<sup>57</sup> However, many material aspects are still directly governed by this Regulation, and it should be noted that the interpretation of this Regulation and its implementation in Netherlands' law are subject to the jurisdiction of the Court of Justice of the European Communities. Nevertheless, each Member State has been given certain choices in its implementation of the Regulation, and consequently each country has its own EEIG. In the Netherlands, the EEIG (Europees Economisch Samenwerkingsverband, or EESV) is a legal entity, but in many other respects shows great similarity to the general partnership (see supra Chapter 2.4.b). The most notable differences are that:

- (a) the EEIG must serve the interests of its members (entrepreneurs or professionals, corporations or individuals) and not have corporate purposes of its own;
- (b) its members must be domiciled or resident in one of the Member States;
- (c) an EEIG must have at least two members from two or more different Member States;

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<sup>53</sup> BW art. 2:286(1).

<sup>54</sup> BW art. 2:289.

<sup>55</sup> BW arts. 2:300, 2:360(3).

<sup>56</sup> Council Regulation No. 2137/85, 28 O.J. Eur. Comm. (No. L199) 1 (1985).

<sup>57</sup> Statute of 28 June 1989, 1989 S. 245.

- (d) while the activities of the EEIG must be of support to its members, the EEIG itself should not be an independent profit centre. However, the making of profit by the EEIG in itself is not prohibited;
- (e) the EEIG cannot hold shares in the capital of its members;
- (f) it cannot have more than 500 employees;
- (g) membership is personal. The transfer by a member of its participation in the EEIG requires the approval of all other members;
- (h) the provisions concerning the liability of board members in case of bankruptcy (see infra Chapter 9.2.d) and the investigation into the affairs of the legal person (enquête, see infra Chapter 10.2.b.v) also apply to the EEIG;
- (i) the EEIG must have its annual accounts audited by an independent auditor;
- (j) the members of the EEIG shall compensate the EEIG in equal parts for the amount for which the losses exceed the profits (unless a different allocation of compensation has been agreed upon in the formation agreement).<sup>58</sup>

An EEIG is not considered an independent taxpayer. Like a general partnership, it serves for tax purposes as a transparent vehicle in which profits and losses are attributed to its members.

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<sup>58</sup>

EC Regulation (see 48) Act on EEIG art. 21(2).



### 3 TYPES OF CORPORATIONS; FORMATION; CORPORATE PURPOSE

#### 3.1 Introduction

**a General.** Any corporation incorporated under foreign law can validly carry on business in the Netherlands. From a Dutch legal perspective, however, foreign corporations continue to be governed by the corporate laws of the jurisdiction of their incorporation and this law will be recognised by Dutch courts, unless it conflicts under Netherlands' law with Dutch public order, even if the main centre of activities of the corporation (siège réel) is in the Netherlands rather than in the country or state of incorporation. An attempt by a foreign corporation to transfer the corporate seat to the Netherlands will not be recognised and a Dutch court may declare the corporation for Dutch legal existing purposes void or non-existent. However, in case of conflict, the situation shall be determined pursuant to the provisions of the GLCA. For a transfer of the seat of a Dutch corporation, see infra Chapter 11.7.

Most Netherlands' law concerning corporations is statutory law, contained in Book 2 of the Civil Code. Book 2 contains mandatory provisions, only to be deviated from in the articles if the relevant statutory provision expressly so provides. Netherlands' law recognises two different types of corporations: the N.V. (Naamloze Vennootschap) and the B.V. (Besloten Vennootschap). Both the N.V. and B.V. are separate legal entities, separate from their shareholders, with a capital divided into shares.<sup>59</sup> The N.V. and the B.V. can be used for the same business purposes, can own and transfer property, lend money, buy and sell securities, engage employees, contract and borrow in their own name, participate in other ventures and sue or be sued. Due to limitations on the transferability of its shares, the B.V. is a privately held or closed corporation, while unless the articles of association provide for a limitation on the transferability of its shares, which is optional for an N.V., the free transferability of N.V. shares makes the latter a public corporation (see infra Chapter 3.2).

**b The Concept of the Group (Concernrecht).** Netherlands' law recognises that corporations often do not operate on a stand-alone basis. A significant number of

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BW art. 2:64(1)/175(1).

business organisations consists of a holding company, several sub-holding companies and a considerable number of subsidiary companies. Larger groups may also have, within the group, a management company and a finance company. There is no standard pattern for any group structure. Any group has its own history, tax parameters, organisational requirements, production and service locations, sales outlets, financing arrangements, captive insurance plans, etc.

The diversity of these group arrangements created a need for legislative reform and clarification, especially with respect to such matters as annual accounts and disclosure requirements; the rules concerning "large" companies (see infra Chapter 8); and the requirements of the Works Councils Act.

Netherlands' law defines a "subsidiary" (dochtermaatschappij) as a legal entity in which a parent company (i) can exercise more than one-half of all eligible voting rights at a shareholders' meeting, or (ii) can appoint or remove more than one-half of the management or supervisory boards (assuming all votes are cast).<sup>60</sup> The parent company's rights may be derived from its majority as a shareholder or from a shareholders' agreement (see infra Chapter 7.4) and may be held either by the corporation alone or jointly with any of its other subsidiaries. A general or limited partnership in which one or more corporations or any of their subsidiaries is fully liable to creditors is deemed to be a "subsidiary" of such corporation. A corporation may also be a subsidiary of more than one shareholder. This situation may occur, inter alia, if one of its shareholders, pursuant to the articles or a shareholders' agreement, is entitled to appoint the majority of the managing directors and another shareholder is entitled to appoint the majority of the supervisory directors.<sup>61</sup>

Netherlands' law defines a "group" (groep) as an economic structure in which legal entities, partnerships, or both are united in one organisation (i.e. centralised management).<sup>62</sup> If a party has majority control over a company that qualifies as "centralised management", that other company will be a group company of the first party.<sup>63</sup> Equity interests are not conclusive evidence for the qualification of a company as a group company. A minority participation or a participation of 50 per cent. may

<sup>60</sup> BW art. 2:24a.

<sup>61</sup> ASSER-MAEIJER 2, III, supra p. 23 at note 6, § 610.

<sup>62</sup> BW art. 2:24b.

<sup>63</sup> ASSER-MAEIJER 2, III, supra p. 23 at note 6, § 608.

suffice, provided ancillary provisions granting decision-making powers exist.

Consequently, a company may be a group company in more than one group.

A "participation" (deelneming) exists when a legal entity or partnership, for its own account, either directly or through one or more subsidiaries, has an equity interest in another company, with the objective of having a long-term association with that other company for the furtherance of its own business purposes. Contributing one-fifth or more of the issued capital creates a rebuttable assumption of a "participation".<sup>64</sup> A company participates in a partnership if it or its subsidiary as a partner (i) is fully liable towards its creditors, or (ii) has as its objective a long-term association with that partnership for the furtherance of its own business purposes.

For the statutory definition of a "dependent company" (afhankelijke maatschappij), see infra Chapter 8.1.b.ii.

Netherlands' law has to some extent adopted a consistent theory concerning groups of affiliated companies. The reality of the group as a business concept has had an effect on the development of theories concerning the responsibility of a parent for the actions of its subsidiary and vis-à-vis the creditors of the subsidiary (see infra Chapter 3.5), the availability of subsidiary assets as collateral for loans made to the parent or to sister corporations (see infra Chapter 4.7), and the extent and nature of the instructions that a parent may give to the management board of a subsidiary (see infra Chapter 8.2.a.i).

### **c Investment Company with Variable Capital**

**(Beleggingsmaatschappij met veranderlijk kapitaal).** Investment companies, both open-end and closed-end, that meet the requirements stated below are exempt from certain strict rules concerning the capital of the corporation. These exemptions relate to the power of the management board to decide on the issuance of new shares and the pre-emptive rights of shareholders (see infra Chapter 4.4), the repurchase of shares (see infra Chapter 4.3.f), and the redemption of shares (see infra Chapter 4.6.b). Investment companies qualify for these exemptions only if they meet the following requirements:<sup>65</sup>

- (a) the investment company must be an N.V.;

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<sup>64</sup> BW art. 2:24c.

<sup>65</sup> BW art. 2:76a(1).

- (b) the investment company must have the exclusive purpose to invest its assets with spread risk, with the objective of sharing the benefits with its shareholders;
- (c) the articles must empower the management board to issue, acquire and dispose of shares in the capital of the investment company;
- (d) the shares, other than priority shares (see infra Chapter 5.1.c), will be quoted on a stock exchange;
- (e) the articles must state that the N.V. is an investment company with variable capital; and
- (f) the issued capital of the investment company in excess of the shares acquired and held by it must equal at least 10 per cent. of the authorised capital (see infra Chapter 4.1.a) stated in the articles.<sup>66</sup>

**d Corporate Formalities.** Netherlands' corporate law is complex and generally strict, while maintaining flexibility in certain areas. Great emphasis is placed on the articles (see infra Chapter 3.3.c), capitalisation and subscription (see infra Chapter 4), the annual accounts, disclosure requirements at the Commercial Register (see infra Chapter 12), and the representation of labour in management decisions (see infra Chapter 13). The management board must keep a record of all shareholders' resolutions available for inspection by shareholders and the holders of depository receipts<sup>67</sup> (see infra Chapter 5.5). Subject to any special requirements stated in the articles, resolutions of the management board or the supervisory board can be adopted in any manner, without any formalities being required. Shareholders' resolutions require special attention (see infra Chapter 7.2).

**e No By-laws.** A corporation is formed by the execution of a deed of incorporation, which contains the articles. By-laws of the type commonly drawn up in the United States are unknown in the Netherlands. The articles are considerably less detailed than most by-laws, but have a similar practical function. However, the articles can only be amended by a shareholders' resolution (see infra Chapter 11.2) after which a declaration of no objections is required from the Ministry of Justice. The

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<sup>66</sup> BW art. 2:98(8).

<sup>67</sup> BW art. 2:120(4)/230(4).

articles are effectively amended by the execution of a Dutch notarial deed, an official copy of which must be filed with the Commercial Register for public inspection (see infra Chapter 12). Internal rules governing the distribution of powers and the decision making process of the management board and the supervisory board may be adopted in the form of a regulation or manual (see infra Chapter 8.2.a.i).

### 3.2 Public and Private Corporations

**a Differences between an N.V. and a B.V.** Netherlands' law provides for two types of corporation, the 'Naamloze vennootschap' (N.V.) and the 'Besloten vennootschap met beperkte aansprakelijkheid' (B.V.). N.V. shares can be either in bearer form, which makes them freely negotiable, or in registered form.<sup>68</sup> The transfer of registered N.V. shares may (but need not) be restricted in any way; the shareholders are free to set forth transfer restrictions in the articles.<sup>69</sup> B.V. shares must be registered shares<sup>70</sup> and, as a general rule, cannot be freely transferred. Consequently, B.V. shares cannot be listed on the Amsterdam Stock Exchange. The articles of a B.V. must contain one of the transfer restrictions imposed by law (see infra Chapter 5.4.c.ii).<sup>71</sup> Share certificates can only be issued to N.V. shareholders; B.V. shareholders cannot obtain certificates evidencing title to their shares. Furthermore, a B.V. may, within specific statutory restrictions, give loans for the acquisition of its shares<sup>72</sup>, whereas an N.V., with the exception of loans for employees' shares, may not (see Chapter 4.3.g),<sup>73</sup> the amount of treasury shares permitted is limited to 50 per cent. for the B.V.<sup>74</sup> as opposed to 10 per cent. for the N.V. (see infra Chapter 4.3.f),<sup>75</sup> and the respective mandatory minimum capital requirements differ<sup>76</sup>

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<sup>68</sup> BW art. 2:82(1).

<sup>69</sup> BW art. 2:87(1).

<sup>70</sup> BW art. 2:194(1).

<sup>71</sup> BW art. 2:195(2).

<sup>72</sup> BW art. 2:207c(2).

<sup>73</sup> BW art. 2:98c(1).

<sup>74</sup> BW art. 2:207(2)(b).

(currently € 18,000 for a B.V.<sup>77</sup> and € 45,000 for an N.V.).<sup>78</sup> There are other differences, but these are usually of minor significance for business matters. Both the B.V. and the N.V. can be a statutory "large" company (see infra Chapter 8.1.b). Many substantial corporations in the Netherlands have adopted the B.V. form (in contrast to the situation in certain other Member States, such as the United Kingdom, where the closed corporation form is available only to the small or medium-sized corporation). The specific audit and disclosure requirements are almost identical for N.V.s and B.V.s., irrespective of whether they are "large" companies.

**b      Modification of Corporate Form.** An N.V. may convert to a B.V.<sup>79</sup> and a B.V. may convert to an N.V.<sup>80</sup> This conversion of form does not affect the corporation's existence or identity (which would have disastrous tax consequences).<sup>81</sup> A decision by the shareholders to convert the corporate form is executed in the same way as other amendments to the articles (see infra Chapter 11.2).<sup>82</sup> Additional requirements relate to the equity of the corporation<sup>83</sup>. An auditor must declare that at a certain moment in a period less than five months prior to the conversion, the equity of the corporation was equal to at least the issued and paid-up capital of the corporation as stated in the notarial deed of conversion. For the conversion of an association, a co-operative, a mutual insurance association and a stichting to an N.V. or B.V. and vice versa (see infra Chapter 11.5).

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<sup>75</sup> BW art. 2:98(2)9b).

<sup>76</sup> Different rules apply to investment companies with variable capital (see supra Chapter 3.1.c).

<sup>77</sup> BW art. 2:178(2).

<sup>78</sup> BW art. 2:67(2).

<sup>79</sup> BW arts. 2:18, 2:183(1).

<sup>80</sup> BW arts. 2:18, 2:72(1).

<sup>81</sup> BW art. 2:18(8).

<sup>82</sup> BW art. 2:18(2).

<sup>83</sup> BW art. 2:163.

### 3.3 Formation

**a General.** The formation of a Dutch corporation is subject to a number of formalities and can be relatively time-consuming. The corporation can only be formed upon receipt of official clearance by the Ministry, known as a certificate of no objection (verklaring van geen bezwaar). The corporation can then be formed either by an individual acting in his own capacity, on behalf of a legal entity, or on the strength of a power of attorney<sup>84</sup>. One or more parties, known as the founders, must appear before a Dutch civil law notary, or be represented pursuant to a power of attorney and confirm their desire to form the corporation with articles as read to them, in full or in summary form.

The initial management board is appointed in the deed of incorporation.<sup>85</sup> Each of its members is in addition to the corporation jointly and severally liable for each transaction for which the corporation is bound until the moment that the corporation has made the application for registration with the Commercial Register and the minimum capitalisation requirements have been met.<sup>86</sup>

#### **b Incorporation.**

**i The Deed of Incorporation.** A corporation comes into existence upon the execution before a Dutch civil law notary of the deed of incorporation (akte van oprichting), which contains three parts. In the first part, each of the parties is identified and they declare their desire to incorporate a corporation. The second part states the articles (statuten). In the third part the parties confirm their participation for a certain number of shares, stating how those shares are or will be paid up and appointing the initial managing directors and the members of the supervisory board, if applicable.<sup>87</sup> The articles are subject to and must be consistent with the law.<sup>88</sup> The deed of incorporation cannot be executed prior to the receipt of a certificate of no

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<sup>84</sup> BW arts. 2:4(1), 2:64(2)/175(2).

<sup>85</sup> BW art. 2:132/242.

<sup>86</sup> BW art. 2:69(2)/180(2).

<sup>87</sup> BW art. 2:66(1)/177(1).

<sup>88</sup> BW art. 2:68(2)/179(2).

objection from the Ministry of Justice (see iv). By-laws of the US type are unknown. A filing with the Commercial Register must be made within eight days after its incorporation. This filing is not in any way a prerequisite for the incorporation or completion of existence.

ii Procedure. The draft deed of incorporation is prepared by a Dutch civil law notary or an attorney who specialises in corporate matters. The civil law notary or attorney submits the final draft to the Ministry of Justice, and arranges for payment of the filing fees.<sup>89</sup> The notarial deed must be in the Dutch language.<sup>90</sup> The civil law notary is required by law to retain the original of the deed. Certified copies may be issued to the founders and the management board.<sup>91</sup>

iii The Founders. The deed of incorporation must be signed by the civil law notary and by the founders or their duly authorised representatives. Both corporations and individuals may be founders. Each founder must subscribe to part of the capital.<sup>92</sup> The aggregate contribution to the issued capital is required by law to be at least one-fifth of the authorised capital (see infra Chapter 4.1.b).<sup>93</sup> Issued capital is the sum of the nominal value of all shares issued, commonly referred to in US corporate law as "stated capital".<sup>94</sup> The authorised capital is the maximum capital as stated in the

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<sup>89</sup> BW art. 2:68(1)/179(1).

<sup>90</sup> BW art. 2:65/176.

<sup>91</sup> Wet op het Notarisambt (Act on the Notarial Profession) art. 42, 1842 S. 20, as amended.

<sup>92</sup> BW art. 2:64(2)/175(2), as amended on 1 Sept. 2001. The text of this provision may lead to the conclusion that it is no longer necessary for every party to the incorporation to subscribe for part of the capital. This however, is disputed by various legal authors, who are of the opinion that this should be regarded as 'a slip of the pen' of the legislator.

<sup>93</sup> BW art. 2:67(4)/178(4). Different rules apply to investment companies with variable capital (see supra Chapter 3.1.c).

<sup>94</sup> Please note that the stated capital under US State law may be calculated as the shares issued and outstanding, which shares have been paid in full. Under Netherlands' law, the shares may under certain circumstances (see infra Chapter 4.1.b) be partly paid up and treasury stock will still remain to be considered as "outstanding".



articles of association up to which shares may be issued without an amendment of the articles being required. Any issue of shares in excess of the authorised capital is null and void.

All of the shares may be held by a single individual or corporation.<sup>95</sup> For the disclosure and recording requirements of a company with a single shareholder, see infra Chapter 5.2.c. The founders may be of any nationality and may be domiciled anywhere.

A founder can be represented only by a written power of attorney,<sup>96</sup> which must conform to the requirements of the law applicable to the founder. A power of attorney by telefax is acceptable to most civil law notaries. Once incorporated, the corporation does not automatically cease to exist should the power turn out to be invalid. The courts may, however, dissolve such a corporation (see infra Chapter 11.6.b.ii).<sup>97</sup>

iv The Certificate of No Objection. Before issuing the certificate, the Ministry investigates, on the basis of criminal, bankruptcy or other records, whether there is reason to fear abuse of the corporate form.

The certificate can be refused only on the following grounds: if there is a danger, in light of the intentions or prior records of those who will determine or take part in the determination of the corporate policy, that the corporation will be used for unlawful activities or that creditors will be prejudiced by its activities, if not at least one-fifth of the corporation's authorised share capital will be subscribed for at the incorporation (see infra Chapter 4.1.b)<sup>98</sup>; or that the filing fee due to the Ministry of Justice has not been paid.<sup>99</sup> Refusal to issue a certificate of no objection can be appealed to the Court of Appeal from Decisions of the SER, Product and Trade Boards (College van Beroep voor het bedrijfsleven).<sup>100</sup>

The notary or attorney must also submit to the Ministry of Justice details regarding the identity of the founders, the names of the first members of the

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<sup>95</sup> BW art. 2:64(2)/175(2).

<sup>96</sup> BW art. 2:65/176.

<sup>97</sup> BW arts. 2:4(2), 2:21(1)(a).

<sup>98</sup> This minimum ratio will remain applicable also after the incorporation.

<sup>99</sup> BW art. 2:68(2)/179(2).

<sup>100</sup> BW art. 2:174a/284a.

management board and, where applicable, the supervisory board; for foreign corporate shareholders, recent annual accounts; for foreign individuals, a letter from any bank stating that the individual is known to the bank and regularly meets his obligations; and, if the corporation is to engage in banking or the insurance business, certain certificates from The Netherlands Bank or the institution which supervises the insurance business, the Insurance Chamber (Verzekeringkamer). Furthermore, the ultimate foreign shareholders of the corporation must submit a letter of intent stating that they have no intention to transfer the shares in the newly formed corporation or to change the initial management of the corporation within one year after its incorporation. This procedure may be time-consuming. However, under certain circumstances when the need of an expedited incorporation is demonstrated to the Ministry of Justice, it may, at its sole discretion, grant the certificate on an expedited basis. Any subsequent changes to the articles require a new notarial deed and a new certificate of no objection from the Ministry of Justice (see infra Chapter 11.2). The certificate of no objection does not immunise the articles from subsequent objections concerning their legality. The certificate of no objection remains valid for a period of three months.

v Personal Liability of Managing Directors. The management board, or the civil law notary on its behalf, must register the corporation's data and deposit a certified copy of the deed of incorporation and, depending on the nature of the contribution on the shares in cash or in kind, respectively, a certified copy of the bank statement or the auditors' statement (depending on the contribution on the shares, respectively, in cash and in kind) with the Commercial Register of the Chamber of Commerce (see infra Chapter 12).<sup>101</sup> The management board must also ensure that, at the date of incorporation, at least 25 per cent. of the nominal value per issued share is paid up, and that the total nominal value paid up equals at least € 45,000 (for an N.V.), or € 18,000 (for a B.V.) (see infra Chapter 4.3.c). Until both of these mandatory requirements are complied with, the managing directors are jointly and severally liable for the transaction by which the corporation is bound, in addition to the corporation's liability for such obligations<sup>102</sup> (see also infra Chapter 9.3.c).

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<sup>101</sup> BW art. 2:69(1)/180(1).

<sup>102</sup> BW art. 2:69(2)/180(2).

vi Defective Incorporation. A corporation that was formed without complying with all the formalities stated under v above, was otherwise not formed in conformity with the law or has articles that violate the requirements of the law is subject to an action by the public prosecutor or other interested party to have it dissolved by the court.<sup>103</sup> The court will allow for an action by the founders to redress the defects.<sup>104</sup>

However, when business is conducted in the name of a corporation whose deed of incorporation was not signed by a Dutch civil law notary, or if the certificate of no objection was not obtained from the Ministry of Justice, or was no longer valid, then it is found that the corporation never came into existence.<sup>105</sup> In this case, the estate is liable for all of its obligations, jointly and severally with its present managing directors or those who were acting as such, absent of which the persons who created these obligations in the name of the corporation are liable.<sup>106</sup> This de facto corporation<sup>107</sup> should be clearly distinguished from the corporation "to be formed" (see *infra* Chapter 3.4.b).

Netherlands' law does not recognise the concept of corporations by estoppel as such exist in the United States.

**c Articles of Association.**

i General Introduction. The rules governing a corporation's conduct are set forth in the law and in the articles. Netherlands' corporate law does not recognise or require by-laws, separate and distinct from the articles.

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<sup>103</sup> BW art. 2:21(1).

<sup>104</sup> BW art. 2:21(2).

<sup>105</sup> BW art. 2:4(1).

<sup>106</sup> BW art. 2:4(3),(4).

<sup>107</sup> Dutch courts will not recognise a de facto corporation.

The articles must not be in conflict with mandatory provisions of the law.<sup>108</sup>  
The law requires that the following subjects be dealt with in the articles:<sup>109</sup>

- (a) the name of the corporation (see infra ii);
- (b) the official seat (see infra iii);
- (c) the objects of the corporation (see infra iv);
- (d) the authorised share capital specified by type of shares (the issued share capital must be stated in the deed of incorporation (see supra Chapter 3.3.b.i, but it is not part of the articles); and
- (e) a provision for the event that a member of the management board fails in or is prevented from performing his duties.

In order to give management, shareholders and others a more complete and balanced picture of the corporation's structure, practice has demonstrated the value of stating in the articles various additional legal provisions that apply mandatorily to the corporation.

ii The Name. The name must contain an indication of the corporate form, either the abbreviation "N.V."<sup>110</sup> or "B.V."<sup>111</sup>. It cannot contain any such indication in a foreign language.

Any name is acceptable as long as it is not too general or too vague (city names are, for example, prohibited), does not imply that the corporation has powers or purposes that it does not have, is not confusing or deceptive to the public, and does not violate the trade name or trademark rights of others.<sup>112</sup> A name search is usually conducted with the assistance of the Commercial Register and, sometimes, the Benelux Trademark Office. Their opinions are generally sufficient for this purpose, but do not give full protection against claims for trade name or trademark infringement. Names referring to a certain business activity may only be used if the

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<sup>108</sup> BW art. 2:21(1)(b).

<sup>109</sup> BW arts. 2:66(1)/177(1), 2:67(1)/178(1) and 2:134(4)/244(4).

<sup>110</sup> BW art. 2:66(2).

<sup>111</sup> BW art. 2:177(2).

<sup>112</sup> Handelsnaamw. arts. 5, 5a, 5b; BMW art. 13.

corporation is actually engaged in that business; the words "bank"<sup>113</sup> or "insurance company" can be used only if the corporation meets the statutory requirements applicable to banks or insurance companies. An investment company with variable capital (see supra Chapter 3.1.c) must refer to this status whenever its name is used.<sup>114</sup>

The full name (including the N.V. or B.V. abbreviation), the official seat and the registration number must appear on the corporation's stationery and on all other papers (except telexes, telegrams and advertising announcements) emanating from the corporation (see infra Chapter 12.1.c).<sup>115</sup>

If the business is carried out under a trade name which is different from the corporate name, the trade name must also be filed with the Commercial Register.<sup>116</sup>

iii The Seat. The official or statutory seat is normally the principal office of the corporation. It can be in any municipality in the Netherlands.<sup>117</sup> The official seat must be stated in the articles. Frequently, it will be the municipality in which the corporation's principal office is situated, but this need not be so.

Under the Commercial Register Act 1996, providing for one national registration only, a corporation must register with the Commercial Register at the district in the Netherlands in which it has its principal place of business or in the event that it has no business in the Netherlands at its official seat.<sup>118</sup>

Netherlands' law does not recognise the concept of a registered office or registered agent. A corporation can be sued by the serving of process on a member of its management board or on its head office.<sup>119</sup> In order to establish the seat of the competent court with regard to claims against the corporation the determination factor

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<sup>113</sup> Wet Toezicht Kredietwezen 1992 [WTK] (Act on the Supervision of the Credit System) art. 83(1), 1992 S. 722, as amended.

<sup>114</sup> BW art. 2:76a(2).

<sup>115</sup> BW art. 2:75(1)/186(1); HrW 1996, art. 25(1).

<sup>116</sup> HrW 1996 art. 8(1); HrB 1996 art. 9(1).

<sup>117</sup> BW art. 2:66(3)/177(3).

<sup>118</sup> BW art. 2:66(1),(3); HrW 1996 art. 6(1).

<sup>119</sup> Rv art. 4(3).

is the location of the corporate domicile.<sup>120</sup> For a transfer of the seat, see infra Chapter 11.7.

iv The Corporate Purposes or Objects. The objects may consist of a short general description of the corporation's major activities. The purposes clause can be changed only by an amendment to the articles. It can be very general, normally specifying the principal business or activity of the corporation, coupled with such language as "and to engage in any other similar business". Investment companies with variable capital (see supra Chapter 3.1.c), must include in the purposes clause a reference to defined activities.<sup>121</sup> The corporate purposes provision can limit the power of the corporation. Unless the articles state otherwise, a corporation has the power to engage in any lawful business, to own property, to buy or sell securities, to lend money, to enter into contracts, to sue, to borrow money, to issue notes or bonds, to grant mortgages on its property as security, to fix the compensation of employees and managing directors, to participate in ventures as a partner or a manager, to own shares in another corporation, and to act as a founder of another Dutch or foreign corporation. While it may be argued that in theory the powers of a corporation cannot extend beyond promoting its own individual interests,<sup>122</sup> it is nevertheless useful for subsidiaries to include in their purposes clauses a statement that the interests of the corporation include the interests of the parent and other corporations of the group and that its assets can serve as collateral on behalf of other corporations of the group<sup>123</sup>. As part of the articles, the purposes provision is available for public inspection. If the corporation acts in a way that exceeds the scope of its express or inherent powers the doctrine of ultra vires (see infra Chapter 3.5) may operate to nullify the transaction, within three years, if it can be shown that the other party knew, or was supposed to know, on the basis of prima facie information, that the transaction was beyond the scope of the corporation's

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<sup>120</sup> BW art. 1:10. It will be this district court which will be authorised to decide in procedures regarding corporate matters. Inquiry procedures are solely conducted by the Enterprise Chambers of the Amsterdam Court of Appeal (see infra Chapter 10.2.b).

<sup>121</sup> BW art. 2:76a(1)(d).

<sup>122</sup> For a different view, see supra Chapter 3.1.b.

<sup>123</sup> See Chapter 3.5.

purposes.<sup>124</sup> These other parties to the transaction cannot, however, invoke this doctrine, even if they can prove that the corporation knew that the act exceeded its purposes. Therefore, they are bound by the transaction whether or not it is within the scope of the corporation's purposes. Managing directors who act beyond the corporation's purposes may be personally liable for damages incurred by the corporation.<sup>125</sup>

v **Infinite Term.** The articles may not contain any limitations on the duration of a corporation's existence<sup>126</sup> i.e., a corporation is incorporated for an indefinite period of time.

d **Costs of Formation.** The costs of corporate formation include a filing fee of € 90.76, due to the Ministry of Justice upon submission of all documents; a fee not exceeding € 80 to the Chamber of Commerce for a name search on possible trade name infringement; and a fee of several hundred Euros to a trade mark agency for a name search on possible trademark infringements.

The fees for consultants such as notaries, attorneys, tax specialists, and auditors reflect the work involved.

The annual levy of the Commercial Register (see infra Chapter 12.4) is calculated on the basis of a schedule that takes into account such variables as equity and loans made to the corporation.

The capital contribution tax is 0.55 per cent. of the higher of the value either of the net capital contribution or of the paid-up portion of the nominal value of the issued shares. The capital tax must be paid within one month after incorporation.<sup>127</sup> In the event of a merger, takeover or internal reorganisation, subsequent capital tax reductions and exemptions can be obtained (see infra Chapter 14.4).

### 3.4 Pre-Incorporation Transactions

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<sup>124</sup> BW art. 2:7. This provision does not impose a duty to make inquiries.

<sup>125</sup> BW art. 2:9.

<sup>126</sup> BW art. 2:17.

<sup>127</sup> Wet op belastingen van rechtsverkeer [BRV] (Tax Act on Legal Transactions) arts. 35, 36, 38, 39, 1970 S. 611, as amended.

**a General.** The initial steps in forming a corporation are undertaken by a corporation or an individual who arranges the necessary funding for the new corporation, recruits the management, and outlines the corporate structure. This individual is not always the founder. Certain individuals may wish to enter into business transactions for the account of the new corporation prior to its inception, assign existing business to the new corporation, or encumber the new corporation with certain commitments made prior to the date of incorporation.

**b The Corporation To Be Formed.** Netherlands' law recognises the concept of actions on behalf of a corporation prior to its formation. Consequently, any person or entity can act on behalf of the corporation to be formed and, in such capacity, can enter into contracts.<sup>128</sup> There are, however, significant limitations.

All transactions must be ratified,<sup>129</sup> expressly or implicitly, by the corporation after its incorporation, i.e., by the management board, in order to construe that the rights and obligations arising from such a transaction will actually be conferred upon the corporation. Ratification of a contract that is detrimental to the corporation can constitute an act of mismanagement (see infra Chapter 9.2). Until ratification occurs, the persons acting on behalf of the corporation "to be formed" are personally bound and liable unless otherwise expressly stipulated.<sup>130</sup> Upon ratification, the corporation is bound, with retroactive effect until the incorporation. If the corporation then cannot honour the contract, and the persons who acted on behalf of the corporation to be incorporated knew or could reasonably be expected to have known of the corporation's future inability to perform, they will be personally liable for damages suffered by the third party as a result thereof. Bankruptcy within one year after the date of incorporation creates a rebuttable statutory presumption of this knowledge of the person who acted on behalf of the corporation when it was in formation (see infra Chapter 9.2.d).<sup>131</sup> However, a third party may, under certain circumstances, also hold the management board liable on the basis of tort in the event that the management

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<sup>128</sup> BW art. 2:93(1)/203(1).

<sup>129</sup> BW art. 2:93(1)/203(1).

<sup>130</sup> BW art. 2:93(2)/203(2).

<sup>131</sup> BW art. 2:93(3)/203(3).



board when ratifying the transaction knew, or reasonably could have known that the corporation would not honor its obligations arising from the transaction so ratified.<sup>132</sup> In the event that the corporation would go bankrupt, the management board may be held liable for the deficit of the bankrupt estate (see infra Chapter 9.2.d).<sup>133</sup> Internally, the members of the management board may be held liable on the basis of the principle of proper care (see infra Chapter 10.2.b.i.)<sup>134</sup> for damages incurred to the corporation. If the contract is not ratified, it is not enforceable against the corporation. If a transaction with a corporation to be formed entails the transfer of title to property prior to incorporation, the title may only legally be deemed to accrue to the parties acting on behalf of such corporation if this is specifically stated in the deed of transfer. If not, the title to the property remains with the transferor until the ratification. Upon ratification, the title will transfer to the newly formed corporation by operation of law without any additional taxes being incurred. These rules regarding actions on behalf of the corporation in formation do not apply to the following actions by the founders, provided these actions will be incorporated in the deed of incorporation: (a) the issue of shares; (b) the acceptance of contributions to those shares; (c) the appointment of managing and supervisory directors; and (d) potentially onerous transactions as listed in Chapter 3.4.c below.<sup>135</sup> In these cases the incorporator(s) will bind the corporation directly in the deed of incorporation. For potential liabilities with respect to these actions, see supra Chapter 3.4.d. In order to work with the concept of actions on behalf of a corporation to be formed, there must be made some first steps for incorporation. This is necessary in order to establish the identity of the corporation to be formed and the corporation that has actually been formed. If no such identity exists, the formed corporation cannot ratify the transactions which were entered into on its behalf prior to its incorporation.<sup>136</sup> In order to establish this identity, as a minimum, the name of the corporation to be

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<sup>132</sup> Judgment of 28 Mar. 1997, NJ 1997, No. 582.

<sup>133</sup> BW art. 2:138/248.

<sup>134</sup> BW art. 2:138/248.

<sup>135</sup> BW art. 2:94/204.

<sup>136</sup> Judgment of 8 July HR, 1993 NJ No. 116.

formed, the persons or entities involved and the proposed capital (in view of the transaction) should be established.

In the event that prior to its formation an enterprise is started on behalf of the corporation to be formed, such enterprise must be registered with the Commercial Register.

To avoid confusion about the actual existence of the corporation or the intention to contract on behalf of the corporation to be formed, it is customary to indicate that the corporation is in the course of formation by adding the abbreviation "i.o." (in oprichting) after the name of the corporation.

**c Potentially Onerous Agreements.** In order to be relieved from personal liability, as far as possible, the founders or other parties acting on behalf of the corporation "to be formed" may wish to ensure that the corporation will honour certain obligations from its inception, without any need for ratification by the management board. A mere agreement to this effect with the other founders or parties acting on behalf of the corporation "to be formed" will not suffice. This result can only be achieved by setting forth the obligations in the deed of incorporation or by reference to the obligations in an attachment to the deed of incorporation. This is, however, limited under Netherlands' law to the following types of transactions:<sup>137</sup>

- (a) subscriptions for shares that impose special obligations on the corporation;
- (b) acquisitions of shares on conditions other than those available to the general public (applies to N.V.s only);
- (c) transactions that confer a benefit on a founder or third party incorporator; and
- (d) capital contributions other than in cash.

After incorporation, these types of transaction may be entered into only with the prior approval of the shareholders, except if and to the extent that the management board is so expressly authorised in the articles.<sup>138</sup> If the articles of association do not provide for this authorisation of the management board or no approval has been given

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<sup>137</sup> BW art. 2:94(1)/204(1).

<sup>138</sup> BW art. 2:94(2)/204(2).

by the shareholders, the corporation will not be bound to this transaction.<sup>139</sup> The notes to the annual accounts for the year in which any such transaction is entered into must be disclosed in this transaction.<sup>140</sup>

**d Liability of the Founders.** A founder may incur liability<sup>141</sup> if he does not exercise sufficient care in placing the initial shares, accepting contributions to the shares, or appointing the initial management board (and supervisory board, if there is one), or by entering into any of the types of transaction set forth in Chapter 3.4.c above. This cause of action is similar to a mismanagement claim (*see infra* Chapter 9.2.b and d).

**e Organisational Expenses.** The corporation is responsible for the payment of all reasonable expenses relating to its formation. The total amount of these expenses, or an estimate thereof, must be disclosed in the Commercial Register.<sup>142</sup>

### 3.5 Ultra Vires

This doctrine focuses on the purposes or objects clause in the articles (*see supra* Chapter 3.3.c.iv). The purposes of a corporation can merely give guidance to the interpretation of the interest that a corporation may have in a certain transaction.<sup>143</sup> If a corporation acts in gross violation of its own interests, it may be acting ultra vires. Courts will interfere only when the challenged action could not possibly be in the "interests of the corporation". The interests of a subsidiary prevail over the interests of its parent (*see also infra* Chapter 9.2.b.i). Consequently, a subsidiary may act ultra vires by providing collateral for a third party loan to its parent corporation, thereby incurring a serious risk to its own future financial security (*see also infra*

<sup>139</sup> ASSER-MAEIJER 2, III, *supra* p. 23 at note 6, § 100 for the opinion that even without this approval, the corporation may nevertheless be bound to the transaction involved.

<sup>140</sup> BW art. 2:378(3).

<sup>141</sup> BW arts. 2:93(4)/203(4), 2:9, 2:138.

<sup>142</sup> BW art. 2:69(1)/180(1).

<sup>143</sup> Judgment of 7 Febr. 1992, HR, 1992 NJ No. 438; Judgment of 16 Oct. 1992, HR, 1993 NJ No. 98.

Chapter 4.7). A corporation may only void a transaction that could not conceivably be within the scope of its purposes, when the other party knew the corporate purposes and should have known that this transaction was ultra vires. The other party is not required to make inquiries.<sup>144</sup> The mere availability at the Commercial Register of the articles containing the purposes provision does not create a presumption of the requisite knowledge. The other party cannot invoke the nullity, but can require the corporation to decide within a reasonable period of time whether or not it intends to proceed with the transaction.<sup>145</sup>

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<sup>144</sup> BW art. 2:7.

<sup>145</sup> BW art. 3:55(2).

## 4 CORPORATE FINANCE; FUNDING

### 4.1 Equity and Debt

**a General.** Although for corporate finance and accounting purposes a conceptual delineation is made between equity and debt, progressively this distinction has blurred in practice. Certain financing and tax schemes have spurred the development of various "hybrid" financing instruments that possess attributes that mystify a classification as either equity or debt on the basis of the conventional criteria (fixed return versus sharing of business risks etc.).<sup>146</sup> Examples thereof that have gained recent popularity include profit participation rights (winstrechten) issued in the form of profit participation certificates (winstbewijzen) (see *infra* Chapter 5.1.b) and subordinated loans. Although the holder of a profit participation certificate does not have any voting rights, he is entitled to share in the corporation's profits and, depending on the articles, may have certain specified additional rights (see *infra* Chapter 5.1.b). This instrument bears some resemblance to a non-voting share, which is non-existent in the Netherlands. In the example of subordinated loans, the rights of a subordinated creditor with respect to interest payments and for the liquidation proceeds rank below the rights of other creditors, which may provide the corporation with debt that can be considered "near-equity".

**b Equity.** Under Netherlands' law various notions of capital are in existence. When using the word capital in relation to shares the following distinctions should be made. The authorised capital (maatschappelijk kapitaal) is the maximum share capital provided for in the articles of association. The authorised capital may be issued without an amendment of the corporation's articles being required. The authorised capital is divided into a certain number of shares with a nominal value, which is the amount expressed in Euros or Dutch Guilders. The number of shares actually issued multiplied by the nominal value of each of the shares of any type will result in the issued capital (geplaatst kapitaal), which must be at least one fifth of the authorised capital. Shares must be fully paid up when subscribed for, unless these shares are

<sup>146</sup>

For convertible debt securities and cumulative preferred profit sharing shares, see *infra* Chapter 5.1.e and Chapter 5.1.c.

registered shares for which the articles specifically allow and the corporation and the initial holders of these shares have agreed to contribute less than the nominal value. In that case the paid-up capital (gestort kapitaal) shall be less than the issued capital, but should be at least 25 per cent. of the issued capital.<sup>147</sup> Bearer shares must be fully paid in upon issuance.<sup>148</sup> The difference between the nominal value and the lesser amount actually contributed to the shares (obligo) will only be due and payable by the holders of these shares if the corporate body empowered by the articles to do so calls for payment, upon that moment the unpaid but called for part of the capital shall be shown on the balance sheet as the called up capital (opgevraagd kapitaal) (and the asset side of the balance sheet will show a receivable.) The unpaid portion acts as a cushion to support the equity. However, until the moment the corporation actually calls for further payment of the unpaid part of the nominal value, the unpaid part is not due by the shareholders and is not as such a part of the equity of the corporation. Therefore, the corporation may not put this future claim on its balance sheet. It is also possible that a shareholder pays more than the nominal value on a share to be issued, in which case there will be a capital surplus (agio). Equity refers to shareholders' funds. It includes the amount actually contributed to capital, called up capital, capital surplus, reserves and retained earnings.<sup>149</sup>

Netherlands' law recognises in principle three types of reserves: (i) statutory reserves (wettelijke reserves), which are reserves which the corporation must maintain pursuant to a statutory obligation, such as a participation reserve<sup>150</sup> and a revaluation reserve<sup>151</sup> (ii) reserves required to be maintained by the articles (statutaire reserves) (iii) freely distributable reserves (vrije reserves), such as the capital surplus reserve and the general reserve. Both the statutory reserves and the reserves required by the articles are not freely distributable. The total nominal value of the issued shares (i.e., the issued capital) has great significance in Dutch corporation law, but bears no direct relationship to shareholders' equity, the value of the shares, the value of the assets, or

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<sup>147</sup> The paid-up capital should amount to at least the minimum capital, i.e. € 45,000 for an N.V. and € 18,000 for a B.V.

<sup>148</sup> BW art. 2:82(3).

<sup>149</sup> BW art. 2:373(1).

<sup>150</sup> BW art. 2:389.

<sup>151</sup> BW art. 2:390.

the cash position of the corporation. The issued capital must at all times be at least one-fifth of the authorised capital stated in the articles.<sup>152</sup> For the various types and classes of shares, see infra Chapter 5.1.

There are no rules on debt-equity ratios for corporations other than banks and insurance companies. However, it should be noted that if the total equity of an N.V. is less than one half of its issued and called up capital, the management board must convene a shareholders' meeting within three months<sup>153</sup> after this situation becomes clear to the management board in order to discuss any possible measures to be taken. This provision does not apply to a B.V.

## 4.2 Preservation of Equity

There is a wide variety of diverse statutory provisions aimed at defending the corporation, as far as possible, against a deterioration of its equity. Although the Dutch Parliament cannot legislate against losses incurred in the ordinary course of business (as opposed to those resulting from mismanagement) it has done the following:

- (a) set rules for the preservation of issued capital (see infra Chapter 4.3) and for any reduction of issued capital, (see infra Chapter 4.6);
- (b) set rules concerning the payments on shares for the amounts that may exceed the nominal value (i.e., capital surplus contributions, see infra Chapter 4.4.a);
- (c) restricted the use of corporate assets for the benefit of persons other than the corporation (see infra Chapter 4.3.e and g). This includes empowering the corporation to void a transaction that violates the corporate purposes (see supra Chapter 3.5);
- (d) set strict rules for the presentation of annual accounts, for audits, and for the accounting profession;
- (e) required the disclosure of annual accounts (see infra Chapter 12.2) and of certain proposed reductions in the issued capital of the corporation (see infra Chapter 4.6);

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<sup>152</sup> BW art. 2:67(4)/178(4).

<sup>153</sup> BW art. 2:108a.

- (f) set strict rules for the accounting of the financial results of subsidiaries, group companies, and affiliates; and
- (g) subjected members of the management board and supervisory board to liability for mismanagement and other malfeasance in cases of non-compliance with certain statutory requirements (see infra Chapter 9.2 and 9.3).

### 4.3 Preservation of Issued Capital

**a Objective.** The rules concerning capital to a large extent reflect the implementation of the Second and Fourth EC Company Law Directives (see supra Chapter 1.3.b and d). These rules focus on the concept of the nominal value per share and of the issued and paid-in share capital. Their prime objective is to prevent the dilution of the issued capital, which might leave creditors and shareholders with a mere shell.

Although a potential creditor of a corporation might check the Commercial Register for the amount of the issued and paid-in capital (see infra Chapter 12.2) and may rely on the published annual accounts of the corporation, in a large number of cases the amount of the issued capital will be only a small fraction of eventual claims. Nevertheless, the rules concerning the preservation of capital must be strictly observed. If the rules have not been strictly observed, the transaction may be void and the managing directors may be personally liable.

**b Nominal Value.** Shares must have a nominal value.<sup>154</sup> The nominal value is a fixed amount per type of share. It is an arbitrary figure stated in the articles. The articles may provide for shares with different nominal values.<sup>155</sup> Shares without a nominal value are not permitted.<sup>156</sup> The share capital and the nominal value of each share must be expressed in Dutch Guilders<sup>157</sup> or Euros. Shares may, of course, be

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<sup>154</sup> BW arts. 2:67(1)/178(1), 2:79(1)/190.

<sup>155</sup> BW art. 2:67(1)/178(1).

<sup>156</sup> BW art. 2:67/178.

<sup>157</sup> HANDBOEK, supra p. 27 at note 6, § 161.



issued at a price above their nominal value. The consideration in excess of the nominal value is called capital surplus or share premium.

**c Minimum Capital.** In order to ensure that the capital will not fall below an absolute minimum level that will remain available to the corporation to the extent not deteriorated by losses, the law requires a minimum capital of € 45,000 for an N.V.<sup>158</sup> and € 18,000 for a B.V.<sup>159</sup> The statutory amount of the minimum capital may be increased. For N.V.s, increases are pegged to mandatory increases prescribed by EC legislation.<sup>160</sup> For B.V.s, the minimum capital can be increased pursuant to a Royal Decree that refers to a price index.<sup>161</sup> In order to be listed at Euronext Amsterdam N.V., the equity of an N.V. must be at least € 5,000,000.<sup>162</sup> There are specific rules applicable to the minimum capital of banks and insurance companies.

The minimum capital may be an amount that is very small in relation to the nature of the business of the corporation and the risks it may incur in its ordinary course of business. In the case of inadequate capitalisation, the creditors may want to "pierce the corporate veil" (see infra Chapter 10). However, only in very special circumstances will such claims be successful.

The paid-in capital (see supra Chapter 4.1.b) is that part of the issued capital for which contributions have actually been made. It must amount to at least 25 per cent. of the issued capital, but in any event not less than € 45,000 in the case of an N.V., or € 18,000 in the case of a B.V.<sup>163</sup> If at any time after formation, the aggregate of the amount contributed to the issued capital, any amounts called up and the balance sheet reserves formed pursuant to the law (called statutory reserves) (see supra Chapter 4.1.b) or the articles is below the minimum capital prescribed by law, a B.V. is

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<sup>158</sup> BW art. 2:67(2).

<sup>159</sup> BW art. 2:178(2).

<sup>160</sup> Second Company Law Directive, supra p. 6 at note 30, art. 6(3).

<sup>161</sup> BW art. 2:178(2); Act of 12 Dec. 1985, 1985 S. 656, art. IX.

<sup>162</sup> A company seeking a listing on the Nieuwe Markt Amsterdam (NMAX) (which can best be compared to the Alternative Investment Market in England) must have equity of at least € 222,000.

<sup>163</sup> BW arts. 2:67(3)/178(3), 2:80(1)/191(1).

required to maintain an additional statutory reserve in the amount of the shortfall,<sup>164</sup> but only to the extent this reserve can be formed, for example, out of profits. An N.V., however, must at all times have a minimum paid-in capital (i.e., contributions must have been made) equal to or in excess of € 45,000. If it fails to comply, it must either be dissolved (see infra Chapter 11.6.b) or convert itself into a B.V. (see infra Chapter 11.5).

A shareholder is liable for the unpaid balance on his shares, but not in excess of their nominal value.<sup>165</sup> He is also liable for the amount of the subscription price in excess of nominal value. Netherlands' law allows for assessable shares (aandelen met stortingsplicht boven de nominale waarde) only if the articles provide for them at formation or thereafter by an amendment unanimously adopted by all the shareholders concerned. Assessable shares are uncommon but possible. They can be particularly useful in joint ventures where parties want to avoid the formalities that an increase of the issued capital beyond the authorised capital may entail.

Even after selling shares that are not fully paid up, all previous shareholders remain liable for the unpaid balance until a previous shareholder is released from such obligation by a notarial deed or a registered non-notarial deed by the management board and, where applicable, the supervisory board.<sup>166</sup> This liability only concerns the unpaid part of the nominal value. In spite of the release, however, the released former shareholder remains liable with respect to payments which are called up within one year after the day on which the notarial deed of release was executed or the non-notarial deed was registered with the Tax Register. The corporation's share register is not open to the public, except with regard to shares that are not fully paid up.<sup>167</sup> The fact that shares are not fully paid up must be registered with the Commercial Register.<sup>168</sup> If shares are subscribed for under the agreement, that capital surplus will be paid at a time in the future (only possible for a B.V.); the obligation to pay such a surplus remains with the subscribing shareholder.

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<sup>164</sup> BW art. 2:178(3).

<sup>165</sup> BW art. 2:81/192.

<sup>166</sup> BW art. 2:90(1)/192(1).

<sup>167</sup> BW art. 2:85(4)/194(4).

<sup>168</sup> HrB art. 14(e). See infra Chapter 11.

**d Shareholders and Creditors.** The issued share capital is considered a guarantee for the corporation's liabilities. Upon dissolution of the corporation, the claims of shareholders are subordinate to claims of debenture holders and other creditors. Shareholders have a claim upon liquidation that is, in fact, subordinate to all other debts of the corporation.<sup>169</sup> A shareholder may not, without the corporation's consent, set off the corporation's claims against the amount due for payment on his shares.<sup>170</sup> The trustee in bankruptcy may contest any such consent granted prior to bankruptcy.

**e Contributions to Capital.** The required contribution to the issued capital must be made at the time of issuance of the shares (see infra Chapter 4.4). There are two forms of capital contributions; contributions in cash<sup>171</sup> and contributions in kind (non-cash contributions).<sup>172</sup> Cash contributions can be made either in Euros or a foreign currency. At the time of formation, the civil law notary must obtain a statement from a Dutch bank (or another bank within the European Economic Area that is under governmental supervision<sup>173</sup>) that upon formation the money is indeed available to the corporation immediately after its incorporation, or that the bank has received the required amount of cash in an account in the name of the corporation "to be formed" (see supra Chapter 3.4.b). This statement must be issued not more than five months prior to the date of incorporation. The deed of incorporation may state that the corporation accepts this contribution, even though the amount of cash available at the date of formation may differ from the amount originally paid into the bank account.<sup>174</sup> If payment is made in a foreign currency, the bank statement must

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<sup>169</sup> BW art. 2:23b(1).

<sup>170</sup> BW art. 2:80(4)/191(3), this also includes the former shareholder for payment on shares which are not fully paid up (see Chapter 4.3.c); Judgment of 23 Dec. 1937, HR, 1938 NJ No. 538. For a B.V. this includes any capital surplus amounts (BW art. 2:191(3)).

<sup>171</sup> BW art. 2:80a(1)/191a(1).

<sup>172</sup> BW art. 2:80b(1)/191b(1).

<sup>173</sup> BW art. 2:93a(3)/203a(3).

<sup>174</sup> BW art. 2:93a(1)/203a(1).

state the amount in Euros into which the amount in foreign currency may be freely exchanged on any given day during the one month period prior to incorporation. If the bank statement relates to a moment prior to that month, a new statement must be obtained, stating the exchange rate on the day of incorporation.<sup>175</sup> An official copy of the statement by the bank is deposited with the Commercial Register (see infra Chapter 12.1.a) for public inspection. After formation, a statement from a bank is required only when foreign currency is contributed<sup>176</sup>, and is limited to the exchange rate only.

The corporation may allow a shareholder to contribute only partially to the nominal value of his shares and to agree that the remainder, up to a maximum of 75 per cent., must be contributed when called for by the corporation (see supra Chapter 4.1.b).<sup>177</sup> The issuance of shares at a discount to their nominal value is allowed only in cases of issuance by an N.V. to a professional underwriter, and the discount may not exceed 6 per cent. of nominal value. The underwriter is not entitled to contribute in instalments, and he must pay in cash.<sup>178</sup> These shares are thereafter regarded as having been issued at nominal value.

In order to make valid non-cash contributions,<sup>179</sup> both at the time of formation<sup>180</sup> of the corporation and thereafter<sup>181</sup> certain formalities must be observed. Several provisions counter the issue of "watered shares", i.e., nominal value shares issued for a non-cash contribution that has a value below the aggregate nominal value of the issued shares. In addition, as a complement to these rules, Netherlands' law contains certain statutory provisions that subject certain transactions, which differ in their form from contributions to shares, but judged on their substance are equivalent,

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<sup>175</sup> BW art. 2:93a(2)/203a(2).

<sup>176</sup> BW art. 2:93a(6)/203a(6).

<sup>177</sup> BW art. 2:80(1)/191(1).

<sup>178</sup> BW art. 2:80(2).

<sup>179</sup> Exceptions may be applicable. BW art. 94a/204a(3) or 94B/204B(5).

<sup>180</sup> BW art. 2:94a/204a.

<sup>181</sup> BW art. 2:94b/204b.

to similar control rules. The German buzz word for these statutory provisions, "Nachgründung", has become the Dutch term as well.

Contributions of property and other non-cash items to shares are restricted to assets that can be objectively appraised and can be actually transferred. Promises to perform work or services cannot serve as capital contributions.<sup>182</sup> In addition thereto, the contributor, i.e., the future shareholder must have the objective to actually transfer the asset and to put it at the disposal of the corporation. If this is not the case it may later on be argued that the shares actually have not been paid up.<sup>183</sup> This may result in an additional obligation for the shareholder to make a contribution in cash or kind and may under certain circumstances also result in a liability for each member of the management board for actions performed by the corporation during that period (see infra Chapter 9.3).<sup>184</sup>

At the formation, the contributed assets must be described and valued, and described in writing by the incorporators. In the event of a later issue, this description must be prepared by the management board. In both cases the description must be accompanied by an auditors' statement that must show that the value of the contribution equals at least the aggregate amount to be paid up on the shares to be issued (see infra Chapter 4.4).<sup>185</sup> The auditor's statement and, in case of an N.V., the description of the assets, must be deposited with the Commercial Register for public inspection.<sup>186</sup> Exemptions apply to group companies (see supra Chapter 3.1.b) for which another group company has assumed liability pursuant to a statutory procedure. If a non-cash contribution of property is proposed at the time of formation, it must be stated in the deed of incorporation or in an attachment thereto (see supra Chapter 3.4.c). Thereafter, approval by a majority vote of the shareholders is required for non-cash contributions, unless the management board is expressly authorised in the articles of association to accept this contribution<sup>187</sup>. Any contribution in kind must be made forthwith after the shares have been subscribed for.

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<sup>182</sup> BW art. 2:80b(1)/191b(1).

<sup>183</sup> Judgment of 24 Mar. 2000, HR, NJ 2000 No. 354.

<sup>184</sup> BW art. 2:69 (2)/180 (2).

<sup>185</sup> BW arts. 2:94a(2)/204a(2), 2:94b(2)/204b(2).

<sup>186</sup> BW arts. 2:94a(1),(2)/204a(1),(2) and 2:94b(2)/204b(2). A violation of these provisions is a criminal offense, see Wet op de Economische Delicten [WED] (Act on Economic Offenses) art. 1(4), 1990 S. 258, as amended.

In some cases the contribution in kind is structured in a way that the future shareholder contributes assets under the obligation for the corporation to assume certain liabilities. In order to fulfil the payment obligation on the shares issued, the balance of the value of the assets minus the value of the liabilities to be assumed must equal at least the amount expressed in Euros to be paid on such shares. This structure is used, inter alia, for the contribution of an enterprise as payment on shares.

During the two-year period following its first registration with the Commercial Register, a corporation must observe certain formalities when entering into any transaction involving the acquisition of assets that were personally owned by any founder (for N.V.s and B.V.s) at any time during the one-year period preceding the formation date or thereafter, or were owned during that time by any person who is a shareholder (for B.V.s).<sup>188</sup> The acquisition of assets as well as any preparatory action serving to acquire assets in the future, such as an option agreement, falls under the scope of these Nachgründung rules.<sup>189</sup> The prohibition does not apply to acquisitions: (i) made at a public auction or stock exchange; (ii) completed within the normal course of business of the corporation; (iii) for which an accountant's statement has already been issued; or (iv) resulting from a statutory merger (see Chapter 11.3).<sup>190</sup> The risk of non-compliance with the Nachgründung rules is that a transaction may be voided by the corporation<sup>191</sup> during the three-year period following such transaction. The directors may be liable for breach of their fiduciary duties (see infra Chapter

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<sup>187</sup> BW art. 2:94(2)/204(2).

<sup>188</sup> BW art. 2:94c(1)/204c(1).

<sup>189</sup> Numerous schemes have been developed in practice to set aside the Nachgründung rules (see C.E.M. VAN STEENDEREN, Nachgründung, in: VENNOOTSCHAPSRECHT IN EG-PERSPECTIEF, p. 19 (A.G. Lubbers & W. Westbroek, 1st ed. 1993), Kluwer (Deventer)). Schemes with merit include: (a) formation of the corporation by a foundation which issues depository receipts for shares to its founders. The shares are fully paid up in cash and the property intended to be acquired is then purchased by the corporation from the holders of the depository receipts and not from its shareholders; (b) formation by the corporation of another corporation that acquires the property from the shareholders of its parent; or (c) sale of property to the corporation followed by an issuance of shares; the corporation's obligation to pay the purchase price will be set off against its claim for the cash contribution to the shares.

<sup>190</sup> BW art. 2:94c(6)/204c(6).

<sup>191</sup> Or the trustee, in the case of bankruptcy of the corporation.

9.1.a) towards the corporation when they neglect to seek the nullity of such transaction. The formalities required to avoid nullification of the transaction are: (i) a description to be prepared by the management board relating to the assets to be acquired by the corporation, stating the acquisition price; (ii) an auditors' statement, confirming that the price to be paid equals at least the value of the assets; and (iii) a resolution of the shareholders' meeting, authorising the acquisition. If the corporation acquires assets from its incorporators (and/or shareholders for B.V.s) during the period to which the Nachgründung rules apply without paying consideration, the Nachgründung rules nevertheless apply! The auditors' statement must then confirm that the value of the assets equals at least zero.

**f Treasury Shares (Ingekochte Aandelen).** Netherlands' law allows a corporation to acquire its own shares.<sup>192</sup> There are, however, significant limitations:

- (a) a corporation cannot subscribe for shares that it will issue at formation or at any time thereafter;<sup>193</sup>
- (b) the nominal value of the shares held in treasury must be fully paid;<sup>194</sup>
- (c) an N.V. may not, directly or indirectly through its subsidiaries, acquire or hold in ownership or hold as a pledgee more than 10 per cent. of its own stock.<sup>195</sup> For a B.V., this amount is 50 per cent.;<sup>196</sup>
- (d) a corporation may not repurchase shares in an amount that pursuant to the latest adopted annual accounts (at all times subject to the restrictions stated under (f) below) would bring its equity below the aggregate of the amount contributed to the issued capital, any amounts called up, and statutory reserves and reserves required by the articles;<sup>197</sup>

<sup>192</sup> For this purpose the term "shares" encompasses depository receipts issued therefor (BW art. 2:98(9)/207(5)). Different rules apply to investment companies with variable capital (see supra Chapter 3.1.c and BW art. 2:98(8)).

<sup>193</sup> BW art. 2:95(1)/205.

<sup>194</sup> BW art. 2:98(1)/207(1).

<sup>195</sup> BW art. 2:98(2).

<sup>196</sup> BW art. 2:207(2).

<sup>197</sup> BW art. 2:98(2)/207(2). This means that the purchase price to be paid by the corporation may not exceed the free distributable resources.

- (e) the articles of an N.V. must allow for a repurchase, by an action of the management board, subject to authorisation by the shareholders prior to the actual repurchase.<sup>198</sup> A general authorisation cannot exceed an 18 month period.<sup>199</sup> Without a (valid) authorisation the management board is not authorised to repurchase the shares.<sup>200</sup> The articles of a B.V. must permit a repurchase and may confer this right of authorisation to holders of a specific class or type of shares or to the supervisory board, in which case the authorisation may be general and unlimited in time;<sup>201</sup>
- (f) a repurchase is prohibited during the last six months of the corporation's financial year if the annual accounts for the preceding financial year were not adopted and approved, where applicable, during the first six months;<sup>202</sup>
- (g) parties who purchase shares in their own name for the account of the corporation are, in the case of a B.V., deemed to have purchased for their own account<sup>203</sup> or, in the case of an N.V., under a statutory obligation to transfer the acquired shares to the corporation;<sup>204</sup>
- (h) the possibility of subsidiaries to hold shares in a parent is restricted. A subsidiary of an N.V. or B.V. may not subscribe for shares issued by the parent. It may, however, purchase shares of a parent and repurchase its own shares held by its parent company only to the extent this parent corporation may do so;<sup>205</sup> and

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<sup>198</sup> For an N.V. this authorisation is not required for an acquisition for the purpose of transferring such shares to employees of such N.V. or a group company (*see supra* Chapter 3.1.b), provided the articles so permit and the shares are listed on an exchange (BW art. 2:98(5)).

<sup>199</sup> BW art. 2:98(4).

<sup>200</sup> An unauthorised repurchase may be invoked against the selling shareholder.

<sup>201</sup> BW art. 2:207(2)(d).

<sup>202</sup> BW art. 2:98(3)/207(3).

<sup>203</sup> BW art. 2:207b.

<sup>204</sup> BW art. 2:98b.

<sup>205</sup> BW art. 2:98d(1)/207d(1).



- (i) voting rights cannot be exercised on treasury shares.<sup>206</sup> Unless the articles provide differently, treasury shares are entitled to distribution rights.

Repurchased shares remain part of issued capital until redeemed (ingetrokken) (see infra Chapter 4.6.b). Redemption has the effect of reducing issued capital by the amount of the total nominal value of the repurchased and redeemed shares. Treasury shares may not be shown in the annual accounts as assets.<sup>207</sup> Equity must be reduced by the price of the repurchased shares. The value attributed to an investment in a subsidiary is reduced by the price at which the subsidiary purchases shares of the parent company.

Any repurchase of shares in a B.V. within two years after the first registration with the Commercial Register upon its incorporation falls automatically under the rules of Nachgründung (see Chapter 4.3.e). This means that in such a case those shares to be repurchased should be appraised and described in writing, an auditor's opinion should be obtained and shareholders' approval should be given before this transaction is entered into.

If a corporation intends to sell the treasury shares which are registered shares where the articles provide that the transfer is restricted (see supra Chapter 5.4.c), the corporation must observe these provisions.

**g Financial Assistance Rules.** Netherlands' law generally prohibits corporations from giving financial assistance to third parties (whether shareholders or others) if this assistance is "for the purpose of" the subscription or acquisition by third parties of its shares or depository receipts issued therefor. These financial assistance rules were incorporated into Netherlands' law to implement the Second EC Company Law Directive (see supra Chapter 1.3.b).<sup>208</sup> These rules purport to preserve corporate equity and to protect creditors.

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<sup>206</sup> BW art. 2:118(7)/228(6).

<sup>207</sup> BW art. 3:373(3).

<sup>208</sup> Every Member State had to implement this second directive in its national legislation. The Dutch implementation may differ significantly from other Member States.

Implementation of this directive in the Netherlands created statutory provisions which differ in their treatment of N.V.s<sup>209</sup> and B.V.s<sup>210</sup> (an N.V. may, however, convert to a B.V., see infra Chapter 11.5). For both N.V.s and B.V.s the financial assistance rules prohibit the corporation from providing collateral, guaranteeing payment of the acquisition price or otherwise guaranteeing or binding itself with or for third parties "for the purpose of the subscription or acquisition by third parties of its shares or depository receipts issued therefor".<sup>211</sup> In addition, N.V.s are prohibited from granting loans for this purpose.<sup>212</sup> The respective prohibitions also extend to subsidiaries (see supra Chapter 3.1.b). A B.V. may only provide loans for this purpose up to an amount that does not exceed the distributable reserves (see supra Chapter 4.1.b and infra Chapter 4.8.a.ii) and provided that the articles so permit.<sup>213</sup> Finally, the financial assistance prohibitions do not apply to N.V. shares acquired by or for the account of employees of the corporation or its group companies (see supra Chapter 3.1.b).<sup>214</sup>

Due to the unclear language of the law, the financial assistance prohibitions effectively discourage various forms of leveraged acquisition that are common in the United States.<sup>215</sup> Several alternative means of financing a leveraged acquisition have developed in practice. However, in the absence of case law which provides a

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<sup>209</sup> BW art. 2:98c.

<sup>210</sup> BW art. 2:207c.

<sup>211</sup> BW art. 2:98c(1)/207c(1).

<sup>212</sup> BW art. 2:98c(1).

<sup>213</sup> BW art. 2:207c(2). This will merely depend on the objects clause as stated in the articles of association of the B.V. An expressly stated permission to grant such loans is not necessary (ASSER-MAEIJER 2, III, supra p. 23 at note 6, § 163). The B.V. must maintain a non-distributable reserve in the amount of such loans (BW art. 2:207c(3)).

<sup>214</sup> BW art. 2:98c(2). Similarly, with respect to N.V.s, these provisions do not apply to banks and similar institutions registered under the Act on the Supervision of the Credit System (WTK), to the extent such transactions are concluded in the normal course of their businesses (BW art. 2:98c(3)).

<sup>215</sup> As the financial assistance rules apply to share acquisitions only, in the Netherlands a leveraged buy out [LBO] in the form of an asset acquisition is often easier to finance than an LBO in the form of a share acquisition. For a more elaborate analysis of the financial assistance rules, see M&A IN THE NETHERLANDS, supra p. 24 at note 13, Chapter 3.

conclusive interpretation of the financial assistance prohibitions, great care should be exercised.

#### 4.4 New Issuance of Shares

**a General.** A new issuance of shares increases the issued capital, which must at all times remain within the limits of the authorised capital.<sup>216</sup> The authorised capital can only be increased by an amendment to the articles (see infra Chapter 11.2). The ministerial certificate of no objection will be refused if, at the time of execution of the notarial deed required for an amendment to the articles, subscription has not been made for at least one-fifth of the newly authorised capital.<sup>217</sup>

With respect to the payment on the shares, the following distinction should be made, which applies both to shares to be issued at the incorporation and thereafter. With respect to the N.V., the law provides<sup>218</sup> that the payment obligation on a share to be issued consists of:

- (a) the nominal value of the share (unless it has been agreed upon and the articles of association so permit that the shares shall not initially be fully paid up); and
- (b) the surplus on the share to be paid if so agreed upon by the new shareholder and the corporation, the agreed surplus.

With respect to the B.V., the law provides that the payment obligation only relates to the nominal value<sup>219</sup> (unless the shares are not fully paid up, see supra Chapter 4.1.b.).

This means that with respect to the N.V., a shareholder subscribing for a new share must pay up the amount of the payment obligation when subscribing for the share and as a result thereof, the formalities regarding the actual payment, such as the bank statement (only required at the formation of the corporation) and the auditors' statement must relate to this payment obligation. When paying up the shares in kind, a surplus can be created "spontaneously". For instance, a future shareholder subscribes for shares with an aggregate nominal value of 100,000 and agrees to contribute on

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<sup>216</sup> BW art. 2:79(2)/190. An issue of shares in excess of the authorised capital will be void. HANDBOEK, supra p. 27 at note 6, § 162.

<sup>217</sup> BW arts. 2:68(2)/179(2), 2:67(4)/178(4).

<sup>218</sup> BW art 2:30 (1).

<sup>219</sup> BW art 2:191(1).

such shares a participation in another corporation with a value in excess of 100,000. If the value appears to be 150,000, a spontaneous surplus was created of 50,000. The formalities as described above do not apply to this spontaneous surplus.

As a result of the above, with respect to the N.V., a surplus on the shares cannot be agreed to be paid at a later date. If shares are issued and a surplus is agreed upon, this surplus qualifies as agreed surplus and must be paid on the shares upon issue.

With respect to the B.V., the agreed surplus does not form a part of the payment obligation. Consequently, the shareholder and the corporation can agree that the surplus on the shares can be paid at a later moment, provided that this payment of surplus will be made in cash. Since all payments in kind must be made forthwith after the shares are subscribed for, a contribution in kind cannot be agreed at a future date. This restriction also applies to any called up part of the unpaid up capital.

The distribution of power within the corporation for the issuance of new shares, and the pre-emptive rights that existing shareholders may have to these newly issued shares, are discussed below. The power to issue shares is normally accompanied by the power to determine the consideration therefor. If the consideration is below fair market value, the value of the shares of the existing shareholders will be diluted. This may lead to an action in court based on the grounds that the determination of the consideration violated principles of good faith (see infra Chapter 10.2.c).

The power to issue new shares and to determine the consideration therefor may also be of significance in hostile takeover situations. The key element of this device is the ability of either the management board or holders of a specific type of shares (e.g., priority shareholders, see infra Chapter 5.1.c) to place preference shares overnight to fend off a raider.

When issuing shares, a distinction should be made between the corporate resolution to issue shares and the actual formalities, based on such resolution, by which the shares are issued and subscribed for. Without a valid resolution to issue shares, the subsequent formalities performed will be invalid.<sup>220</sup> The issued shares are placed by the management board.

In the case of a public offer, the management board must observe the applicable stock exchange regulations. The formalities for the issuance of shares are similar to

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<sup>220</sup>

Judgment of 10 Mar. 1995, HR, 1995 NJ No. 595.

the formalities for the transfer of shares (see infra Chapter 5.4). As noted above, a corporation cannot subscribe to its own shares, and is severely restricted in purchasing shares initially issued to others (see supra Chapter 4.3.f).

**b N.V. Corporation.** The shareholders' meeting of an N.V. have the power to decide on the issuance of new shares and to determine the consideration for those shares. The shareholders' meeting may delegate this power to the management board or the supervisory board or another corporate body, for a certain period not exceeding five years, stating the number of shares which may be issued pursuant to this delegation.<sup>221</sup> The delegation gives the corporate body so designated exclusive rights i.e., during the period of delegation the shareholders are not authorised to resolve to issue shares. During this period, the delegation cannot be revoked, unless otherwise stated in the delegation resolution, but it can be renewed from time to time. It is common practice to renew this delegation on an annual rolling basis. The delegation must be registered with the Commercial Register within eight days after the resolution has been taken. If there are different types of shares, the power of the shareholders' meeting to issue shares of a specific type and to delegate this power to the board is subject to the prior approval of the holders of that type of shares.<sup>222</sup> Within eight days after the issuance of new shares the corporation must file information concerning the type and number of shares with the Commercial Register.<sup>223</sup>

As noted under [a] above, certain formalities may need to be observed in addition to the relevant resolution in order to complete the actual issue of shares. A distinction should be made between:

- (a) bearer shares: resolution to issue shares may be followed by a subscription agreement and should be followed by the actual deliverance of share certificates;<sup>224</sup>

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<sup>221</sup> BW art. 2:96(1). Different rules apply to investment companies with variable capital (see supra Chapter 3.1.c).

<sup>222</sup> BW art. 2:96(2).

<sup>223</sup> BW art. 2:96(3). A violation of this provision is a criminal offense, see WED art. 1(4).

<sup>224</sup> One cannot become a holder of a bearer share without a share certificate.

- (b) registered shares in a non-listed corporation: resolution to issue shares must be followed by the execution of a notarial deed to which the subscriber is a party and by which the shares will be actually issued;
- (c) registered shares in a corporation of which (part of) the issued capital is listed on an official stock exchange:<sup>225</sup> no specific requirements are necessary provided the subscriber appears to accept the shares issued to him.

Shareholders of an N.V. have a statutory pre-emptive right to subscribe for newly issued shares of the type owned, proportional to their existing shares in the capital of the corporation.<sup>226</sup> The shareholders can, in various ways, be excluded or restricted from this pre-emptive right. The shareholders' meeting can take a resolution to that effect. The shareholders' meeting can also delegate to a corporate body (the same which was originally delegated the power to issue new shares) the right to exclude or restrict the shareholders' pre-emptive rights. This delegation is limited to a period of five years, cannot be revoked, unless otherwise stated in the delegation resolution, and may be renewed from time to time.<sup>227</sup> A shareholders' resolution to restrict or exclude pre-emptive rights or to delegate this power requires a qualified majority of two-thirds of the votes cast if less than half of the issued shares is represented at the meeting.<sup>228</sup> Within eight days after the resolution about the restriction or exclusion of pre-emptive rights was taken, the corporation must file the complete text thereof with the Commercial Register.<sup>229</sup>

Pre-emptive rights are not available for new shares issued with a consideration other than cash, unless the articles provide otherwise, or with respect to shares issued to employees of the corporation or its group companies (see supra Chapter 3.1.b). Except as otherwise provided in the articles, holders of preference shares have

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<sup>225</sup> Or of which this is expected to happen in the near future BW art. 2:86c(1).

<sup>226</sup> BW art. 2:96a(1). Different rules apply to investment companies with variable capital (see supra Chapter 3.1.c).

<sup>227</sup> BW art. 2:96a(6).

<sup>228</sup> BW art. 2:96a(7).

<sup>229</sup> BW art. 2:96a(7). A violation of this provision is a criminal offense, see WED art. 1(4).

no pre-emptive rights, and holders of ordinary shares have no pre-emptive rights with respect to preference shares.<sup>230</sup>

**c B.V. Corporation.** The issued capital of a B.V. may be increased by a resolution of the shareholders. The shareholders can delegate this power to a corporate body. This delegation can be revoked at any time.<sup>231</sup> Furthermore, the articles may confer the power to issue new shares to a corporate body.

In order to complete the increase of the issued capital of the B.V., a notarial deed of issue must be executed by which both the corporation and the subscriber shall be parties.

Unless the articles state otherwise, each existing B.V. shareholder has a pre-emptive right to subscribe for newly issued shares proportional to his existing shares in the capital of the corporation, except for shares issued to employees of the corporation and its group companies.<sup>232</sup> Therefore, unlike the N.V., the articles of a B.V. may provide that the existing shareholders will never have pre-emptive rights. If the articles do not contain such provision, the shareholders can, nevertheless, restrict or exclude the pre-emptive rights of existing shareholders by shareholders resolution for every issuance of shares, unless the articles provide otherwise.<sup>233</sup> The articles may also designate another corporate body which is or will be authorised to exclude pre-emptive rights.

Except as otherwise provided in the articles, holders of preference shares have no pre-emptive rights and holders of ordinary shares have no pre-emptive rights with respect to preference shares.<sup>234</sup>

#### 4.5 Stock Options

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<sup>230</sup> BW art. 2:96a(2),(3).

<sup>231</sup> BW art. 2:206(1).

<sup>232</sup> BW art. 2:206a(1).

<sup>233</sup> BW art. 2:206a(1).

<sup>234</sup> BW art. 2:206a(2).

A corporation can give options either on treasury shares or on newly issued shares. Unless restricted in the articles, treasury shares can be sold by the corporation on terms that the management board deems appropriate, without restraint. However, if the articles provide for a restriction on the transfer of shares, this restriction must be observed. Options to acquire newly issued shares, however, are subject to the same rules as an original issue (see supra Chapter 4.4),<sup>235</sup> including the rules for pre-emptive rights.<sup>236</sup>

#### 4.6 Reduction of Issued Capital

**a General.** Two different methods are available for the reduction of issued capital:

- (i) redemption of shares (intrekking); and
- (ii) reduction of nominal value (afstempelen).

Each method has its merits and limitations.

These two methods are subject to strict rules concerning publication and public notification for the benefit of creditors. Public notification must be made by filing with the Commercial Register and the publication of this filing in a nationally distributed daily newspaper. Creditors may oppose the contemplated action within a two-month period after the date of the publication. Additional waiting periods and posting of security are required in some cases.<sup>237</sup> Disputes are subject to the exclusive jurisdiction of the competent District Court. Irrespective of whether any creditors object, the reduction of issued capital may never bring the issued capital below the statutory minimum capital threshold. If the proposed reduction brings the issued minimum capital below 20 per cent. of the authorised capital (see supra Chapter 4.3), an amendment of the articles is required. An amendment of the articles is also necessary if the nominal value of the shares is reduced.

The resolution to reduce the issued capital, unless it concerns a reduction of the nominal value due to losses (see infra Chapter 4.6.c), only becomes effective after the two months period has lapsed. In the event that an amendment of the articles of

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<sup>235</sup> BW art. 2:96(5)/206(2).

<sup>236</sup> BW art. 2:96a(8)/206a(6).

<sup>237</sup> BW art. 2:100/209.



association is necessary, the capital reduction becomes effective after the deed of amendment has been executed as well.

**b Redemption (Intrekking).** A redemption of shares is only possible with: (i) shares held in treasury; (ii) shares which, in their existing articles of association (i.e., prior to their issue), provide that this specific type of shares can be redeemed with repayment; (iii) only for B.V.s with the approval of all holders of the shares of that class. A shareholder whose shares have been redeemed will receive the nominal value of those shares to the extent paid. However, if, prior to the issue of the shares, redemption of a specific type of shares is permitted under the articles, the redemption will include all shares of that type (e.g., preference shares), unless such redemption relates specifically to balloted shares (uitgeloten aandelen), as stipulated in the articles prior to their issuance.<sup>238</sup> The redemption of a certain type of share (usually preference shares, see infra Chapter 5.1.c) is often part of an anti-takeover device.

**c Reduction of Nominal Value (Afstempeling).** A reduction of nominal value is often effected to make a tax effective distribution to shareholders of an amount of excess cash held by the corporation, or when a new capital issuance is being considered and earlier losses have reduced the value of the shares below their nominal value.<sup>239</sup> A nominal value reduction is therefore usually part of a recapitalisation plan. Reduction of nominal value is possible with or without partial payment of the nominal value to the shareholders and exemption of their obligation of contribution to shares.<sup>240</sup> Since the law prohibits an issuance below nominal value (see supra Chapter 4.3.b), a reduction of nominal value allows for a fresh influx of capital. This method is also applied in order to make distributions to the shareholders from contributions to the issued capital, but not more than is allowed under the rules concerning minimum and issued capital (see supra Chapter 4.3.b).

With respect to the reduction of the nominal value with repayment, a notarial deed of amendment<sup>241</sup> must be executed in order to reduce the nominal value of the shares,

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<sup>238</sup> BW art. 2:99(2)/208(2).

<sup>239</sup> BW art. 2:99(3)/208(3).

<sup>240</sup> BW arts. 2:99(3),(4)/208(3),(4).

<sup>241</sup> BW art. 2:99(1)/208(1).

subject to the requirements concerning filings, waiting periods and any creditors' opposition. The amount to be paid by the corporation to the shareholder as a result of the reduction of the nominal value shall become due and payable as per the day of the execution of the notarial deed. In the event the reduction of the nominal value serves to make up for losses only, i.e., without any repayments to shareholders, these requirements do not apply.

#### **4.7 Debt Financing of the Group; Central Cash Management**

Due to several major bankruptcy cases in the Netherlands, considerable attention has been given to the financing practice of corporations affiliated in a group (see supra Chapter 3.1.b) whereby the parent corporation, or a financing subsidiary, creates a debt with collateral from other subsidiaries, including corporations that either do not share in the benefits, or do not do so in a proportional amount. The ultra vires doctrine (see supra Chapter 3.5) provides the framework for determining whether the subsidiary may validly make collateral available to its parent and, through the parent, to its sister companies. It can be argued that upstream guarantees are valid even when the financing does not serve the interests of the subsidiary. The best test of the validity of this financial assistance by the subsidiary is whether the pledge on the assets jeopardises the corporation's existence.<sup>242</sup>

Even more complex are questions concerning central cash management systems, often employed in groups. Is the cash requirement of an ailing subsidiary a proper justification for the resulting cash shortage of an affiliated corporation which may "starve to death" even though it contributed largely to the central cash management system? No consensus exists in the Dutch legal community about this business phenomenon. Cross-collateralisation between corporations of the same group is deemed legally acceptable, provided the cross-financing and cross-collateralisation are properly disclosed with the Commercial Register and it is reasonably unlikely that these arrangements will threaten the continued existence of the corporations which made the cash payments.<sup>243</sup> No court decision is available with regard to the legality of central cash management systems.

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<sup>242</sup> Judgment of 19 Dec. 1995, Ger. Arnhem, 1996 NJ No. 307.

<sup>243</sup> ASSER-MAEIJER 2, III, supra p. 23 at note 6, § 615.

## 4.8 Distributions

### a Dividends.

i Profit Allocation; Dividend Allocation. The shareholders' meeting has the power to adopt the annual accounts. If, however, the corporation has the status of a "large" company (see infra Chapter 8.1.b.ii) the annual accounts must be adopted by the mandatory supervisory board, following which the shareholders' meeting shall approve the annual accounts.<sup>244</sup> The right to adopt the annual accounts does not, however, imply the right to allocate profits. The principle rule under Netherlands' law is that, unless the articles provide otherwise, profits shall be distributed to the shareholders. Many articles state that the profits are at the disposal of the shareholders' meeting. In that case, the shareholders' meeting has the power to create reserves and allocate profits, and consequently to determine the amount of dividends to be distributed.<sup>245</sup> However, the articles may grant the power to create reserves out of profit to another corporate body, such as the management board, the supervisory board, or the meeting of holders of a specific type or class of shares (e.g., priority shares, see infra Chapter 5.1.c). Unless the articles state otherwise, the claim for payment of dividends is created by a resolution of the shareholders, which requires the prior adoption of the annual accounts;<sup>246</sup> for "large" companies the adopted annual accounts must be approved by the shareholders' meeting before dividends can be paid.

All shareholders share in the profit in proportion to the mandatorily<sup>247</sup> paid-in part of the nominal value of their shares in the capital of the corporation, unless otherwise provided in the articles,<sup>248</sup> provided that no share is completely excluded

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<sup>244</sup> BW art. 2:101(3)/210(3). A violation of these provisions is a criminal offense, see WED art. 1(4).

See Chapter 8.1.b regarding the new "large" company rules as proposed. Under these new rules the annual accounts must be adopted by the shareholders' meeting, irrespective whether the corporation is a "regular" or a "large" company.

<sup>245</sup> BW art. 2:105(1)/216(1).

<sup>246</sup> BW art. 2:105(3)/216(3).

<sup>247</sup> See supra Chapter 4.4.a.

<sup>248</sup> BW arts. 2:92(1)/201(1), 2:105(6)/216(6).

from dividend rights. Treasury shares attract dividends, unless the articles state otherwise.<sup>249</sup> Cumulative preference shares (see infra Chapter 5.1.c), with payments in arrears rank first with respect to payments of the arrearages. Thereafter, payment on all other preference shares must be made in the amount of the stated preferences, followed by payment on ordinary shares. The articles may provide that the profits to which a certain class of shares is entitled be allocated in full or in part to a certain reserve.<sup>250</sup> Dividends may be paid either in cash or in kind. Corporations listed on the Euronext Amsterdam N.V. may distribute cash or shares but not property. A shareholder's claim for payment expires after five years, unless a longer period is granted under the articles.<sup>251</sup>

ii Legality. With regard to payment of dividends, a distinction should be made between: (i) the regular dividend following the adoption (for "large" companies: approval) of the annual accounts; and (ii) distributions which are made at any other time during a financial year, called interim dividends.

For both categories of distribution the rule is that dividends can be paid only to the extent that the corporation's equity (see supra Chapter 4.1.b) exceeds the actual contributed amount and the called-up part (see supra Chapter 4.3.e) of the issued capital, plus the statutory reserves and reserves required to be maintained by the articles (the equity preservation test).<sup>252</sup> Consequently, so-called "nimble dividends", i.e., dividends paid out of current profits despite the existence of an accumulated loss that could not be eliminated by current profits, are not permitted.

There are no solvency or cash flow requirements that the corporation must meet before dividends can be paid. With respect to the regular dividends, the distribution shall take place after adoption (for "large" companies: approval) of the annual accounts which demonstrates that the distribution is allowed. This means that profit available to be distributed is not subject to any rights of other corporate bodies to allocate profit to certain reserves. A corporation may, if the articles so permit,

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<sup>249</sup> BW art. 2:105(5)/216(5).

<sup>250</sup> BW art. 105(10)/216(9).

<sup>251</sup> BW art. 2:105(7)/216(7).

<sup>252</sup> BW art. 2:105(2)/216(2).

distribute an interim dividend, which is declared and paid before the annual accounts are adopted (or, for a "large" company, approved), provided that at that time the equity preservation test can be met.<sup>253</sup> For N.V. corporations, the equity preservation test must be met by a date not earlier than the first day of the third month prior to the month in which the payment of an interim dividend is announced.<sup>254</sup> In addition, the management board of an N.V. must prepare a statement of assets and liabilities as of the date of the test, to be signed by each managing director and filed with the Commercial Register.<sup>255</sup>

This interim distribution can take place in either of the two following forms, or in a combination of them: (i) distribution out of the free distributable reserves; (ii) distribution out of profits. In the latter case the profit distribution shall relate to the profits of the current financial year.

To the extent that, upon their adoption or approval, the annual accounts indicate a failure to meet the equity preservation test, any interim dividends previously paid in that financial year must be repaid to the corporation if it is a B.V. corporation.<sup>256</sup> For N.V. corporations the right to rescind dividend payments is limited to dividend recipients who knew or should have known that the distribution of the dividend was illegal.<sup>257</sup>

iii Stock Dividends; Bonus Dividends. Dividends can take the form of a distribution of shares of the corporation. Stock dividends normally mean that shareholders receive newly issued shares out of current profits. The aggregate market value of the newly issued shares is the amount of the dividend. The issued capital account is increased by the amount of the aggregate nominal value of the issued shares. Bonus dividends are similar to stock dividends, except that the dividend is paid out of a reserve, usually the capital surplus account.<sup>258</sup>

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<sup>253</sup> BW art. 2:105(4)/216(4).

<sup>254</sup> BW art. 2:105(4).

<sup>255</sup> BW art. 2:105(4). A violation of this provision is a criminal offense, see WED art. 1(4).

<sup>256</sup> BW art. 6:203(2).

<sup>257</sup> BW art. 2:105(8).

iv Dividend Withholding Tax. Profit distributions made by Dutch resident companies whose capital is divided into shares are subject to dividend withholding tax at a rate of 25 per cent.<sup>259</sup> The tax must be withheld by the distributing company.<sup>260</sup> If the dividend is received by a Dutch resident taxpayer, the dividend withholding tax can be credited against the individual or corporate income tax due.<sup>261</sup> However, the dividend withholding tax can under certain circumstances be reduced, for example, due to the application of tax treaties or domestic provisions implementing the EC Parent-Subsidiary Directive (see infra Chapter 13.3).

**b Redemption.** A redemption can be achieved by two different means: either through a repurchase and subsequent cancellation of shares, or through a direct redemption (see supra Chapter 4.6.c).

**c Repayment on shares by Decrease of the Nominal Value.** (see supra Chapter 4.6.c).

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<sup>258</sup> Certain statutory reserves may also be converted into issued share capital.

<sup>259</sup> Wet op de dividendbelasting [DIV] (Dividend Withholding Tax Act) art. 7, 1965 S. 621, as amended.

<sup>260</sup> DIV art. 7.

<sup>261</sup> Algemene Wet inzake Rijksbelastingen [AWR] (General Act on Taxation) art. 15, 1959 S. 301, as amended; Vpb art. 25.

## 5 SHARES; SHARE TRANSFER

### 5.1 Types and Classes of Shares

**a N.V. and B.V.** Although their articles may create different types of shares, B.V.s can only issue uncertificated shares - bearer shares cannot be issued.<sup>262</sup> N.V.s may issue certificated bearer shares, certificated shares registered in the name of the holder, and uncertificated registered shares.<sup>263</sup> The legal position of the holder of a certificated registered share and an uncertificated registered share is very similar. The only difference lies in the evidence vis-à-vis the issuing corporation.<sup>264</sup> No difference exists with regard to possible title defects (such as the absence of clean title of the previous owner) or formalities for the transfer of these shares, except for the N.V.s of which all or part of its shares are listed (see Chapter 5.4).

**b Non-Voting Shares.** Unless the articles provide otherwise, all shareholders have equal rights in proportion to the nominal value of their shares.<sup>265</sup> Provisions in the articles concerning payment on shares, voting rights, profit-sharing, and participation in liquidation proceeds may limit, but not completely eliminate, these inherent rights. Non-voting shares do not exist in the Netherlands. It is permissible to create a trust office, which in effect separates the voting power from the beneficial interest in the shares (see infra Chapter 5.5). It is also possible to include in the articles a provision that permits a profit distribution to persons other than shareholders. A "profit participation right" (winstrecht) created in this way may be issued in negotiable form as a "profit participation certificate" (winstbewijs) and may even be listed on Euronext Amsterdam N.V., subject to the applicable listing requirements. Profit participation rights are of a contractual nature. The creation of profit participation rights must be expressly permitted in the articles.<sup>266</sup> The

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<sup>262</sup> BW art. 2:175(1).

<sup>263</sup> BW art. 2:82(1).

<sup>264</sup> Rv art. 184(2).

<sup>265</sup> BW arts. 2:118/228 and 2:92(1)/201(1).

<sup>266</sup> BW art. 2:105(1)/216(1).

beneficiary of a profit participation right (i.e., the holder of a profit participation receipt) has a right to share in the corporation's profits, as outlined in the contractual terms of this right, but can never be granted any rights to cast votes in a shareholders' meeting. In addition to profit sharing, other rights may be granted to these beneficiaries, to the extent that these additional rights are not by law the exclusive prerogatives of the shareholders.<sup>267</sup> These rights cannot be affected or abrogated by an amendment to the articles without the consent of every such beneficiary, unless stated otherwise in the articles prior to the creation of such rights.<sup>268</sup> In general, the corporation has a duty of good faith towards these beneficiaries (see infra Chapter 10.2.c).<sup>269</sup> Profit participation receipts are sometimes given to the founders of the corporation and are then called "founders receipts" (oprichtersbewijzen). Profit participation rights are unusual. For the granting of founders receipts at incorporation see supra Chapter 3.4.c. The assignment of profit participation rights to third parties can have significant tax effects.

**c     Types of Shares.** Ordinary or common shares are shares for which no special provisions are made. When dividends are paid in the form of shares (see supra Chapter 4.8.a.iii), these shares are usually ordinary shares.

Preference shares have a preference over ordinary shares in the payment of dividends up to - and limited to - a percentage of their nominal value as stated in the articles, or to a fixed interest rate. The articles may state that the preference also relates to liquidation proceeds. Holders of preference shares may have the same voting rights as holders of ordinary shares. Preference shares may be used to raise equity when profits do not allow sufficient return to the holders of ordinary shares. Preference shares may also be used as an anti-takeover device and as such will indirectly offer managing directors a means of maintaining control over a corporation. The issuance of these shares to a friendly third party dilutes the voting rights of the holders of ordinary shares. In this scenario, only 25 per cent. of the "protection" preference shares will be paid up, to minimise the cash necessary to

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<sup>267</sup> ASSER-MAEIJER 2, III, supra p. 23 at note 6, § 198.

<sup>268</sup> BW art. 2:122/232.

<sup>269</sup> Judgment of 27 Jan. 1956, HR, 1956 NJ No. 48.



finance the subscription. The issuance of preference shares may be delegated to the management board for a five-year period in the case of an N.V. and for an unlimited period in the case of a B.V. (see supra Chapter 4.4.b and c).

Cumulative preference shares are preference shares with an additional right to carry forward all preference dividends not paid in previous years (because of lack of profits or otherwise), to be paid in full before any payment to the holders of ordinary shares.

Cumulative profit-sharing preference shares (i.e., participating preference shares) are cumulative preference shares which, after payment of their preferred dividend, confer on the holder a claim to dividends on an equal or proportional basis with the holders of ordinary shares.

Priority shares give their holders certain powers stated in the articles. Priority shares may be used to acquire control over certain resolutions of the shareholders' meeting or the management board (called "oligarchic" control) by shareholders who are usually founders, managing directors or supervisory directors of the corporation. With respect to a public corporation, legal title to these shares is for practical reasons often held by a stichting (see supra Chapter 2.5.b). Priority shares also represent a widely used instrument for minority shareholders to retain control over the corporation. Their powers<sup>270</sup> may include:

- (a) the right to make binding nominations to shareholders regarding the appointment of board members. This right of nomination cannot be created when the corporation is a "large" company (see infra Chapter 8.2.c.ii). The shareholders cannot appoint persons other than those proposed. However, binding nominations may be rejected by the shareholders by a two-thirds vote if it represents more than half of the issued share capital;<sup>271</sup>
- (b) the right to make proposals to the shareholders' meeting (see infra Chapter 7.2.a). If priority shares are used to that effect, the articles may also provide that the shareholders may pass the relevant resolution with a simple majority and irrespective of the capital represented at the meeting. This provision is often followed by a provision in the articles that, with

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<sup>270</sup> BW art. 2:92/201(3).

<sup>271</sup> BW arts. 2:133(2)/243(2) and 2:134(2)/244(2).

respect to proposals not made by the holders of priority shares, a supermajority is required for the shareholders' vote, e.g., a majority of two thirds representing at least 50 per cent. of the issued capital is required in order to adopt a resolution by the shareholders' meeting;

- (c) the right to veto the issuance of new shares;
- (d) the right to create reserves out of annual profits;
- (e) the right to veto proposed amendments to the articles; and
- (f) the right to grant or to reject approval when requested by a shareholder in connection with a restriction on the transfer or registered share (see infra Chapter 5.4.c).

Warrants are securities issued by an N.V. corporation creating an option to acquire shares at a specific price during a specific period of time.

Claims are securities, issued by an N.V. corporation, which allow the holder to acquire shares from the corporation (upon the issuance of new shares) for a consideration that is usually below market value.

Scrips are securities, issued by an N.V. corporation, which are convertible into shares but which do not carry any shareholders' rights until conversion.

**d Classes of Shares.** It is possible to create different classes of shares for different groups of shareholders within the same type of shares. In practice, this is limited to registered ordinary shares. Normally, each of these classes is identified by a letter, e.g., class A shares, class B shares etc. Classes are created by a provision in the articles, principally to allow pre-emptive rights on shares of the same class, to require the approval of shareholders of a specific class of shares prior to the sale of any shares of that class (see infra Chapter 5.4.c); or to provide for differences in profit distribution (or profit retention) for each class of shares; or to give the holders of a specific class of shares the possibility to make a binding nomination (see supra under c) for the appointment of a managing or supervisory director, who will be identified by the same letter as the share (e.g., managing director A relates to the class A shares).

**e Convertible Debt Securities.** Convertible debentures (including bonds) are debt securities which, under conditions set out in the terms of the loan, provide for an option to convert the debt into shares. Whether this conversion is to be called for at

the option of the corporation or the holder of the debenture, the rules concerning the issuance of new shares must be complied with prior to the issuance of the convertible debentures (see *supra* Chapter 4.4.a). Voting rights are not available to the holders of such securities prior to conversion.

## 5.2 Certificates; Registration

**a Share Certificates.** Share certificates should not be confused with the Dutch word "certificaten", which refers to depository receipts (see *infra* Chapter 5.5).

Share certificates can only be issued to N.V. shareholders. The issuance of share certificates to B.V. shareholders is specifically prohibited.<sup>272</sup> Bearer shares are negotiable instruments, registered shares are not.<sup>273</sup> Consequently, a transfer of registered shares may be subject to certain defects in the title of previous owners, including the seller.<sup>274</sup> Except in cases of fraud, a bearer share certificate evidences title to the shares.<sup>275</sup> N.V. shareholders with registered shares but without share certificates, and B.V. shareholders, can prove their title to shares only: (a) if they are founders, or successors to the rights of one or more founders, by reference to the deed of incorporation, together with documents constituting complete chain of title (e.g., all transfer deeds, see *infra* Chapter 5.4.b); or (b) if they own shares issued after incorporation, by showing the appropriate corporate resolution and documents constituting a complete chain of title. A deed of transfer for shares often contains a waiver of the right to rescind (or nullify) the transfer. Although such a waiver may give some comfort to a buyer, it does not shield the owner of the shares against an action to nullify. Furthermore, a certificate may be required from the management board that it has no knowledge of any share transfer other than that shown, and that the shares are still outstanding. In short, N.V. shareholders with registered shares and B.V. shareholders may encounter difficulty in establishing title to shares. However, since all registered shares, other than registered shares issued by listed companies, are

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<sup>272</sup> BW arts. 2:175(1) and 2:202.

<sup>273</sup> BW art. 3:86.

<sup>274</sup> BW art. 3:88.

<sup>275</sup> BW art. 3:119.

required to be transferred by a deed of a Dutch civil law notary (who must do a title search) the exposure with regard to title defects is limited (see infra Chapter 5.4).

The share certificate for an N.V. share can be in the name of the shareholder (called a registered share certificate) or made out to bearer. A bearer certificate cannot be issued until the full amount of the nominal value of the shares it represents has been paid.<sup>276</sup> Share certificates must be signed by one or more managing directors or supervisory directors. Facsimile signatures are valid. Holders of the certificate are presumed to know the contents of the articles. Consequently, the share certificate does not usually specify any rights or limitations other than the type of shares, the number of shares, the nominal value, and the class (if any).

The form, colour and other particulars of share certificates are prescribed by royal decree.<sup>277</sup> If N.V. shares are listed on Euronext Amsterdam N.V., compliance with the applicable stock exchange regulations is required.

For the notification of certain thresholds of voting rights or capital interests in an N.V. listed on an official stock exchange in the European Economic Area, see supra Chapter 4.1.4 and infra Chapter 5.4.a.

**b Shareholders' Register.** If the shares are registered, which is always the case for B.V. shares, the management board must keep a register stating:<sup>278</sup>

- (a) the names and addresses of the shareholders;
- (b) the amount contributed to the nominal value of each share;
- (c) any transfers of shares not fully paid up at the date of transfer, as well as any releases that may have been given to previous shareholders from their obligation to make further payments on these shares;
- (d) the date of transfer of shares not fully paid up at the date of transfer; and
- (e) any manifest pledge or life interest (see infra Chapter 5.3.a and c) affecting the shares, together with the names and addresses of the pledgees or the beneficiaries of the life interest.

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<sup>276</sup> BW art. 2:82(3).

<sup>277</sup> Koninklijk Besluit [KB] (Royal Decree) of 8 Jan., 1947, S. H7.

<sup>278</sup> BW art. 2:85(1)/194(1). A violation of these provisions is a criminal offense, see WED art. 1(4).

A managing director must sign the shareholders' register every time a new entry is made. Shareholders<sup>279</sup> have the right to inspect the register. The shareholders' register is not, however, open for public inspection, except for shares for which the nominal value has not been fully paid.<sup>280</sup>

Every shareholder and pledgee or beneficiary of a life interest in shares of the corporation has the right to obtain an affidavit of his registration, free of charge.<sup>281</sup> As discussed above, this affidavit is not conclusive legal evidence that the registered person is the rightful owner, pledgee, or beneficiary, or that the shares are properly paid up. The affidavit is not negotiable.

The register must remain at the corporation's main offices in the Netherlands (except for N.V.s that under foreign law or stock exchange regulations must remain as part of their shareholders' register in that foreign country).<sup>282</sup> The articles may provide that shareholders are entitled to a certified copy, and that a copy of the register shall be kept in the custody of a Dutch civil law notary or attorney.

**c Disclosure; Single Shareholder.** A corporation with a single shareholder is subject to certain public disclosure rules. Single-member corporations are N.V.s or B.V.s with one shareholder who directly holds all of the issued shares. The single shareholder may be another corporation (including the parent) or a natural person. Treasury shares of the single-member corporation or shares held by its subsidiaries are ignored when determining the number of shareholders.<sup>283</sup>

Once a shareholder either qualifies as a single shareholder of an N.V. or loses this qualification, he must notify the corporation within eight days.<sup>284</sup> Shareholders of a B.V. corporation are known to the corporation, and consequently no special

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<sup>279</sup> Pledgees and beneficiaries of a life interest that have the "information rights" similar to holders of depository receipts issued with the support of the corporation (see *infra* Chapter 5.5.e.) have this right as well, except (for N.V.s only) with respect to that part of the shareholders' register that is allowed to be kept outside the Netherlands (BW arts. 2:85(4)/194(4), 2:88(4)/197(4) and 2:89/198).

<sup>280</sup> BW art. 2:85(4)/194(4).

<sup>281</sup> BW art. 2:85(3)/194(3).

<sup>282</sup> BW art. 2:85(4)/194(4).

<sup>283</sup> BW arts. 2:91a(4), 2:137(1)/247(1).

notification by the single shareholder is required. Within one week,<sup>285</sup> the corporation must notify the Commercial Register of the name and domicile of the single shareholder. For a single shareholder corporation special rules apply with respect to transactions between the corporation and the shareholder if the corporation is represented by the shareholder. These transactions must be put in writing to avoid the transaction being nullified on behalf of the corporation. This provision also applies to corporate shareholders<sup>286</sup>.

### 5.3 Security Interests and Other Encumbrances

**a Pledge (Pandrecht).** The existence of the underlying debt determines the existence of the pledge.<sup>287</sup> The pledge automatically ceases to exist once the debt is satisfied.

The pledge on bearer shares (N.V.s only) can be created by: (i) an agreement between pledgor and pledgee, and compliance with the formalities to remove the share certificates from the pledgor's possession (possessory pledge or vuistpandrecht),<sup>288</sup> or (ii) by the execution of an instrument before a Dutch civil law notary, or an instrument signed by the pledgor, officially registered with the local tax registration bureau (Belastingdienst Ondernemingen, afdeling Registratie),<sup>289</sup> in which case it is not necessary to remove the share certificates from the pledgor's possession (non-possessory pledge or bezitloos pandrecht)<sup>290</sup>. The pledgor is required to state in the instrument that he has the power to pledge the shares and, as the case may be, that certain limited rights are vested in the shares. Any misrepresentation in this respect

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<sup>284</sup> BW art. 2:91a(1),(2). A violation of these provisions is a criminal offense, see WED art. 1(4).

<sup>285</sup> HrW 1996, arts. 5(1), 9(2); HrB 1996 art. 14(g). A violation of these provisions is a criminal offense, see WED art. 1(4).

<sup>286</sup> BW art. 2:137/247 (1).

<sup>287</sup> BW art. 3:7. A pledge may only be created as security for a monetary debt, expressed in any currency.

<sup>288</sup> BW art. 3:236(1).

<sup>289</sup> Registratiewet (Act on Registration) 1970 S.610.

<sup>290</sup> BW art. 3:237(1),(2).

may give rise to a claim against the pledgor, but it will not protect the pledgee against any defect in the pledge created in his favour.

To create a pledge on registered shares the same formalities must be complied with as for the transfer of such shares (see infra Chapter 5.4.a and b).<sup>291</sup> The management board must register pledges disclosed to it in the shareholders' register (see supra Chapter 5.2.b). The articles of both N.V.s and B.V.s may exclude or limit the right to pledge registered shares.<sup>292</sup>

Bearer shares deposited in the clearing house system (providing for transfers by administrative entries) of the Central Securities Depository in the Netherlands (Necigef) (Nederlands Centraal Instituut voor Giraal Effectenverkeer B.V.) can be pledged subject to the provisions of the Securities Depository Act.<sup>293</sup>

The articles may state that the right to vote on the shares may not be conferred to the pledgee. In the event that the articles do not contain such a provision the pledgor and the pledgee may agree that the voting rights pertaining to the pledged shares will remain with the pledgor or will be assigned to the pledgee at the moment the pledge is created. However, if a transfer of the shares concerned to the pledgee will be subject to any transfer restriction included in the articles, the assignment of the voting rights to such pledgee will be subject to the approval of the shareholders' meeting or such other corporate body which, under the articles, is competent to approve any transfer of shares under the transfer restriction provisions. It shall be at the discretion of the shareholders' meeting to grant or deny such approval unless under the company's articles another corporate body is competent to grant approval for any transfer of shares.<sup>294</sup>

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<sup>291</sup> BW arts. 3:236(2) and 2:86/196, 2:86c. Registered shares in a company, shares or depository receipts of shares which are listed on an official stock exchange, can also be pledged by execution of an instrument before a Dutch civil law notary or by an instrument registered with the local tax registration bureau without acknowledgement by or notification to the company (BW art. 2:86c(4)).

<sup>292</sup> BW art. 2:89(1)/198(1).

<sup>293</sup> Wet Giraal Effectenverkeer [WGE] (Securities Depository Act) arts. 20, 21, 42, 1977 S. 333, as amended.

<sup>294</sup> BW art. 2:89/198

**b Foreclosure (Executie).** The pledgee can foreclose the shares without the power of a title of enforcement or court order.<sup>295</sup> Any restrictions on the transfer of shares (see *infra* Chapter 5.4.c) will apply.<sup>296</sup> The shares must be sold at public auction. Until the secured debt has become due and payable, the pledgor and the pledgee may not agree to foreclosure of the collateral by private sale.<sup>297</sup> The pledgor may also seek a court order for a private sale.

In order to start foreclosure proceedings, the non-possessory pledgee of bearer shares must first obtain possession of the share certificates. If the instrument was not made in notarial form, a court order is required in order to obtain the necessary power to instruct a court bailiff to seize the share certificates.<sup>298</sup>

**c Life interest (Vruchtgebruik).** This is a personal beneficial interest which an owner of assets grants to another person. It is also known as life estate or usufruct. A life interest in shares may include voting rights<sup>299</sup> and the right to receive distributions,<sup>300</sup> but will normally not include the right to sell or encumber the shares.<sup>301</sup> The articles of an N.V. or a B.V. cannot preclude a shareholder from creating a right of life interest in any of his shares,<sup>302</sup> or exclude all or certain persons from exercising the voting rights if they are to become usufructuaries.

## 5.4 Transfer of Shares

<sup>295</sup> BW art. 3:248.

<sup>296</sup> BW art. 2:89(5),(6)/198(5).

<sup>297</sup> BW art. 3:251(1),(2).

<sup>298</sup> Rv art. 496(1),(2).

<sup>299</sup> BW art. 2:88/197.

<sup>300</sup> Judgment of 23 May 1958, HR 1958, NJ No. 458.

<sup>301</sup> BW arts. 3:201,3:212, 3:216.

<sup>302</sup> BW art. 2:88(1)/197(1).



**a N.V. Shares.** Bearer shares are transferred by surrendering the share certificates, unless the shares have been deposited with Necigef which provides for transfers by book entry as regulated by law.

Registered shares are transferred by a deed of transfer executed before a Dutch civil law notary.<sup>303</sup> The notarial deed contains certain specific details about the parties, the corporation and the shares being transferred.<sup>304</sup> The articles may require the share certificate to be surrendered to the corporation, in which case transfers may be completed by an endorsement and a replacement of the old certificate by a new certificate in the name of the new owner.<sup>305</sup> Registered shares of a corporation, all or part of the shares of which are listed on an official stock exchange, or are likely to be admitted to such an official stock exchange in the near future, can be transferred without the involvement of a Dutch civil law notary.<sup>306</sup>

Except when the corporation is a party to the transfer deed, regarding an N.V. that is not listed on an official stock exchange, all shareholder rights can be exercised only by the new shareholder after the corporation has acknowledged the transfer of the registered shares (erkenning), or the notarial deed has been served upon the corporation by a Dutch court bailiff (betekening).<sup>307</sup> In the interim the transferor, who is no longer the legal owner of those shares, may not exercise any rights pertaining to those shares either. The acknowledgement can be placed in the deed of transfer or made by means of a dated statement on a notarial transcript or on a certified copy of the deed.<sup>308</sup> In the absence of a request from any of the parties to the transaction to acknowledge the transfer, the corporation itself can acknowledge the transfer by

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<sup>303</sup> BW art. 2:86(1).

<sup>304</sup> BW art. 2:86(2).

<sup>305</sup> BW art. 2:86c(3).

<sup>306</sup> Unless the latter category of shares is listed and deposited with Necigef, such shares are transferred by a deed of transfer. Unless the corporation is a party to the transfer, in order to actually transfer the ownership of the shares, this deed must either be acknowledged in writing by the corporation, or served upon it by a Dutch court bailiff (BW art. 2:86c).

<sup>307</sup> BW art. 2:86a(1).

<sup>308</sup> BW art. 2:86b.

entering the new shareholder in the register of shareholders.<sup>309</sup> With respect to registered shares in a listed corporation, the transfer of shares shall only become effective after the corporation has acknowledged the transfer of the shares. It is only after this acknowledgement that the transferee becomes shareholder of the N.V. If certificates of registered N.V. shares have been issued, the acknowledgement of transfer is placed on the existing certificate, or a new share certificate is issued upon presentation to the corporation of the existing certificate. If the amount of the nominal value has not been fully paid, the acknowledgement must occur either in notarised form or the deed of acknowledgement must be filed with the tax authorities.

Actual or potential holders of a direct or indirect interest (in terms of shares or voting rights or both) in the capital of an N.V. whose shares or depository receipts are listed on an official exchange in a European Economic Area State must notify<sup>310</sup> the corporation and the Authority-FM when any of the following thresholds are reached or passed: 5 per cent., 10 per cent., 25 per cent., 50 per cent. and 66<sup>2</sup>/<sub>3</sub> per cent. (see supra Chapter 1.4).

**b B.V. Shares.** B.V. shares, which are by definition registered shares, are transferred by a deed of transfer executed before a Dutch civil law notary (see supra Chapter 5.4.a).<sup>311</sup> The procedure for the transfer of registered shares in a B.V. is similar to that for the transfer of registered N.V. shares. Unless the B.V. is a party to the transfer, shareholder rights can only be exercised by the new shareholder (although the transferor no longer has these rights) after the corporation has acknowledged the transfer (erkenning), or the notarial deed has been served upon the corporation by a Dutch court bailiff (betekening) (see supra Chapter 5.4.a).<sup>312</sup> The acknowledgement can (i) be placed in the deed of transfer or made by means of a dated statement on a notarial transcript or on a certified copy of the deed, or (ii) be made by registering the transfer in the shareholders' register.<sup>313</sup> The corporation itself

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<sup>309</sup> BW art. 86a(2).

<sup>310</sup> WMZ 1996 arts. 2(1),3(1).

<sup>311</sup> BW art. 2:196(1).

<sup>312</sup> BW art. 2:196a(1).

<sup>313</sup> BW arts. 2:196a(1),2:196b.

can also acknowledge the transfer at its own initiative once it has actual knowledge of the transfer<sup>314</sup>, by registration of transfer in the shareholders' register.

**c Share Transfer Restrictions.**

i N.V. Shares. Any restrictions on the transfer of N.V. shares must be set forth in the articles.<sup>315</sup> Restrictions can only apply to registered shares. Bearer shares are always freely transferable. Permissible restrictions may include a condition that registered shareholders be individuals or entities having certain qualifying characteristics, such as residency in the Netherlands, a specified family affiliation, or the absence of shareholdings in a directly competitive industry. Restrictions shall not, however, render transfer impossible or onerous.<sup>316</sup> Among restrictions considered to be unfair are those which render the amount to be received by the transferor inequitable (e.g., below fair market value, as determined by an independent expert, at the request of the seller) and those which limit the qualifying characteristics of those to whom shares may be transferred. In practice, restriction clauses for N.V. shares are often similar to corresponding B.V. provisions.

ii B.V. Shares. The transfer of B.V. shares must be restricted and specified in the articles according to mandatory legal provisions, which allow only limited flexibility.<sup>317</sup> The transfer must be subject either to approval by a corporate body, e.g., the corporation's management, or supervisory board (see infra iii) the shareholders' meeting or the meeting of holders of a specific class of share as set forth in the articles, or to rights of first refusal of the other shareholders (see infra iv). Combinations of both alternatives are also permitted.

The restrictions apply to all transfers, regardless of the underlying reason (sale, gift, inheritance, foreclosure, etc.). However, unless the articles provide otherwise,

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<sup>314</sup> BW art. 2:196a(2).

<sup>315</sup> BW art. 2:87(1).

<sup>316</sup> BW art. 2:87(1), as amended.

<sup>317</sup> BW art. 2:195(2).

these restrictions do not apply to a transfer to a shareholder's spouse, certain relatives, another shareholder, or the corporation itself.<sup>318</sup>

The articles may limit the transfer of shares to persons who meet specific criteria (see supra i). Any share transfer restrictions in the articles must be such that a shareholder, upon his request, receives an amount equal to the value of his shares as determined by one or more independent experts.<sup>319</sup> The articles may provide for standards for expert valuation of the shares, provided they do not lead to an apparently unreasonable valuation. The offer price of any third party may not be made the exclusive valuation standard of the expert.

Clauses restricting the transfer of shares may be circumvented when shares are held by a corporate shareholder. For example, corporation A has a transfer restriction provision. Shareholders of corporation A are corporation B and Mr. C. The sole shareholder of corporation B is Mr. B. In order to make the transfer restriction effective, an agreement between Mr. B and Mr. C is required. Otherwise, Mr. B may freely sell his shares in corporation B, which in practical terms abrogates Mr. C's rights under the transfer restriction. For this purpose, the articles may limit the ownership of the corporation's shares to individuals.

An alternative to the agreement between Mr. B. and Mr. C. is to make, in the articles, for a change of control provision. This provision will require the shares to be offered to the other shareholders if all or part of the shares in an ultimate corporate shareholder are in any way transferred to a third party, by operation of law, by universal succession of title or otherwise.

iii Approval Procedure. The articles can make the transfer of shares subject to the approval of the management board, the supervisory board, the shareholders' meeting, or the holders of a certain type or class of share, such as priority shares.<sup>320</sup>

After the approval is granted, the seller may offer his shares within three months of such approval to the transferee mentioned in the request for approval.

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<sup>318</sup> BW art. 2:195(1).

<sup>319</sup> BW art. 2:195(6). The experts must also be independent from the corporation. The external accountant of the corporation may be appointed as an expert. The internal auditor may be appointed only when the parties consent thereto (ASSER-MAEIJER 2, III, supra p. 23 at note 6, § 219).

<sup>320</sup> BW art. 2:195(4).

The approval shall be deemed to be granted if the corporate body designated in the articles for that purpose does not grant the approval with a simultaneous designation of an interested party who will purchase the offered shares for a reasonable price, to be paid upfront in cash.

The offeror may then, upon determination of the price by the experts, withdraw his offer. He cannot be forced to transfer his shares to the designated party. For tax reasons, the corporation may be named as a prospective buyer only if the seller agrees.<sup>321</sup>

If the parties fail to agree, the price at which the proposed buyer will purchase the shares must be determined by independent experts. A shareholder may, upon determination of the price by the experts, withdraw his request for an approval to sell.

iv Right of First Refusal. Alternatively, the articles may provide for a right of first refusal. The articles must then provide that the shares shall be offered to all shareholders. However, the articles may specify a certain sequence of shareholders who have this right in respect of certain types of share.<sup>322</sup> It is not possible to provide in the articles of a B.V. that the right of first refusal may only be exercised by shareholders of particular types or classes. This objective can be achieved only if a further provision is included that a certain corporate body must give its approval to such a transfer (see supra iii).

It is also possible to make the proposed sale subject to both an approval (see supra iii) and the right of first refusal.

A shareholder proposing to sell may withdraw his offer within one month after notification of the identity of the proposed purchaser and the price offered. If it appears that not all shares offered for sale will be purchased upfront for cash, at the request of the prospective transferor, and at a price determined by independent experts,<sup>323</sup> the selling shareholder may, within three months thereafter, freely transfer the shares to whomever he chooses.<sup>324</sup>

<sup>321</sup> BW art. 2:195(7).

<sup>322</sup> BW art. 2:195(5).

<sup>323</sup> BW art. 2:195(6).

<sup>324</sup> BW art. 2:195(5). Please note that many articles require the selling shareholder to disclose the identity of the prospective buyer when offering the shares to the co-shareholders.

#### **d Compulsory Transfers**

i Loss of Qualifications. A shareholder may be required to sell and transfer his shares in certain situations set forth in the articles,<sup>325</sup> which may include the holding of shares in competitors, engagement in competitive activities, death (in case of individuals), bankruptcy or liquidation (in the case of a corporate shareholder). Again, the selling shareholder must receive an amount which is equal to the value of the shares, offered as determined by one or more independent experts. The articles may provide that until the moment of transfer the rights pertaining to the shares to be transferred shall be suspended.<sup>326</sup>

ii Force-Outs. A shareholder owning 95 per cent. or more of a corporation's issued capital may initiate legal proceedings to require all of the other shareholders to transfer their shares to him.<sup>327</sup> A force-out action is subject to the jurisdiction of the Enterprise Chamber (a division of the Amsterdam Court of Appeal) (see infra Chapter 10.1), with a right of appeal to the Supreme Court on questions of law only.<sup>328</sup> The price of the shares to be transferred is determined by the Enterprise Chamber, which may order expert valuation. The Enterprise Chamber will refuse the mandatory transfer of a minority interest of five per cent. or less only<sup>329</sup> (i) if the sellers would suffer considerable financial damage that would not be compensated by the sale price; or (ii) if the articles attribute special powers to the minority shares and the minority shareholders can effectively use this power in the corporation (i.e., priority shares; see supra Chapter 5.1.c);<sup>330</sup> or (iii) if the majority shareholder has renounced his right to initiate these legal proceedings (which may be particularly relevant in joint ventures).

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<sup>325</sup> BW art. 2:87a(1)/195a(1).

<sup>326</sup> BW art. 2:87a(1)/195a(1).

<sup>327</sup> BW art. 2:92a(1)/201a(1).

<sup>328</sup> BW art. 2:92a(2)/201a(2).

<sup>329</sup> BW art. 2:92a(4)/201a(4).

<sup>330</sup> ASSER-MAEIJER 2, III, supra p. 23 at note 6.

## 5.5 Depository Receipts for Shares (Certificaten)

**a General.** Depository receipts<sup>331</sup> are instruments issued by a trust office (administratiekantoor), representing certain shares of a corporation held by the trust office. The legal concept applied for transfer to the trust office is fiducia cum amico (ten titel van beheer). The trust office is usually a foundation (stichting) (see *supra* Chapter 2.5.b) formed by the corporation or the shareholder transferring his shares to the trust office.

The transfer to the trust office may occur with or without the co-operation of the corporation. If the articles allow the corporation to co-operate, and for any specific transfer the corporation acts accordingly, the holders of the depository receipts will have certain rights pertaining these receipts (see *infra* Chapter 5.5.e).

The receipts refer to the sorts and types of share, but are not identical to the underlying shares. The rights conferred on receipt holders are determined by the provisions according to which the receipts are issued. These provisions are called "trust conditions" (administratievoorwaarden). The financial position of the holder of receipts issued with the co-operation of the corporation is secured by a statutory pledge on the shares.<sup>332</sup> When creating depository receipts, the legal ownership of the shares is transferred to the trust office. As shareholder the trust office will cast the votes pertaining to these shares. The trust conditions may stipulate that for certain proposals that are subject to a ballot at the shareholders' meeting, the trust office must obtain prior approval of the meeting of depository receipt holders. In most cases, the trust conditions stipulate that distributions by the corporation to the trust office as shareholder flow to the receipt holder. Depository receipts are often used as an anti-takeover device.

**b Types of Depository Receipts.** A distinction can be made between registered depository receipts and bearer depository receipts (BDRs). For a B.V., no bearer

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<sup>331</sup> Depository receipts reflect certain rights to which shareholders in a corporation are entitled. These rights should not be confused with profit participation rights (see *supra* Chapter 5.1.b), which are created by a provision in the articles, for persons other than shareholders.

<sup>332</sup> BW art. 3:259.

depository receipts may be issued.<sup>333</sup> Another distinction can be made between: convertible receipts (royeerbare certificaten), which can be converted into the underlying shares upon request and payment of a nominal fee; partially convertible receipts (gedeeltelijk royeerbare certificaten), which can be converted only upon satisfaction of certain trust conditions; and non-convertible receipts (niet royeerbare certificaten), which are convertible only upon the liquidation of the trust office.

**c Stock Exchange Rules.** The listing rules of Euronext Amsterdam N.V. contain special rules for depository receipts and trust offices, and require the trust office to be independent of the corporation in which it holds shares.<sup>334</sup> This is of particular importance when the trust office has been formed and its board appointed at the corporation's initiative, in order to avoid interference by a shareholder or a takeover bid.

**d The Practical Use of Depository Receipts.** Depository receipts are used to facilitate trade on Euronext Amsterdam N.V. in foreign shares, particularly if these shares are registered or if the nominal value of such shares is unusual or impractical for Dutch investors (e.g., expressed in a foreign currency), as well as to protect a corporation against corporate raiders.

**e Rights of Receipt Holders.** Holders of depository receipts do not have the right to vote the underlying shares. However, they do have the right to share in the corporation's profits. For that reason they do not have a direct right vis-à-vis the corporation, but a contractual right vis-à-vis the trust office. In addition, if the depository receipts are issued with the corporation's concurrence, their holders have the right, enforceable against the corporation, to attend and participate in shareholders' meetings<sup>335</sup> and to obtain any reports, statements and other documents to which shareholders are entitled. For these "information rights", see infra Chapter 7.6.

Furthermore, this type of receipt holders may participate in convening a

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<sup>333</sup> BW art. 2:202.

<sup>334</sup> Fondsenreglement, Book II AEX Listing Rules, Exhibit X, part A (2000).

<sup>335</sup> BW art. 2:117(2)/227(2).



shareholders' meeting through a court order (see infra Chapter 7.2.a), and they are considered to be among the persons and bodies to which special rules apply requiring reasonable and fair behaviour (see infra Chapter 6).<sup>336</sup>

**f Meetings of Receipt Holders.** The trust conditions may provide for meetings of receipt holders. Most trust offices hold meetings only upon the request of a specified percentage of receipt holders. The receipt holders may have voting rights at such meetings. Only in exceptional cases do the trust conditions require the trust office to cast its vote at the shareholders' meeting in accordance with instructions given by the receipt holders.

**g Transfer of Depository Receipts.** The character of depository receipts may be qualified as claim rights against the trust office. Registered depository receipts may be transferred by deed of assignment.<sup>337</sup> The transfer of bearer depository receipts is effected by surrendering the certificate to that effect to the transferee<sup>338</sup> (unless they are deposited with Necigef, which provides for transfers by book entry, as regulated by law).

**h Statutory Pledge.** For the benefit of the receipt holders created with the co-operation of the corporation, a statutory pledge exists<sup>339</sup> on the shares held by the trust in the corporation for which the depository receipts are issued, unless specifically stated otherwise. The pledge exists for any and all claims which such receipt holder may have against the trust pursuant to the relationship for which the receipts were issued.

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<sup>336</sup> BW art. 2:8

<sup>337</sup> BW arts. 3:93,3:90(1).

<sup>338</sup> BW art. 3:94.

<sup>339</sup> BW art. 3:259.

## **6 CORPORATE BODIES; CORPORATE RESOLUTIONS**

### **6.1 Corporate Bodies**

Although Netherlands' law does not define the concept of a corporate body, an accurate description could be that it entails any institution within the corporation which either by law or by the articles of association received certain powers to make decisions within the corporation.

All N.V.'s and B.V.'s have at least two corporate bodies: the shareholders' meeting and the management board. In the event that the corporation qualifies as a "large" company, it must also, pursuant to law, have a supervisory board, consisting of at least three members. In the event that the corporation does not qualify as a "large" company, the articles may or may not provide for a supervisory board (see infra Chapter 8.1.a).

These three corporate bodies are well regulated by law. The powers are divided among these corporate bodies. As will be further described in chapters 7 and 8, when dealing with these corporate bodies in more detail, no corporate body can legally be deemed to be the ultimate holder of control within the corporation.<sup>340</sup>

Besides these three corporate bodies provided by law, the articles of association may provide for other corporate bodies, as long as their powers are different from those attributed to the former three corporate bodies by mandatory law.

For example, the articles of "large" companies may provide for an audit committee.

Besides corporate bodies which serve a special purpose, holders of a specific class of shares may also form a separate corporate body. For instance, if the corporation has priority shares, the holders of such shares may form a corporate body to which certain powers are allocated, such as the power to make a binding nomination with respect to the appointment of managing directors, issue of shares and approval of certain

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Real life may be different, much depending on the actual circumstances of the corporation in question. It is clear that in a single shareholder corporation the influence of the shareholders' meeting, then consisting of only one person or legal entity, shall be considerably greater than the influence of the shareholders' meeting in a listed corporation, where only a limited percentage of the shareholders may be represented. In the first case, the influence of the shareholder on the management board shall be considerable.

resolutions of the management board etc.

## 6.2 Resolutions of Corporate Bodies

Corporate bodies consist of one or more members. As a forum of those members, it may take resolutions. The resolutions are supposed to be the result of the meetings of such corporate bodies.<sup>341</sup>

The effects of these resolutions differ in nature, depending on the kind of resolution.

Basically, a distinction can be made between the following kinds of resolution.

**a Resolutions with Internal Effect.** These resolutions are adopted only to have an effect within the corporation, i.e., they aim to deal with an internal situation or to change the structure of the corporation. An example of a purely internal resolution is the approval of the shareholders' meeting that may be required by the articles for a certain decision of the management board. The approval of the shareholders is an internal resolution only and has no external effect.

**b Semi Internal Resolutions.** Certain resolutions may be the first step in a chain of actions. The resolution itself does not work externally but without a valid resolution of the appropriate corporate body the external action cannot have any effect.<sup>342</sup>

For instance, in order to amend the articles, the shareholders' meeting must adopt a resolution to that effect. However, this resolution by itself does not result in an amendment of the articles. In addition, a declaration of no objection by the Ministry of Justice and a Dutch notarial deed are necessary in order to complete the amendment. If the resolution of the shareholders' meeting was not valid in the first place, the amendment is not valid either. Consequently the resolution has a certain external effect.

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<sup>341</sup> Judgment of 15 July 1968, HR , NJ 1969 No. 101.

<sup>342</sup> Third parties in good faith may be protected against the effect of an invalid or non-existent resolution. See infra Chapter 6.3.c.

**c External Resolutions.** Certain resolutions have direct external effect as they are directed towards a third party. The resolution itself creates a certain relationship between the corporation and the third party. Examples of such direct external resolutions are the appointment of a managing director by the shareholders' meeting or a resolution by the appropriate corporate body to issue registered shares in a listed corporation to a specific shareholder.

### **6.3 Resolutions of Corporate Bodies that are Void or Voidable; Principles of Reasonableness and Fairness; Third Party Protection**

As resolutions differ in character from other actions performed by the corporation they need different treatment in order to judge their validity. Two (legal provisions) articles provide for special rules in respect thereto. They apply to N.V.s and B.V.s.

**a Void Resolutions**<sup>343</sup> A resolution taken by a corporate body in violation of the law or the articles of association of the corporation is void. The resolution is non-existent. It has no effect.

This means for instance that, if in a corporation (other than a "large" company) a managing director is appointed by resolution of the supervisory board, the appointment is not valid. The resolution was adopted in violation of the articles and the law. The shareholders' meeting, not the supervisory board, is authorised to adopt this resolution.

However, if a resolution is void because it was adopted in violation of the required previous action of, or announcement to, a third party, as provided for in the law or the articles, then the void resolution may be remedied by an action of this other party.<sup>344</sup>

**b Resolutions which may be Subject to Nullification.**<sup>345</sup> A resolution of a corporate body may be nullified by a court decision in each of the following events:

- (a) If the resolution is taken in violation of provisions of law or the

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<sup>343</sup> BW art. 2:14.

<sup>344</sup> See Chapter 6.2.

<sup>345</sup> BW art. 2:14(2).

articles which deal with the manner in which resolutions must be adopted. For instance, the articles of association provide that notice for a shareholders' meeting must be given no later than on the seventeenth day prior to the shareholders' meeting. In actuality, the notice was given 15 days prior to the meeting. The meeting takes place and the shareholders' meeting resolves certain issues. These resolutions are subject to nullification.<sup>346</sup>

- (b) If the resolution is taken in violation of the principles of reasonableness and fairness<sup>347</sup> as provided for in the law.<sup>348</sup> The law provides that the legal entity and all parties who are connected to the organisation of the legal entity pursuant to law or the articles of association must behave vis-à-vis each other with all due respect towards these principles.

The law does not apply to corporate bodies only, but may also apply to individuals who are connected to the organisation of the legal entity.<sup>349</sup> If a majority shareholder used his majority vote in a shareholders' meeting only to harm the interest of the minority shareholder, he might violate this principle, and any resolutions so adopted may be nullified. This provision in the law also has a significant influence on decisions of the management board (see infra Chapter 10.2.c). When deciding on a certain issue, the management board must consider what effect its decision might have on any other persons connected to the legal entity and may have to reconsider the resolution if it would unreasonably affect the interests of these persons and as a result thereof may be in violation of the principles of

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<sup>346</sup> Unless the entire issued capital was represented at that meeting. BW art. 2:115/225.

<sup>347</sup> BW art. 2:8.

<sup>348</sup> BW art. 2:15(1)(b).

<sup>349</sup> It is not clear whether a Works Council falls within the scope of BW art. 2:8. No case law exists. A recent report of the Social Economic Council (Sociaal Economische Raad [SER] 17 Jan. 2001) seems to indicate that it does. Learned writers are divided.

reasonableness and fairness.<sup>350</sup>

- (c) If a resolution is taken in violation of the by-laws.<sup>351</sup> It should be noted that the concept of by-laws in the Netherlands may differ from the concept of by-laws in other jurisdictions. In the Netherlands by-laws are often used by large associations. They are an internal set of rules to be considered more as a code of order. Sometimes a supervisory board draws up by-laws regulating the number of meetings and establishing a scheme of rotation.

A resolution which is void (see supra (a)) is void ab initio. A resolution which is subject to nullification remains in existence until it is nullified by a court decision. If it is nullified, then this resolution shall be deemed never to have existed. In other words, the nullification has retro-active effect.

The court may nullify the resolution upon request of any person who has a reasonable interest in the resolution being nullified or upon request of the legal entity itself pursuant to a board resolution.<sup>352</sup> However, the power to request the court to nullify the resolution will elapse one year after the day on which either the resolution has been adequately announced or the interested party has obtained actual knowledge of the resolution or has been notified that the resolution has been taken.<sup>353</sup>

Only a resolution which is subject to nullification as described under [i] above may be healed by another resolution provided that for the latter resolution all requirements for adopting this resolution have been duly observed.

**c Protection of a Third Party who was acting in Good Faith.**<sup>354</sup> A final decision of the court to nullify a resolution or to establish the nullity of a resolution is binding on everybody provided that the corporation has been a party to the procedure.<sup>355</sup>

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<sup>350</sup> Judgment of 1 Oct. 1982, Ger. 's-Gravenhage, 1983, NJ No. 393.

<sup>351</sup> BW art. 15(1)(c).

<sup>352</sup> BW 2:15(3).

<sup>353</sup> BW 2:15(5).

<sup>354</sup> BW art. 2:16.

<sup>355</sup> BW 2:16(1).

However, resolutions may be directed to specific third parties or may have an effect on the validity of transactions entered into with specific (see supra Chapter 6.2) third parties. The law protects this third party against invalidity of that transaction if this party did not know or was deemed not to know that there was any defect in the underlying resolution in terms of its nullity. In that case the void or nullified resolution cannot be held against that party.

This protection does not apply with respect to a resolution by which a managing director is appointed. The appointment will not be valid, but the corporation may be held liable for damages.

## 7 SHAREHOLDERS

### 7.1 - Basic Powers

**a Appointment of Managing Directors and Supervisory Directors.** In the Netherlands, the shareholders' meeting does not have supreme authority within the corporation, and the management board is not subordinate to it.<sup>356</sup> The shareholders have, in fact, a very limited role in the management and operations of the corporation.<sup>357</sup> The shareholders cannot operate as the executive of the corporation (which is the exclusive power of the management board), give detailed instructions to the management board, or, particularly in the case of "large" companies (see infra Chapter 8.3.a.ii), overrule decisions of the supervisory board made pursuant to the powers vested in that board by the law or the articles. As indicated in Chapter 6, however, it will very much depend on the nature of the corporation, such as with regard to number of shareholders, how in effect the powers are divided within the corporation.

If the corporation is not a "large" company the shareholders' meeting primary power is the power to appoint,<sup>358</sup> suspend and remove<sup>359</sup> managing directors and supervisory directors and to adopt the annual accounts of the corporation. In the case of an optional supervisory board, i.e., one provided for in the articles<sup>360</sup> but not required by law, the shareholders' meeting may not assign this power to the supervisory board.<sup>361</sup> If, however, the corporation is a "large" company and not fully or partially exempt (see infra Chapter 8.1.b.iv), the managing directors are appointed, suspended and removed by the mandatory supervisory board.<sup>362</sup>

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<sup>356</sup> Judgment of 21 Jan. 1955, HR, 1959 NJ No. 43.

<sup>357</sup> BW arts. 2:107(1)/217(1), 2:129/239.

<sup>358</sup> BW arts. 2:132/242, 2:142(1)/252(1).

<sup>359</sup> BW arts. 2:134/244, 2:144(1)/254(1).

<sup>360</sup> BW art. 2:140(1)/250(1).

<sup>361</sup> BW arts. 2:132/242, 2:142(1)/252(1).

<sup>362</sup> BW arts. 2:162/272, 2:134(1)/244(1).



With respect to the appointment of managing and supervisory directors, the shareholders' meeting may be required to accept nominations made by the management or supervisory board, by a particular type or class of shareholder, usually the holders of priority shares (see supra Chapter 5.1.c), or by any other person or institution stated in the articles. These nominations can always be overruled by a qualified majority of two-thirds of the votes cast, representing more than half of the issued shares.<sup>363</sup> The articles cannot subject the appointment of directors, managing or supervisory, to the approval of any third parties.<sup>364</sup>

**b Annual Accounts; Annual Report; Dividends.** The shareholders' meeting has the power to adopt the annual accounts.<sup>365</sup> This right to adopt the annual accounts provides for the possibility to make changes to the annual accounts. However, if the corporation is "large"<sup>366</sup> and not fully or partially exempt (see infra Chapter 8.1.b.iv), the right to adopt the annual accounts is vested in the supervisory board, while the final approval of the adopted annual accounts is vested in the shareholders' meeting.<sup>367</sup>

The management board must prepare the annual accounts and submit them to the shareholders' meeting within five months following the end of the financial year. In special circumstances, the shareholders' meeting may provide for a one-time extension of a maximum of six months.<sup>368</sup> The management board must file the annual accounts, adopted or approved, within eight days, with the Commercial Register. In the event that the annual accounts are not adopted within two months after the period permitted by law, i.e., within 13 months (five months + six months + two months)

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<sup>363</sup> BW arts. 2:133(2)/243(2), 2:142(2)/252(2).

<sup>364</sup> If the corporation is not a "large" company the articles may provide that one or more supervisory directors with a maximum of one-third of the total number of supervisory directors, may be appointed by someone other than the shareholders' meeting, BW art. 2:143/253.

<sup>365</sup> BW art. 2:101(3)/210(3). Non-compliance with these provisions is a criminal offence, see WED art. 1(4).

<sup>366</sup> See Chapter 8.1.b.i regarding the new structure rules as proposed, the annual accounts shall be approved by the supervisory board and adopted by the shareholders' meeting.

<sup>367</sup> BW arts. 2:101(3)/210(3), 2:163/273.

<sup>368</sup> BW art. 2:101(1)/210(1).

after the end of the financial year,<sup>369</sup> the management board should file forthwith the draft annual accounts with the Commercial Register, with a reference to their draft status. The annual accounts must be accompanied by the auditor's opinion<sup>370</sup> and the annual report of the management board.<sup>371</sup> The annual report of the management board (which does not include the annual accounts)<sup>372</sup> is final and cannot be amended by the shareholders' meeting or the supervisory board. The annual accounts prepared by the management board may include a proposed allocation of profits. If the right to adopt the annual accounts is vested in the shareholders' meeting<sup>373</sup>, the final allocation of profits is made by the shareholders, subject, however, to any provisions in the articles for the formation of and allocation to certain reserves and to any powers that the articles may vest in that respect in the management board, the supervisory board or the priority shareholders (*see supra* Chapter 5.1.d). The allocation of profits includes the determination of amounts available for dividends (for the distribution of dividends, *see supra* Chapter 4.8.a). It is therefore not the management board that determines whether dividends will be paid and in what amounts. The articles may specifically provide that the management board may allocate a portion of the profits to a reserve account, which will affect the amount of the profits available for distribution.

If the law or the articles require that the books and accounts be audited, the shareholders have the power to appoint the auditors.<sup>374</sup> The auditor's internal report,

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<sup>369</sup> BW art. 2:394(3).

<sup>370</sup> BW art. 2:393(6).

<sup>371</sup> BW art. 2:101(1)/210(1).

<sup>372</sup> BW art. 2:391. The annual report is not the glossy, printed report containing the annual accounts familiar to US lawyers and accountants. It is a report by the management board that explains the annual accounts, and indicates the board's views on the development of the enterprise. It must be in Dutch. The use of another language is permitted only if so resolved by the shareholders' meeting before the beginning of the financial year, and if during that year no shareholder objects (BW art. 2:362(7)).

<sup>373</sup> *See* Chapter 8.1.b.i regarding the new structure rules as proposed, the annual accounts shall be approved by the supervisory board and adopted by the shareholders' meeting. This will apply to all corporations.

<sup>374</sup> BW art. 2:393(2). If the shareholders' meeting fails to do so, this power will accrue to the supervisory board.

known as the management report,<sup>375</sup> is only submitted to the management board and, where applicable, the supervisory board. This report must include the auditor's findings in respect of the reliability and continuity of the automated data processing.<sup>376</sup> Its findings may become part of the auditor's opinion,<sup>377</sup> which is among the documents that the management board must submit to the shareholders. Any interested person has the authority to enforce the statutory obligation to have the accounts audited.<sup>378</sup>

As a general rule, all corporations are subject to the requirement to file their annual accounts and other information with the Commercial Register (see infra Chapter 12.1).

Annual accounts may be contested before the Enterprise Chamber<sup>379</sup> (see infra Chapter 10.2.d).

**c Approval of Major Corporate Changes.** The shareholders have the right to approve major changes in the corporate structure, including amendments to the articles, statutory mergers, statutory divisions, dissolution, and the sale of all or substantially all of the corporate assets (see infra Chapter 11).<sup>380</sup>

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<sup>375</sup> BW art. 2:393(4).

<sup>376</sup> BW art. 2:393(4).

<sup>377</sup> BW art. 2:393(5).

<sup>378</sup> BW art. 2:393(7).

<sup>379</sup> Rv art. 999.

<sup>380</sup> See Chapter 8.1.b.i regarding the new "large" company rules, as proposed. Under these new rules the approval of the shareholders' meeting shall be required for resolutions of the management board regarding:

- (a) transfer of all or substantially all of the entire enterprise to a third party;
- (b) entering into, or termination of, a long lasting cooperation with another corporation or legal entity by the corporation or its subsidiary, in the event that such co-operation or termination thereof is of fundamental importance to the co-operation;
- (c) Taking an interest in, or divestiture of a participation by, the corporation or one of its subsidiaries with a value of at least one third of the amount of the corporate assets pursuant to the annual accounts of the corporation.

(Proposal to add new BW art. 2:107a/217a). This provision will apply to all corporations.

**d Good Faith Requirements.** The law requires a shareholder to behave reasonably and equitably in all situations towards all parties connected with the corporation, including other shareholders, the management board, the supervisory board, holders of depository receipts issued with the co-operation of the corporation, the Works Council and the corporation itself.<sup>381</sup> This does not imply that shareholders must uphold the corporation's interests, or that they have any obligation towards other shareholders.<sup>382</sup> These good faith requirements may, however, form the grounds for an action to have a resolution of a corporate body voided by court order (see supra Chapter 6.3.b).<sup>383</sup>

## 7.2 Shareholders' Resolutions

**a Shareholders' Meeting.** Shareholders' meetings must be held in the Netherlands. The meeting must be held at the official seat or at a place designated in the articles.<sup>384</sup> Meetings may be held elsewhere (including abroad) if the entire issued share capital is present or represented.

A shareholders' meeting must be held at least once a year.<sup>385</sup> All other meetings are referred to as "special" or "extraordinary" meetings.

The annual meeting must be held within six months after the end of the corporation's financial year, unless the articles specify a shorter period.<sup>386</sup> Notice for meetings must be given by the management board or the supervisory board at least 15 days prior to the date of the meeting unless a longer notice period is specified by the articles.<sup>387</sup> The articles of private corporations and subsidiary corporations often

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<sup>381</sup> BW art. 2:8.

<sup>382</sup> Judgment of 30 June 1944, HR, 1944 NJ No. 465.

<sup>383</sup> BW art. 2:15(1)(b).

<sup>384</sup> BW art. 2:116/226.

<sup>385</sup> BW art. 2:108(1)/218(1).

<sup>386</sup> BW art. 2:108(2)/218(2).

<sup>387</sup> BW art. 2:115/225, unless a longer period is specified by the articles.

permit a notice to be given by shareholders representing 20 per cent. or more of the issued share capital. If the board refuses to convene a meeting, one or more shareholders holding at least 10 per cent. of the issued share capital may convene a meeting by obtaining an order of the president of the competent District Court.<sup>388</sup>

With respect to N.V.s only, the management board is under an obligation to convene a shareholders' meeting within three months after it becomes clear to the management board that the equity of the N.V. has decreased to an amount equal to or less than 50 per cent. of the paid up and called part of the share capital.<sup>389</sup> At such an extraordinary meeting all possible measures to be taken must be discussed.

In the event that there is an obligation pursuant to the law or the articles to hold a shareholders' meeting (e.g. the annual shareholders' meeting or the "loss" meeting), each shareholder (and for that purpose also the other persons authorised to be present at the meeting, such as holders of depository receipts issued with the co-operation of the corporation) has the right to request authorisation from the Court to convene a shareholders' meeting.<sup>390</sup>

N.V.s that have issued bearer shares can give notice only by an announcement in designated nationally circulated newspapers. In all other cases, the notice must be sent by mail. Failure to give proper notice may render the meeting voidable,<sup>391</sup> unless notice is waived by a unanimous vote representing all of the issued share capital.<sup>392</sup>

The agenda of the meeting is determined by the party giving notice.<sup>393</sup> Resolutions on subjects not properly set forth in the notice are valid only if

<sup>388</sup> BW art. 2:110/220. This right is also conferred upon holders of depository receipts issued with cooperation and, under certain circumstances, also to pledgees and usufructuaries, provided that the above persons represent at least 10 per cent. of the issued share capital.

<sup>389</sup> BW art. 2:108a.

<sup>390</sup> BW art. 2:112/222.

<sup>391</sup> BW art. 2:15(1)(a).

<sup>392</sup> BW art. 2:115/225.

<sup>393</sup> See Chapter 8.1.b.i regarding the new "large" company rules as proposed. Under the new rules, shareholders and holders of depository receipts issued with the co-operation of the corporation shall have the right to table issues to the agenda of the shareholders' meeting. This right will exist if they represent jointly at least 1 per cent. of the issued capital. Moreover, if it concerns a listed corporation, this right shall also apply to shareholders and holders of

carried by a unanimous vote of a meeting at which all shareholders are present or represented.<sup>394</sup> B.V.s must state the purpose of the meeting in the notice.<sup>395</sup> N.V.s may refer to an agenda of the meeting that is available for inspection by shareholders at the offices of the corporation.<sup>396</sup> Any proposal to amend the articles must, however, be mentioned in the notice.<sup>397</sup> In the event that annual accounts<sup>398</sup> or amendments to the articles<sup>399</sup> are to be discussed, proposals must be made available at the offices of the corporation for inspection by the shareholders prior to the meeting.

The articles must state who will act as chairman of the meeting. The chairman of the supervisory board or the president of the management board normally serves as chairman of the shareholders' meeting. The chairman may appoint a secretary to keep minutes and prepare the attendance list. The minutes of meetings at which certain important actions are undertaken or discussed must be prepared by a civil law notary.<sup>400</sup> The management board must keep a record of all shareholders' resolutions available for inspection by the shareholders and the holders of depository receipts (see supra Chapter 5.5 and infra Chapter 7.6). They are entitled to receive a copy or excerpt from this record.<sup>401</sup>

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depository receipts issued with the co-operation of the corporation if they represent a market capitalisation of € 50,000,000.

This right to add certain items to the agenda may be overruled if the interests of the corporation would not permit any such issue to be dealt with at the shareholders' meeting.

The petition to add an item to the agenda must be submitted to the management board at least 60 days, for an N.V., or 30 days, for a B.V., prior to the shareholders' meeting.

Proposal to add new BW art. 2:114a/224a. This provision shall apply to all corporations, both "large" and "regular".

<sup>394</sup> BW art. 2:114(2)/224(2).

<sup>395</sup> BW art. 2:224(1).

<sup>396</sup> BW art. 2:114(3).

<sup>397</sup> BW art. 2:123(1)/233(1).

<sup>398</sup> BW art. 2:102(1)/212.

<sup>399</sup> BW art. 2:123(3)/233(3).

<sup>400</sup> BW arts. 2:124(2)/234(2), 2:330(4).

<sup>401</sup> BW art. 120(4)/230(4).

For certain topics, such as putting aside a binding nomination or elimination of pre-emptive rights with respect to a new issue of shares, the law requires a quorum. The articles often contain quorum provisions requiring a certain percentage of shareholders to be present, or represented by proxy, when particular subjects (e.g., amendments to the articles or the dissolution of the corporation) are to be voted on at the shareholders' meeting.

**b Resolutions without a Meeting ("Unanimous Consent Resolutions").**

Corporations with few shareholders (or just one) may have a provision in the articles enabling the shareholders to adopt resolutions without a meeting.<sup>402</sup> These resolutions are valid only if the votes are cast in writing (or by telex, telefax, or telegram), the resolution is passed by a unanimous vote of all shareholders, and no depository receipts are issued with the co-operation of the corporation. The managing directors and the members of the supervisory board have an advisory vote in the meeting of shareholders (see infra Chapter 7.3). This advisory vote cannot be ignored, even when circumstances would normally indicate the shareholders' concurrence with the resolution. The advisory vote can be solicited by a conference call or by a draft resolution circulated and consented to prior to its adoption.<sup>403</sup> Failure to seek an advisory vote will make the shareholders' resolution subject to nullification. Unanimous consent resolutions may be adopted outside the Netherlands and may be executed in counterparts. The management board must keep a record of all unanimous consent resolutions.

**7.3 Voting.** The right to vote is concomitant with the ownership of shares. In principle, voting rights can never be separated from the shares. Recently, a registration date was introduced for N.V.s.<sup>404</sup> In order to facilitate the organisation of a shareholders' meeting of N.V.s, the management board may be authorised by the shareholders' meeting to use a registration date to better orchestrate a shareholders' meeting. The purpose of the registration date is to determine that the

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<sup>402</sup> BW art. 2:128/238.

<sup>403</sup> Judgment of 10 Mar. 1995, HR, 1995 NJ No. 595.

<sup>404</sup> BW art. 2:119.

holders of shares registered on a registration list as of a specific day (which may not be more than seven days prior to the meeting) shall be deemed to be the persons authorised to vote on the shares so registered at the shareholders' meeting, irrespective of whether such persons are still holders of those shares on the day of the shareholders' meeting. The registration date is the first step for Dutch listed corporations to facilitate proxy solicitation.

While N.V.s may have bearer shares (e.g., all shares listed on Euronext Amsterdam N.V. are bearer shares),<sup>405</sup> the articles of an N.V. often require that the share certificates be deposited prior to the meeting at the corporate head office or another designated place (often the offices of a commercial bank). The notice of the meeting must state this requirement. An N.V. shareholder cannot be required to make the deposit more than seven days prior to the meeting.<sup>406</sup> The articles of a B.V. may require a shareholder to give notice of his intended presence at the meeting; however, three days notice is sufficient.<sup>407</sup>

Each shareholder has at least one vote.<sup>408</sup> Non-voting shares are not permitted. The voting rights are, in principle, proportionate to the nominal value of the shares.<sup>409</sup> According to detailed provisions of the law, the articles may grant reduced voting rights per shareholder according to certain non-discriminatory thresholds<sup>410</sup>, provided that the restriction is not more favourable for holders with a large number of shares than for those with a small number of shares (e.g., six votes for 10 per cent., seven votes for 20 per cent., etc.), thereby reducing the voting power of large shareholders. The articles may also otherwise depart from the proportionality between equity interests and voting interests, provided that a single shareholder, irrespective of the number of shares he holds, shall not have more than a certain

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<sup>405</sup> This may change in the near future due to an amendment of the Wet Giraal Effectenverkeer [WGE] (Securities Clearances Act) to admit registered shares to the clearance by Necigef (see infra Chapter 10.3.a).

<sup>406</sup> BW art. 2:117(3).

<sup>407</sup> BW art. 2:227(3).

<sup>408</sup> BW art. 2:118(1)/228(1).

<sup>409</sup> BW art. 2:118(2)/228(2).

<sup>410</sup> BW art. 2:118(4)/228(4).



number of votes specified by law (six if the authorised capital is divided into 100 or more shares; otherwise the maximum is three).<sup>411</sup>

The managing directors and the supervisory directors have an advisory vote at the shareholders' meeting. A shareholder may be represented by proxy. The proxy instrument must be in writing.<sup>412</sup> The articles may prohibit certain persons from being proxy-holders, but attorneys, civil law notaries and register accountants (registeraccountants) may always represent a shareholder as a proxy-holder<sup>413</sup>.

As a general rule, proxies may be revoked at any time before the vote has been taken. Personal attendance of the shareholder at the meeting revokes any proxy given for that meeting.<sup>414</sup> The death or guardianship of the shareholder causes revocation of the proxy by operation of law. The proxy also terminates upon the transfer of the title to the shares. Proxies do not terminate if the N.V. applies a registration date, but this is only with respect to the shares so registered. Subject to the foregoing limitations, an irrevocable proxy may be given, provided it is coupled with an equity interest.<sup>415</sup>

Pledgees<sup>416</sup> and beneficiaries of a life interest<sup>417</sup> (see supra Chapter 5.3) may have voting rights. These voting rights are inherent in and concomitant with their equity interest, and cannot be revoked by the personal attendance of the legal owner of the shares, by the transfer of title to the shares, or by the death or mental incompetence of the shareholder.

Certain shares carry no voting rights, notably treasury shares and shares which have been transferred to a new holder without being acknowledged by the corporation, if so required.

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<sup>411</sup> BW art. 2:118(5)/228(5).

<sup>412</sup> If the registered shareholder gives a proxy to an institution which in its turn grants a sub proxy to the beneficiary, the entire proxy chain should be valid in order to cast a valid vote on the share for which the original proxy was granted. This may particularly be problematic in case a Dutch N.V. is listed at a foreign stock exchange.

<sup>413</sup> BW art. 2:117/227(1).

<sup>414</sup> ASSER-MAEIJER 2, III, supra p. 23 at note 6, § 289.

<sup>415</sup> Judgment of 13 Nov. 1959, HR, 1960 NJ No. 472.

<sup>416</sup> BW art. 2:89(3)/198(3).

<sup>417</sup> BW art. 2:88(3)/197(3).

The shareholders have access to the shareholders' register (see supra Chapter 5.2.b). Proxy solicitations and proxy battles are unusual in the Netherlands. There are, therefore, no special rules governing this phenomenon.

The holders of certain types or classes of share, usually priority shares (see supra Chapter 5.1.c), may have the right to veto certain shareholders' decisions, especially those providing for amendments to the articles or the dissolution of the corporation (see infra Chapter 11.6.b).

#### **7.4 Shareholders' Agreements**

Shareholders may enter into agreements concerning certain rights incidental to the ownership of their shares. Shareholders' agreements are, as a general rule, valid and enforceable, but they bind only the parties thereto. The rights and obligations set forth in the agreement are not incidental to the shares and do not bind future shareholders. The effectiveness of shareholders' agreements may be enhanced by penalty clauses, the use of irrevocable proxies (to the extent legally possible) and covenants to bind a successor or assignee under a penalty provision (kettingbeding).

Most joint venture agreements that call for the formation of one or more corporations to conduct the joint venture business contain provisions concerning the financing of the joint venture, a right of first refusal in the event that a participant wishes to sell its equity stake, and the use that the parties may make of their voting rights. These agreements cannot, however, set aside the powers that the management board and the supervisory board derive from the law and the articles.

It is generally held by legal commentators that a shareholder cannot sell or otherwise dispose of his voting rights separately from his legal or beneficial ownership rights in the shares, albeit that a voting agreement with other shareholders is allowed. However, a shareholder cannot agree to vote according to instructions from the management board or the supervisory board, and a voting agreement, like any other agreement, cannot violate the law, the articles or principles of good morals (goede zeden).<sup>418</sup>

Several types of voting agreement have been specifically approved by the Dutch Supreme Court. A voting agreement is valid if it purports to avoid a deadlock

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<sup>418</sup> ASSER-MAEIJER 2, III, supra p. 23 at note 6, § 288. The agreement would be void.

at a shareholders' meeting, for instance, by providing that an opinion shall be sought from a third party regarding the resolution to be taken and that shareholders shall vote in conformity with this opinion.<sup>419</sup> The third party must act in good faith. The same practical result can be achieved by a provision in the articles that, in case of a tied vote among shareholders, a third party will resolve the matter.<sup>420</sup> A voting agreement may provide for a voting pool that requires certain shareholders to vote as a block and in accordance with the majority vote amongst those shareholders in a pre-meeting.<sup>421</sup> Shareholders may agree with a third party on certain actions of the corporation (such as the sale of parts of its business) and they may also agree amongst themselves that they will appoint a new board, if required, in order to ensure proper performance of the agreement with this third party,<sup>422</sup> as long as they do not commit themselves in general to the third party, but only for specific, well defined circumstances. It is generally believed that other purposes of voting agreements may be valid as well, such as an agreement not to cast votes or to waive a vote under specific circumstances.<sup>423</sup> However, an outright sale of voting rights for consideration is generally perceived as prohibited and void.<sup>424</sup>

Netherlands' law does not permit the formation of a voting trust. However, a similar result can be, and frequently is, achieved by the formation of a stichting (see supra Chapter 2.5.b) that holds title to the shares, subject to certain contractual obligations.

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<sup>419</sup> Judgment of 30 June 1944, HR, 1944 NJ No. 405.

<sup>420</sup> BW art. 2:120(1)/230(1).

<sup>421</sup> Judgment of 13 Nov. 1959, HR, 1960 NJ No. 472.

<sup>422</sup> Judgment of 19 Feb. 1960, HR, 1960 NJ No. 473. However, a voting agreement may not frustrate the statutory provision that any nomination for the appointment of a director can always be set aside by a majority of two-thirds of the votes cast, representing more than one-half of the issued capital (ASSER-MAEIJER 2, III, supra p. 23 at note 6, § 288). Likewise a voting agreement to distribute reserves to evade the thresholds for the applicability of the "large" company rules (see infra Chapter 7.1.b.i) may under certain circumstances be void (Judgment in preliminary proceedings of 15 Dec. 1976, Rechtbank [Rb.] (District Court) Alkmaar, 1978 NJ No. 319).

<sup>423</sup> ASSER-MAEIJER 2, III, supra p. 23 at note 6, § 286.

<sup>424</sup> ASSER-MAEIJER 2, III, supra p. 23 at note 6, § 288.

## 7.5 Inspection of Books and Records

Every corporation must keep books and records, and the management board must store these records for a period of at least seven years.<sup>425</sup> The books and records must be in such a form that, depending on the nature and size of the corporation, an accurate assessment can be made fairly quickly of the financial status of the corporation<sup>426</sup>. With the exception of the shareholders' register (see supra Chapter 5.2.b), shareholders are not entitled to inspect these books and records. Shareholders (or holders of depository receipts) representing either 10 per cent. of the issued shares or a nominal value of € 225,000 (or any lower percentage or amount as provided in the articles) may, under certain circumstances, request the Enterprise Chamber (a division of the Amsterdam Court of Appeal) (see infra Chapter 10.1) to appoint one or more experts to investigate the conduct of the business (see infra Chapter 10.2.b). These court-appointed experts are entitled to full access to the books and records.<sup>427</sup>

## 7.6 - Rights of Holders of Depository Receipts

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<sup>425</sup> BW art. 2:10; see infra Chapter 8.2.d for claims of bankruptcy upon non-compliance with these provisions.

<sup>426</sup> Judgment of 6 June 1993, HR, NJ 1993, No. 713.

<sup>427</sup> BW art. 2:351. In a recent decision the Dutch Supreme Court ruled that the provisions of corporate law for obtaining information are not exhaustive and therefore do not preclude a minority shareholder obtaining information through a preliminary hearing of witnesses (Rv art. 124) (Judgment of 20 Oct. 1995, HR 1996 NJ No. 120)). The court may also require the defendant to give the plaintiff access to its books and records but only to the extent necessary to pursue the court case (Judgment of 7 Nov. 1997, HR 1998 NJ No. 268). This is particularly the case if the claim relates to books and records concerning the accounts of the company (WvK art. 8(1)).

Holders of depository receipts issued with the support or concurrence of the corporation (see supra Chapter 5.5) enjoy the following rights on an equal basis with shareholders:<sup>428</sup>

- (a) the right to receive the agenda of the meeting;<sup>429</sup>
- (b) the right to attend meetings and to participate in discussions.<sup>430</sup> They do not, however, have the right to vote;
- (c) the right to obtain the annual accounts and the annual report and auditors' opinion (see supra Chapter 6.1.b);<sup>431</sup>
- (d) the right to petition for a shareholders' meeting (see supra Chapter 6.2.a) or for an investigation into the affairs of the corporation (enquête) (see infra Chapter 10.2.b.v).

The same rights may be attributed in the relevant agreement to pledgees and usufructuaries with voting rights and pledgors, pledgees and usufructuaries without voting rights, unless this attribution is not permitted by the articles.

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See Chapter 8.1.b.i regarding the new "large" company rules as proposed. Under these new rules the following new rights will be introduced in addition to those listed in this paragraph:

- (i) subject to certain restrictions (see supra Chapter 7.2.a), to add an item to the agenda of a shareholders' meeting;
- (ii) holders of depository receipts for shares in a listed corporation (this applies to both a "large" and a "regular" listed corporation) may request the trust office to grant a proxy to cast a vote on the underlying shares and the trust office must grant this proxy unless:
  - (a) a hostile public bid has been announced or made or it is anticipated that this will occur;
  - (b) a person or group of persons or legal entities has or have acquired 25 per cent. of the depository receipts; and
  - (c) in the opinion of the trust office the voting rights of a holder of receipts will be significantly in conflict with the interests of the corporation and its enterprise.

(Proposal to add new BW art. 2:118a). This provision shall apply to all, both "large" and "regular" listed corporations.

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BW arts. 2:113(1)/223(1) and 2:114(1)/224(1).

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BW art. 2:117(2)/227(2).

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BW art. 2:102(1)/212.

## 8 DISTRIBUTION OF POWERS; MANAGEMENT OF BUSINESS AFFAIRS

### 8.1 Two-Tier System

**a General.** Although Netherlands' corporate law is, in many respects, different from corporate law in other continental European countries, the same basic two-tier management system exists elsewhere. This consists of a management board (known in France as the directoire, and in Germany as the Vorstand) which performs executive functions, as well as a supervisory board (in France, the conseil de surveillance, and in Germany, the Aufsichtsrat) which advises and supervises the management board. In the Netherlands, this system applies to both N.V.s and B.V.s. Each board has its own responsibilities, powers and duties, and each is legally independent of the shareholders.

This two-tier system is mandatory for corporations that have qualified and have been registered with the Commercial Register to that effect as "large" companies (see infra Chapter 8.1.b) for three consecutive years. The status of "large" company can be adopted voluntarily.<sup>432</sup> This may result from negotiations with trade unions or the Works Councils in merger or other situations. This voluntary "large" company status is only available if the corporation or a corporation controlled by it has a Works Council (see infra Chapter 13).<sup>433</sup>

In an N.V. and a B.V., the shareholders have identical powers (and limitations thereto), and the management board (directie or bestuur) and, where applicable, the supervisory board (raad van commissarissen) have the same responsibilities. The concept of an "officer" is unknown in Netherlands' corporate law.

The management board is the executive body and may be made up of individuals and/or corporations.<sup>434</sup> The management board is responsible for the management of the corporation and for its representation, i.e., the actions of the corporation towards third parties (see infra Chapter 8.2.e.).<sup>435</sup> The Dutch management

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<sup>432</sup> BW art. 157(1)/267(1).

<sup>433</sup> Id.

<sup>434</sup> For the fiduciary duties of managing directors, see infra Chapter 9.1.a.

<sup>435</sup> BW arts. 2:129/239 and 2:130(1)/240(1).

board combines the functions of internal managing directors and senior officers in an American corporation. Consequently, there is no position equivalent to that of chief executive officer. The management board may, however, consist of a sole member, in which case that person is customarily called the "managing director" or the "general managing director" (algemeen directeur). If the management board has more than one member, each can have different external powers and internal responsibilities (see infra Chapter 8.2.a.i),<sup>436</sup> but in principle the entire management board is responsible for proper management.

The supervisory board is distinct from the management board and the same persons cannot serve on both boards. The supervisory duties are not necessarily similar to the duties of external managing directors in an American corporation. The supervisory board has a primarily supervisory and advisory function.<sup>437</sup> The articles may give it more specific powers, but the supervisory board cannot exercise executive functions. The supervisory board is not empowered to give specific instructions to the management board, to determine the business policy of the corporation, or to appoint or remove managing directors. The precise duties and responsibilities of the supervisory board may vary, and may depend on the articles. The actual duties of the supervisory board often reflect the degree of delegation of power by the shareholders (see infra Chapter 8.3). The shareholders are free, except in the case of a "large" company, to state in the articles that there will only be a management board.

If the N.V. or B.V. is a "large" company, the supervisory board has a much more prominent position in the corporate hierarchy (see infra Chapter 8.3.a.ii). In neither case, however, does the supervisory board have the power to manage the business or negotiate and conclude contracts (except when the management board has a conflict of interest with the corporation) (see infra Chapter 8.3.a.i).

Furthermore, the shareholders are not the supreme authority within the corporation. They have certain statutory powers, and the articles may to some extent increase their authority to determine the general policy of the corporation.<sup>438</sup> In "large" companies, particularly, the shareholders have limited powers.

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<sup>436</sup> BW art. 2:9.

<sup>437</sup> BW art. 2:140(2)/250(2).

<sup>438</sup> BW art. 2:107(1)/217(1).

**b "Large" Companies (Structuurvennootschappen).**

i Extended Powers of the Supervisory Board. If over a period of three consecutive years an N.V. or a B.V. meets the statutory definition of a "large" company (see infra ii) and is not fully "exempt" (see infra iv), the law requires it to have a supervisory board with broad powers.<sup>439</sup> Following initial appointment in the deed of incorporation by the shareholders, the supervisory directors are appointed as from the date the "large" company rules become applicable (see infra ii) by the supervisory board itself. In addition, the supervisory board of a "large" company is charged with three other basic functions: appointment of the management board, adoption of the annual accounts, and approval of certain important decisions of the management board (see infra Chapter 8.3.a.ii). This mandatory two-tier system, intended to reduce the power of the shareholders and increase the power of the employee-based Works Council, is the Dutch alternative to the more direct form of employee participation in management that exists, for example, in Germany (Mitbestimmung). Additional rules applicable to "large" companies are described in Chapter 8.2 and Chapter 8.3.

On 8 January 2002 a proposal for new legislation was submitted to parliament regarding an amendment of the provisions in the law concerning "large" companies. The new rules, as proposed, are a result of an advise issued by the social economic counsel in January 2001, titled "The functioning and future of the structure rules". The new rules are not only limited to "large" companies, but also entail an expansion of certain shareholders' rights in other areas of corporate law. Furthermore, the new rules imply a major enhancement of the influence of holders of depository receipts in listed corporations. As the new rules still have the status of draft legislation, the proposed amendments are referred to in the notes to the current rules. The relevant note indicates whether the provision as proposed will only apply to "large" companies or to all corporations, irrespective their status "large" or "regular".

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<sup>439</sup>

BW art. 2:154(1)/264(1).



ii Definition of "Large". In order to determine whether a corporation qualifies as "large", the following three cumulative tests apply:<sup>440</sup>

- (a) the corporation's issued capital plus reserves, including its retained earnings, equal at least € 13,000,000<sup>441</sup>; and
- (b) the corporation or a "dependent company" (see infra) has established a Works Council, as required by law (see infra Chapter 13.1); and
- (c) the corporation, together with its dependent companies, normally employs 100 or more persons in the Netherlands.

In addition to the requirement that it has a supervisory board, a corporation that by law qualifies as "large" or has adopted this status voluntarily (see supra Chapter 8.1.a) is subject to a number of special rules in a variety of areas. These are discussed where applicable throughout this paragraph.

A dependent company (afhankelijke maatschappij), as defined in the Dutch Civil Code, is (i) a legal person in which the corporation, or any of its dependent companies, solely or jointly, and for their own account, contributes at least half of the issued capital, and (ii) a partnership with a business enterprise registered with the Commercial Register in which the corporation or a dependent company is a fully liable partner towards third parties.<sup>442</sup> Netherlands' law contains special rules for the definition of "large" in the case of a general partner in a limited partnership.

iii Notification to Commercial Register. A corporation that qualifies as a "large" company and is not fully exempt (see infra iv) must notify the Commercial Register (see infra Chapter 12.2) thereof within two months after the shareholders' meeting adopting or approving the annual accounts, as the case may be, for the year in which the corporation meets the statutory criteria.<sup>443</sup> Three years of uninterrupted registration automatically render the rules for "large" companies applicable.<sup>444</sup> Before the end of

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<sup>440</sup> BW art. 2:153(2)/263(2).

<sup>441</sup> Under the new rules for "large" companies, as proposed, this amount will be € 16,000,000.

<sup>442</sup> BW art. 2:152/262.

<sup>443</sup> BW art. 2:153(1)/263(1). Violation of this provision is a criminal offence, see WED art. 1(4).

<sup>444</sup> BW art. 2:154(1)/264(1).

the three-year period the articles must be amended to comply with the "large" company rules.<sup>445</sup> However, if the articles are not amended before that time, the mandatory provisions would come into force by operation of law. If the corporation no longer meets the criteria for qualification as a "large" company, then it must make a registration to that effect with the Commercial Register. Only after an uninterrupted period of three years of non-qualification as a "large" company are the statutory provisions of "large" companies no longer applicable.<sup>446</sup> However, these provisions may be voluntarily applied<sup>447</sup> provided that the corporation or its dependent company has a Works Council. The corporation will continue to be exempt until it qualifies as "large" again.<sup>448</sup>

iv Exemptions

A Fully Exempt "Large" Companies (Vrijgestelde Vennootschappen). The applicability of the rules for "large" company are triggered after the three year registration to that effect with the Commercial Register. Therefore, all exemptions from the rules for "large" companies will result in an exemption from the obligation to make the relevant registration with the Commercial Register. An otherwise "large" company is fully exempt from the special rules and regulations, and need not notify the Commercial Register, if:<sup>449</sup>

- (a) the corporation is "dependent" (see supra ii) on a legal entity to which the special rules concerning a "large" company apply in full or in part (for partially exempt "large" companies, see infra B) either mandatorily or voluntarily;

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<sup>445</sup> BW art. 2:154(3)/264(3).

<sup>446</sup> BW art. 2:154/264(2).

<sup>447</sup> See Chapter 8.1.b.i regarding the new "large" company rules as proposed. Under these rules, the voluntary application of the "large" company rules will require approval of the shareholders' meeting by majority vote (Proposal to add four new paragraphs to BW arts. 2:154/264).

<sup>448</sup> Resolution of the Minister of Justice of 1 Apr. 1987, 66 DE NAAMLÖÖZE VENNOOTSCHAP 30 (1988).

<sup>449</sup> BW art. 2:153(3)/263(3).

- (b) the corporation exclusively (or almost exclusively) restricts itself to the management and financing of group companies (see supra Chapter 3.1.b) and its own and their participation in other legal entities, provided, however, that the majority of the employees of this holding and finance corporation and all group companies are employed outside the Netherlands;
- (c) the corporation exclusively or almost exclusively renders management and financial services to a corporation as set forth under (b) above and to other companies of that group; or
- (d) at least one-half of the issued capital is held as a participation (see supra Chapter 3.1.b) under a mutual arrangement of co-operation between two or more "large" companies or companies "dependent" on "large" companies.

In practice, the exemptions under (b) and (c) above relate only to international groups of corporations with a Dutch-based holding or sub-holding company. In order to be exempted, the holding corporation must refrain from any activity other than the holding of shares and the financing of its group companies.

A "large" company to which the exemptions become applicable may transform itself and become a "regular" corporation immediately, i.e., without observing the three year waiting period as described under Chapter 8.1.b.iii, by amendment to its articles.<sup>450</sup>

However, in some cases the corporation may want to voluntarily remain a "large" company in order to avoid any of its Dutch subsidiaries becoming a "large" company.<sup>451</sup>

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<sup>450</sup> Such contrary to a "large" company which no longer meets the three criteria as set forth in Chapter 8.1.b.i and will remain a "large" company for another three years.

<sup>451</sup> See Chapter 8.1.b.i regarding the new "large" company rules, as proposed. Under the new rules the management board must propose to the shareholders' meeting to apply the "large" company rules on a voluntary basis and to amend the articles once it becomes exempted from the mandatory application of these rules. Irrespective of any qualified majority of votes that may be required for an amendment of the articles, this resolution may be taken by the shareholders' meeting with an absolute majority of the votes cast (Proposal to add four new paragraphs to BW arts. 2:154/264).

B Partially Exempt "Large" Companies (Verlicht Regime).

"Large" company rules apply only partially to (i) corporations controlled from outside the Netherlands or to (ii) international groups with a Dutch-based holding company.<sup>452</sup> Other than a corporation with a full exemption, this corporation must register as a corporation to which the three qualifications (see Chapter 8.1.b.ii) apply. It will become a "large" company after three years, but not all the provisions of the rules for "large" companies will apply. In other words, the corporation will be partially exempted. This partial exemption sets aside the requirements that give the supervisory board special powers with respect to the appointment of the management board and the adoption of the annual accounts.<sup>453</sup> These powers then remain with the shareholders.<sup>454</sup>

Control from outside the Netherlands is assumed, or a Dutch-based holding corporation of an international group is deemed to exist (and therefore the "large" company rules apply only partially), if at least one-half of the issued shares of the corporation is held by:

- (a) a corporation or another legal entity or its dependent companies, the majority of whose employees (or the employees of their group companies) are employed outside the Netherlands;
- (b) a joint venture formed by one or more corporations or other legal entities or their dependent companies which meet the criteria under (a) above; or
- (c) a joint venture formed by one or more legal entities which meet the criteria under (a) above and one or more fully or partially exempt "large" company.

<sup>452</sup> BW art. 2:155(1)/265(1).

<sup>453</sup> BW art. 2:155(1)/265(1). See Chapter 8.1.b.i regarding the new "large" company rules, as proposed.

Under the new rules, the partial exemption shall also apply to corporations of which the entire share capital is held by a single natural person or, pursuant to a mutual arrangement of cooperation, by two or more natural persons. (Proposal to add new BW arts. 2:155a/265a).

<sup>454</sup> See Chapter 8.1.b.i regarding the new "large" company rules, as proposed.

Under the new rules the right to adopt the annual accounts shall accrue to the shareholders' meeting, both for the non-exempted and the partially exempted "large" company (Proposal to amend BW arts. 2:101/210 paragraph 3).

However, the partial exemption is not available if the majority of the employees of the group to which the "large" company belongs, together with the employees of the legal persons or corporations referred to in (a), (b), and (c) above, are employed within the Netherlands.<sup>455</sup>

## **8.2 The Management Board (Bestuur) and its Agents (Procuratiehouders)**

### **a Powers of the Management Board**

i Regular N.V.s and B.V.s. The members of the management board (often referred to as managing directors) have collective powers and responsibilities. The managing directors share responsibility for all decisions and acts of the management board and for the acts of each individual managing director. The management board may adopt, for internal purposes, a manual or set of regulations that describe in detail the duties, responsibilities, and powers of each managing director, as well as the rules applicable to board meetings. The articles may allow the supervisory board to adopt the regulations governing the management board, which may limit the powers of that board.<sup>456</sup> Whilst these manuals and regulations have no external effect, they can be of practical use and may have a significant impact on the liability of a managing director in cases of mismanagement towards the corporation (see infra Chapter 9.2.b).

The law is not specific about the powers of the management board in undertaking "the management of the corporation."<sup>457</sup> This is generally understood to imply all powers of the management board, except for those expressly attributed to the shareholders or the supervisory board either by law or in the articles. The corporation's business policies must be determined by the management board within the confines of the corporate purposes and in the "interests of the corporation" (see supra Chapter 1.2). The management board oversees the implementation of its policies and the corporation's day-to-day affairs, in addition to implementing decisions of shareholders' meetings and of the supervisory board.

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<sup>455</sup> BW art. 2:155(2)/265(2).

<sup>456</sup> HANDBOEK, supra p. 2 at note 7, § 233.

<sup>457</sup> BW art. 2:129/239.

The management board prepares the annual accounts and the annual report (see supra Chapter 7.1.b). All members of the management board must sign the annual accounts (see infra Chapter 9.3.a). If a managing director fails to sign, the reasons for his failure to do so must be stated.<sup>458</sup> It is the responsibility of the management board to file the annual amounts within eight days of the adoption or, if the annual accounts are not adopted, within thirteen months of the end of the financial year.<sup>459</sup> The articles may empower the management board to resolve to create reserves and thereby allocate profits, and consequently determine the amount of profits available to the shareholders for dividend distribution (see supra Chapter 7.1.b).

The management board is basically independent in the performance of its duties. It is not subordinate to either the shareholders or the supervisory board,<sup>460</sup> nor can it be considered an executive committee of the supervisory board. The articles may, however, require the management board to obtain the prior approval of the supervisory board or shareholders' meeting with respect to decisions on matters set forth in the articles or determined by the supervisory board or the shareholders' meeting.<sup>461</sup> The articles may require that the management board comply with directives issued by the supervisory board or the shareholders' meeting concerning the general course of the corporation's policy on areas as further described in the articles, which is especially relevant if the corporation is part of a group of companies.<sup>462</sup> All these provisions however, are for internal purposes only. Any transactions with third parties concluded by the management board without the required prior approval, or actions in violation of any directive, will nevertheless be binding upon the corporation. The existence of directives or requirements to obtain any prior approval may not be invoked against the third party concerned.<sup>463</sup> Although the management

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<sup>458</sup> BW art. 2:101(2)/210(2). A violation of these provisions is a criminal offense, see WED art. 1(4).

<sup>459</sup> BW art. 2:394.

<sup>460</sup> Judgment of 21 Jan. 1955, HR, 1959 NJ No. 43.

<sup>461</sup> BW art. 2:129(2)/139(2).

<sup>462</sup> Id.

<sup>463</sup> This third party protection is not available in case of a specific abuse of this protection by this third party. Judgment of 17 Dec. 1982, HR, NJ 83, No. 480.

board is not legally obliged to accept detailed instructions from any other corporate body, its refusal to do so could result in a serious conflict with the shareholders or the supervisory board, culminating in the suspension or removal of one or more of the managing directors. A managing director removed because of his refusal to follow detailed instructions may, however, be entitled to significant severance payments.

The Works Councils Act contains several provisions requiring the management board to seek the prior consent or advice of the Works Council for certain critical decisions. These provisions of the Works Council Act are strictly enforced and actions by the corporation that violate them are subject to judicial recourse (see infra Chapter 13.2.f).

The management board has no power to fill its own vacancies or to amend the articles. US-style by-laws do not exist in the Netherlands.

ii "Large" Companies. If an N.V. or B.V. is a "large" company, special rules govern the powers of the management board. These rules supplement the rules applicable to ordinary corporations and state that in case of a conflict, the special rules prevail. In a "large" company, the management board must obtain the approval of the supervisory board prior to undertaking any of the following.<sup>464</sup>

- (a) the issuance or acquisition of shares and debt instruments issued by the corporation or by a general or limited partnership in which the corporation is a general partner;
- (b) co-operation by the corporation in the issuance of depository receipts for shares in its capital;
- (c) an application for listing or withdrawal of a listing at a stock exchange of shares, debentures, bonds and depository receipts (for N.V.s only);
- (d) the commencement or termination of a major long-lasting co-operation of the corporation or dependent company (see supra Chapter 8.1.b.ii) with another corporation or partnership, or participation as a general partner in a general or limited partnership if this co-operation or the termination thereof is of major significance to the corporation;
- (e) any acquisition by the corporation or a dependent company of a participation (see supra Chapter 3.1.b) in another corporation that exceeds the amount of one-fourth of the participating corporation's issued

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BW art. 2:164(1)/274(1).

- capital and reserves as shown on its balance sheet and the notes thereto, and any substantial increase or decrease in any such participation;
- (f) any investment of an amount equal to at least one-fourth of the corporations' own issued capital and reserves as shown on the balance sheet and the notes thereto;
  - (g) any proposal to amend the articles;
  - (h) any proposal to dissolve the corporation;
  - (i) the filing of a petition for bankruptcy or for a suspension of payments;
  - (j) the termination of the employment of a significant number of employees of the corporation or of a dependent company, at the same time or within a short time span;
  - (k) a substantial change in the employment conditions of a significant number of employees of the corporation or of dependent company; and
  - (l) any proposal to reduce the issued capital.

The articles may further supplement these requirements.

If the management board enters into a transaction in violation of these provisions, the corporation is nevertheless bound. The violation may, however, form the grounds for removal of a managing director or for other legal actions (see infra Chapter 9.2.b.i).

The supervisory board cannot force the management board to take action on any of the matters set forth above. This initiative is at the sole discretion of the management board.

**b Structure of the Management Board.** The management board may consist of individuals or legal entities, either Dutch or foreign, resident or non-resident. The management board must have at least one member. Its size is as determined by the articles and is the result of the appointment and removal of managing directors from time to time. The size of the board is not determined by the management board itself.

Most managing directors are employed full-time by the corporation. The concept of an "officer" does not exist in the Netherlands. The management board may resolve to assign special responsibilities (e.g., financial affairs) to one or more members of the management board.<sup>465</sup> These delegated responsibilities remain within

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BW art. 2:9.



the power of the management board as a whole and are part of its general responsibility for corporate affairs. Consequently, the title of president or general director (algemeen directeur) does not always imply a more prominent legal position than that of the other managing directors.

The articles may require certain qualifications or expertise for managing directors.<sup>466</sup>

The managing director's name, residential address (or, if the director is a corporation, its head office address) and other particulars must be entered in the Commercial Register (see infra Chapter 12).

### **c Appointment, Compensation, Suspension and Removal**

i Appointment in Regular N.V.s and B.V.s. The initial management board is appointed by the founders when the corporation is first incorporated.<sup>467</sup> Their names appear in the deed of incorporation. Their credentials will be checked by the Ministry of Justice prior to granting the certificate of no-objection. Thereafter, managing directors are appointed by the shareholders. The articles may provide that certain members of the management board be identified as members A, members B etcetera. This distinction between the board members may be made to show a distinction between the managing directors and their powers to bind the corporation (see infra d.iii). It may also be made to show a direct link between any such managing director and class of shareholder with a corresponding identity (class A, class B, etcetera), having special nomination rights. If the articles require shareholders to consider a binding nomination from a particular type or class of shareholder (usually holders of shares with a class indication or priority shares, see supra Chapter 5.1.c) or from the supervisory board (or any other person or institution stated in the articles) then the shareholders' meeting must appoint one of the candidates on the nomination (at all times consisting of at least two candidates). However, this nomination can be overruled by a qualified majority of two-thirds of the votes cast if they represent more than half of the issued shares.<sup>468</sup> A binding nomination must always include two

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<sup>466</sup> BW art. 2:132(2)/242(2).

<sup>467</sup> BW art. 2:132/242.

<sup>468</sup> BW art. 2:133(2)/243(2).

candidates. Appointment by one class or type of share capital of all or part of the board (known as a classified board) is prohibited. Shareholders may, however, conclude a shareholders' agreement (see supra Chapter 7.4) requiring the parties thereto to vote in favour of a proposal made by holders of one class or type of shares.

If the corporation has a Works Council (see infra Chapter 13.1), the management board is required to give the Works Council prior notice of any proposed candidate for appointment to the board, in order to give the Works Council an opportunity to render non-binding advice before the appointment is made.<sup>469</sup>

Managing directors are usually appointed for an indefinite period of time. Annual appointments or re-appointments are uncommon and, to the extent managing directors have employment agreements with the corporation, are incompatible with Dutch labour law.

ii Appointment in "Large" Companies. In the case of a non-exempt "large" N.V. or B.V., the members of the management board are appointed by the supervisory board.<sup>470</sup> This power cannot be made subject to a nomination by any class or type of shareholders, including priority shareholders (see supra Chapter 5.1.c). The shareholders must be notified prior to the appointment, although they cannot veto the appointment results. The Works Council (see infra Chapter 13.1) must also be notified and given the opportunity to render advice prior to the appointment.<sup>471</sup>

In a partially exempt "large" company (see supra Chapter 8.1.b.iv) the appointment of a managing director is subject to the same rules as apply to ordinary corporations (see supra i).

iii Compensation; Employment Contracts. Members of the management board are in most cases employed by the corporation. The terms of employment are determined by the shareholders, unless otherwise provided in the articles (e.g., that the terms shall be fixed by the supervisory board).<sup>472</sup> In a "large" company, whether or not

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<sup>469</sup> WOR art. 30(1). This consultation right assumes that the managing director qualifies as a director under the Works Councils Act.

<sup>470</sup> BW art. 2:162/272.

<sup>471</sup> WOR art. 30(1).

<sup>472</sup> BW art. 2:135/245.

partially exempt, the terms of employment are also determined by the shareholders, unless otherwise provided in the articles.<sup>473</sup> Although the corporation, in its capacity as employer, is managed by the management board, the management board cannot, by virtue of an employment agreement alone, give instructions to an individual managing director. Moreover, if the managing director is also employed by another corporation, e.g., a parent company, he might appear to be in an ambiguous position. Nevertheless, his responsibilities as a managing director cannot be subordinated to his employment relationship with either corporation.

A managing director's salary is often indexed to or subject to annual revision based on the cost of living. Fringe benefits such as a car, petrol, home telephone, travel expenses, out-of-pocket expenses, and moving costs can, if properly included in the employment agreement and if not excessive, be partially or fully exempt from personal income tax. Tax-free income can sometimes be arranged through the use of a share participation plan or a "phantom stock" plan. New legislation has been adopted concerning the disclosure of the compensation of managing and supervisory directors. This new legislation will only apply to N.V.s which do not have registered shares only, or a restriction on the transfer of shares provided for in its articles, and do not allow bearer depository receipts to be issued with the cooperation of the N.V. A qualifying N.V. must disclose in the explanatory notes to the annual accounts (on an individual basis for each managing/supervisory director) defined payments regarding salary, redundancy and profit sharing as well as any rights to subscribe for shares in the N.V. including the exercise price.<sup>474</sup>

In the event that a managing director is a legal entity, the contractual relationship between the corporation and such legal entity has the legal qualification of a contract of assignment (opdracht).

iv Suspension. A managing director may be suspended at any time by a resolution of the shareholders' meeting (if the shareholders have the power to appoint managing directors). The suspension has the effect that the managing director remains in office, but without any of the emanating powers. The supervisory board always has the

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<sup>473</sup> ASSER-MAEIJER, 2, III, supra p. 23 at note 6, § 310.

<sup>474</sup> BW art. 2:383b-383e.

power to suspend a managing director, unless otherwise stated in the articles.<sup>475</sup> In a "large" company that is not fully exempt this power to suspend is always vested in the supervisory board. A suspension may always be lifted by the shareholders, unless the suspended director was originally appointed by the supervisory board (which is the case in a "large" company which is not fully exempt). Suspension does not in itself terminate the director's employment contract with the corporation.

An irregular or unreasonable resolution to suspend a managing director may be contested in court (see *infra* Chapter 10.2.c). Suspensions must be recorded at the Commercial Register (see *infra* Chapter 12).

v      Removal; Termination of Employment Contract.      The removal of a managing director requires a resolution of either the shareholders' meeting or the supervisory board, whichever has the power to appoint managing directors. In case of a "large" company, the supervisory board must first consult with the shareholders' meeting.<sup>476</sup> In cases of mismanagement, the Enterprise Chamber (a division of the Amsterdam Court of Appeal, see infra Chapter 10.1) may also remove a managing director (see infra Chapter 10.2.d).

If the corporation has a Works Council (see infra Chapter 13.1), the management board must give the Council prior notice of an anticipated removal, in order to allow the Works Council time to render advice prior to the actual removal.<sup>477</sup>

The articles may stipulate that any shareholders' resolution regarding the removal of a managing director requires a special quorum or qualified majority vote, or that no quorum or qualified majority will be required when the removal is proposed by a certain class or type of shareholder (e.g., by priority shareholder) or by the supervisory board. There is, however, a statutory limitation<sup>478</sup> on both the quorum and the qualified majority of vote, being a maximum of two-third of the votes cast which represent a maximum of half the issued share capital.

475 BW art. 2:147(1)/257(1).

476 BW art. 2:362/272.

477 WOR art. 30(1).

478 BW art. 134/244, § 2.

A shareholders' resolution to remove a managing director can be voided by the court<sup>479</sup> if the manager concerned has not been properly heard at the shareholders' meeting prior to the resolution.<sup>480</sup> Also, in respect of such a resolution, both the management board and the supervisory board have an "advisory vote" in such shareholders' meeting.<sup>481</sup> The removal of a managing director must be recorded at the Commercial Register (see infra Chapter 12.2).

The fact that the managing director has been removed from the management board does not automatically mean that the employment contract of a managing director has been terminated. This contract must be terminated separately. The legislation applicable to termination of employment is similar to that which applies to termination of other types of employees, except that no permit is required from the Central Organisation of Work and Income (CWI) (Centrale Organisatie Werk en Inkomen).<sup>482</sup> Disputes and claims fall, in most cases, under the jurisdiction of the District Court,<sup>483</sup> rather than the Cantonal Court (which has jurisdiction over ordinary labour disputes), and the District Court cannot order the corporation to reinstate a managing director.<sup>484</sup> If the court finds that termination was obviously unreasonable, the managing director may be entitled to a substantial severance payment from the corporation. In most cases, a settlement is reached with the board member whereby his employment is terminated with a so-called golden handshake.

#### **d Resolutions by the Management Board and Managing Directors**

i Resolutions passed in Meetings. Meetings are scheduled informally. There are no statutory notice requirements. Meetings are customarily held at the corporation's head office, but may be held elsewhere, even outside the

<sup>479</sup> BW arts. 2:15(1b) Jo 8.

<sup>480</sup> Judgment of 29 Jan. 1943, HR, 1943 NJ 198; see also Judgment of 18 May 1990, Ger. Amsterdam, 1990 NJ 591.

<sup>481</sup> BW art. 117/227, paragraph 4.

<sup>482</sup> Buitengewoon Besluit Arbeidsverhoudingen [BBA] (Decree on Labour Relations) art. 6(5), 1945 S. F214, as amended; Ministeriële Beschikking (Ministerial Decree) of Dec. 10, 1954 Str. 242.

<sup>483</sup> BW art. 2:131/241.

<sup>484</sup> BW art. 2:134(3)/244(3).

Netherlands. The board's manual or regulations (see supra Chapter 8.2.a.i) may provide detailed rules concerning the scheduling of board meetings. A managing director may be represented at a board meeting only by a fellow managing director. The system of substitute managing directors does not exist under Netherlands' law and is not permitted. Although members of the management board, including the chairman, normally have equal powers and voting rights, the articles or board regulations may provide that a managing director with a defined function (e.g., the chairman) has more votes than the others, or a casting vote. However, no managing director, including the chairman, may have voting powers that allow him to override the votes of all other managing directors. Managing directors may not vote by blank proxy. A managing director may give a specific power of attorney to a fellow member of the management board to vote on his behalf in his absence, but this may only take place for a specific meeting and not on a continuing basis. The articles may give the supervisory board or another corporate body a casting vote in the event of a deadlock.<sup>485</sup>

- ii Resolution without a Meeting. The management board may take resolutions without a meeting if the managing directors unanimously agree to the resolution.

#### **e Binding the Corporation; Conflict of Interest**

- i General. Except when specifically stated otherwise in the law (and as explained below) the management board has the exclusive power to represent the corporation. Unless otherwise provided in the articles, each managing director has the authority to represent the corporation in respect of third parties (including appearing in court on behalf of the corporation). This authority does not require any specific action by the management board as a whole.<sup>486</sup> However, specially with respect to important actions on behalf of the corporation, an underlying board resolution is assumed.

The law prohibits any limitations on the basic power of an individual managing director to enter into transactions with third parties, except that either or both of the

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<sup>485</sup> BW art. 2:129(2)/239(2).

<sup>486</sup> BW art. 2:130(2)/240(2).

following may be imposed by the articles (assuming more than one managing director is in office):<sup>487</sup>

- (a) the corporation will be bound only if a minimum number of managing directors have acted jointly;
- (b) the corporation will be bound only if one or more managing directors with defined functions have acted, either individually or jointly, with fellow managing directors, or with designated agents of the corporation.

However, it is not possible to limit the transactional power of managing directors to specific subject matters, or according to the size or nature of the transaction in the articles. The limitation set out in (a) and (b) above may, however, be supplemented by a provision in the articles enabling a managing director to obtain a permanent power of attorney from the other directors. The power may then set forth certain limitations concerning the size or nature of the transactions allowed.<sup>488</sup> This power must be registered with the Commercial Register (see infra Chapter 12.2). Third parties can then, by examining the corporation's filing at the Commercial Register, easily ascertain whether the managing director has the power he purports to have.

ii Statutory Exemptions on the Authority to represent the Corporation.

The law specifically states that for certain transactions the management board is not authorised to represent the corporation.

- (a) Conflict of interest: If a managing director has a conflict of interest with the corporation, none of the managing directors is authorised to represent the corporation any longer. Unless the articles provide otherwise, the corporation shall then be represented by the supervisory board, if there is one.<sup>489</sup> The shareholders' meeting will at all times be authorised to appoint a person (including the managing director who has a conflict on interests) to represent the corporation in that particular case. The articles may however provide that even in a case of a conflict of interest the managing director with whom the

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<sup>487</sup> BW art. 2:130/240.

<sup>488</sup> BW arts. 3:60 to 79.

<sup>489</sup> BW art. 2:146/256.

conflict exists (or the other managing directors) may represent the corporation.

Basically, three different sorts of conflict of interest can be distinguished:

- (i) a direct conflict of interest: the corporation enters into a commercial contract or relationship with one of its managing directors. This mere fact constitutes a conflict of interest. The question whether the managing director in question benefits from the relationship and to what extent he does so, is irrelevant;
- (ii) a conflict of interest in legal capacities: when two corporations enter into an agreement or relationship and one person holds an office on the board of both corporations. In this case investigation should be made whether there is a real conflict-interest, i.e., a personal benefit for this particular managing director;
- (iii) an indirect conflict of interest: While the interest of the managing director is not in direct conflict but the other party to the contract has an indirect link with the managing director of the corporation. For example: the managing director is a shareholder of the other party to the agreement or a close relative to the managing director.<sup>490</sup>

Recently the Supreme Court<sup>491</sup> ruled that in principle the existence of a conflict of interest means there is an external effect, i.e., the corporation is not bound to such an agreement unless the third party is acting in good faith.

- (b) Contribution in kind on shares:<sup>492</sup> The management board is only allowed to accept contributions in kind on shares to be issued if the articles expressly authorise the management board to do so. Otherwise the management board may accept contributions in kind only if the shareholders' meeting grants approval. Without this approval the corporation is not bound to the a transaction.

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<sup>490</sup> Judgment of 22 Mar. 1996, HR, 1996 NJ No. 568.

<sup>491</sup> Judgment of 11 Sept. 1998, HR, NJ No. 100.

<sup>492</sup> BW art. 94/204(2).



- (c) Repurchase of shares:<sup>493</sup> - The management board of an N.V. (not a B.V.) is only authorised to repurchase shares in the corporation if (among other formalities, see supra Chapter 4.3.f) the shareholders' meeting has granted specific authorisation to that effect, as well as with respect to the number of shares, method of repurchase and price. Without this authorisation the management board is under law precluded from repurchasing the shares. The corporation is not bound to the transaction in the event the repurchase concerned registered shares. Managing directors may then be held personally liable for damages of the sellers. If the repurchased shares are bearer shares, the repurchased shares must be transferred to the managing directors by virtue of law. Each of them shall be liable to the corporation for compensation of the purchase price.

Certain matters fall within the exclusive domain of the shareholders or the supervisory board (e.g., adoption of the annual accounts) and may not be delegated. Managing directors have no authority whatsoever in these areas, except for advisory votes regarding shareholders' resolutions.

Transactions with third parties which violate either the law or any of the acceptable limitations on the transactional powers of the management board are not enforceable against the corporation if the limitations are properly disclosed at the Commercial Register.<sup>494</sup> A managing director who lacks the required authority for his actions but implicitly or explicitly warrants that he has this authority may be liable to third parties for any resulting damages.<sup>495</sup> If the unauthorised actions injure the corporation, the corporation may also be entitled to damages.<sup>496</sup>

When a managing director exceeds his authority a distinction should be made between: (i) an action which should have been taken by others (e.g., by the management board as a whole, or jointly with one or more other managing directors, the supervisory board, or shareholders) or (ii) an action to which the corporation is not

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<sup>493</sup> BW arts. 98(4) and 98a (1 and 2).

<sup>494</sup> BW art. 2:6(2).

<sup>495</sup> Judgment of 26 June 1981, HR, 1982 NJ No. 82,1.

<sup>496</sup> ASSER-MAEIJER 2, III, supra p. 2 at note 7, § 294.

authorised. In the latter case the action is null and void,<sup>497</sup> in the former, depending on the nature of the action, the unauthorised act can be ratified through acquiescence or acceptance by the corporation of the benefits of the transaction with knowledge of the material facts.

The articles often contain other provisions limiting the power to transact with third parties. As discussed above, these provisions have no third party effect and serve only internal purposes. Transactions that violate these provisions are nevertheless binding on the corporation. The managing director involved may be liable to the corporation for non-compliance with the articles. Among these internal provisions are provisions requiring the management board to obtain prior approval for certain actions (e.g., acquisition of property) from the shareholders or the supervisory board, including the approval required for the types of actions set forth above in "large" companies (see *supra* Chapter 8.2.a.ii),<sup>498</sup> as well as provisions conferring certain management responsibilities on a specific managing director (e.g., the finance director).

Apart from his individual power to bind the corporation, each managing director has a right of access to shareholders' meetings as well as the right to give his advise on all matters under discussion.<sup>499</sup> This is of particular significance when an individual managing director disagrees with the majority position of the management board.

iii Managers and Agents (procuratiehouders). Netherlands' law does not recognise the concept of officers. All executive authority emanates from the management board,<sup>500</sup> which may appoint persons who are not members of the board to certain management positions. These positions may involve the management of all or part of the corporation's routine affairs. The authority to delegate this power may be

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<sup>497</sup> For example: the issue of shares in excess of the authorised share capital, the subscription by the corporation to its own shares (BW art. 2:95/205) the acquisition of shares in its own capital which are not fully paid (BW art. 2:98(1)/207(1) and acquisition of shares in its own capital in violation with BW art. 2:98(2)/207(2).

<sup>498</sup> BW art. 2:164(2)/274(2).

<sup>499</sup> BW art. 2:117(4)/227(4).

<sup>500</sup> BW art. 2:129/239.

set forth in the articles. In the absence of a provision in the articles, the management board is free to appoint one or more managers. The management board then determines the scope of their powers, which determination may be subject to the prior approval of the supervisory board or the shareholders' meeting. At all times, the persons appointed as managers shall act under the responsibility of the management board.

The power of a person to act on behalf of the corporation with respect to third parties is, for the most part, controlled by ordinary agency principles.<sup>501</sup> The most significant difference, however, between ordinary agents and agents of corporations is the applicability of the ultra vires doctrine: the corporate agent cannot act beyond the scope of the corporation's purposes (see supra Chapter 3.6). Otherwise, the agent's power can be general, without any limitations. This general power excludes the power to appoint sub-agents, unless expressly granted.<sup>502</sup> Limitations on the authority of corporate agents should be clearly defined in a power of attorney. The powers of agents and the limits on their authority to act for the corporation must be filed at the Commercial Register (see infra Chapter 12.2).

In addition to employees whose express authority is normally conferred in writing, corporate employees may have implied authority to engage the corporation in any act incidental to the employee's title or office. Thus, while a "sales director" may not be a managing director, he may nevertheless enter into sales transactions which are concluded in the ordinary course of business on the corporation's behalf. The use of titles for specific offices can therefore create corporate liability even though the holder of the office is not expressly empowered to bind the corporation, i.e., to make the corporation responsible. When the employee holds an executive office or title<sup>503</sup> and his course of conduct leads third parties to believe that he has the required power to act on behalf of the corporation in that specific area, third parties may rely on this apparent authority.<sup>504</sup> This is particularly true if, with or without authority, the person

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<sup>501</sup> BW arts. 3:60 to 79.

<sup>502</sup> HANDBOEK, supra p. 2 at note 7, § 236.

<sup>503</sup> The title directeur alone, or in combination with other designations, is often used for key employees, who are not managing directors, even though the Dutch word directeur literally implies board membership.

<sup>504</sup> C. ASSER, 2, I VERTEGENWOORDIGING EN RECHTSPERSOON: DE VERTEGENWOORDIGING, § 27 (W.C.L. van der Grinten, 7th ed. 1990).

has previously represented the corporation in similar transactions which the corporation did not seek to challenge.<sup>505</sup> An effective means of advising third parties about the proper authority of corporate executives is by recording the extent of each power in the Commercial Register (see infra Chapter 12.2), and by strict enforcement. A corporate agent who is registered with the Commercial Register, but is not on the board, is referred to in Dutch as a procuratiehouder.

An agent who lacks the required authority for his actions but who implicitly or explicitly warrants that he has actual authority may be liable to third parties for any resulting damages.<sup>506</sup> If the unauthorised actions cause injury to the corporation, the corporation may also be entitled to damages.

iv Proof of Authority. Dutch corporations do not have a secretary or other person capable of testifying to the authority of a person who transacts business with third parties on behalf of the corporation. Consequently, certificates of incumbency are unknown. However, as far as third parties are concerned, the corporation's filings at the Commercial Register (the corporation's unique registration number must be on the letterhead of the corporation, see infra Chapter 12.1.c) form conclusive evidence<sup>507</sup> of the extent of the powers of each individual managing director, manager and agent, to sign on behalf of and thereby bind the corporation.

The Commercial Register will provide excerpts from registrations on request.<sup>508</sup> These excerpts are legal evidence and normally make it unnecessary to obtain the types of resolutions of the management board that are customary in other jurisdictions.

### 7.3 The Supervisory Board (Raad van Commissarissen)

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<sup>505</sup> Judgment of 19 Mar. 1942, HR, 1942 NJ No. 445.

<sup>506</sup> BW arts. 3:70, 3:78, 3:79.

<sup>507</sup> Under certain circumstances this evidence is not conclusive due to actions of the corporation which are misleading third parties about the scope of the authority of a managing director or a proxy holder: Judgment of 15 Jan. 1993, HR, 1993 NJ No. 301.  
Judgment of 23 Oct. 1998, HR, 1999 NJ No. 582.

<sup>508</sup> HrW 1996 art. 15; HrB 1996 art. 37.

**a Powers of the Supervisory Board**

i Regular N.V.s and B.V.s. The members of the supervisory board (referred to individually as supervisory directors) have collective powers and responsibilities. The supervisory directors share responsibility for all decisions and acts of the supervisory board and for the acts of each individual supervisory director.<sup>509</sup> From a legal point of view the supervisory board is not subordinate to the shareholders' meeting and need not accept instructions from it. Its sole concern is the "interests of the corporation" (see supra Chapter 1.02) and its business enterprise. The management board is not subordinate to the supervisory board and remains responsible for any action taken in response to a decision of the supervisory board.<sup>510</sup>

The primary responsibility of the supervisory board is to supervise the policy of the management board and the general course of corporate affairs.<sup>511</sup> This supervision includes the power and duty to intervene, whenever necessary, and to take such corrective actions as may be required in the "interests of the corporation", always within the confines of the articles and the law. The management board must consult the supervisory board on all important matters including, but not limited to, any matters delineated in the articles. The supervisory board may also, on its own initiative, provide the management board with advice and request any information it deems appropriate. The articles usually provide for the right to inspect the books and records and for unrestricted access to the corporate premises. The management board has the statutory duty to provide the supervisory board in a timely fashion with the information necessary to carry out its responsibilities and perform its duties.<sup>512</sup>

The supervisory board may in principle rely on this information if it appears to be in good order. However, this does not mean that sometimes the supervisory board

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<sup>509</sup> BW art. 2:140(2)/250(2).

<sup>510</sup> BW art. 2:151(2)/261(2).

<sup>511</sup> BW art. 2:140(2)/250(2).

<sup>512</sup> BW art. 2:141/251. See Chapter 8.1.b.i regarding the new "large" company rules, as proposed. Under the new rules the management board shall at least once a year provide the supervisory board with information in general, in writing, about the strategy of the corporation, the financial risks and the management and control system of the corporation. This obligation of the management board shall apply to all corporations, both "regular" and "large" (Proposal to amend BW arts. 2:141/251 and to add new paragraph 2).

should not ask for additional information if it seems appropriate.<sup>513</sup> The articles may require the management board to obtain prior approval from the supervisory board for actions concerning matters set forth in the articles or in resolutions of the supervisory board. The management board may be required to comply with the supervisory board's directives on the general course of policy of the corporation in such areas as further defined in the articles<sup>514</sup> (see supra Chapter 8.2.a).

The articles may provide that, with respect to the appointment of managing directors, the supervisory board, or some other person or institution as provided for in the articles, may make binding nominations that can only be rejected by the shareholders' meeting in a stipulated qualified majority. Any such nomination can always be overruled by a qualified majority of two-thirds of the votes cast representing more than half of the issued capital. The articles may give additional powers to the supervisory board, provided that these powers are not of an executive nature and do not affect the statutory powers of the shareholders.

Each supervisory director must sign the annual accounts. The reasons for any missing signatures must be stated.<sup>515</sup> Since annual accounts are normally open to public inspection (see infra Chapter 12.2), this statutory requirement emphasises the power that a supervisory director may be able to exercise by threatening to refuse to sign.

Each supervisory director has access to all shareholders' meetings and may at all times give his advice on matters on the agenda, whether or not he agrees with the position of the majority of the board.<sup>516</sup>

The Works Council (see infra Chapter 13.1) meets twice annually with a managing director in what is known as a "consultation meeting" for the purpose of discussing general business affairs. At least one supervisory director usually attends this consultation meeting.<sup>517</sup>

The supervisory board may acquire executive powers when the management board or any of its members has a conflict of interests (see supra Chapter 8.2.e.i) with

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<sup>513</sup> Judgment of 1 May 1990, Rb. Breda, 1990 NJ, No. 740.

<sup>514</sup> BW art. 129(4)/239(4).

<sup>515</sup> BW art. 2:101(2)/210(2).

<sup>516</sup> BW art. 2:117(4)/227(4).

<sup>517</sup> WOR art. 24.

the corporation,<sup>518</sup> unless the articles provide otherwise or the shareholders' meeting has appointed others to represent the corporation on such occasions. The articles may also grant executive powers to the supervisory board in the event that the members of the management board cannot or may not<sup>519</sup> act (see supra Chapter 8.2.e). The supervisory board is also responsible for retaining the auditor of the corporation if an audit of the accounts is required by law or the articles, but only if the shareholders' meeting fails to take the necessary action.<sup>520</sup>

ii "Large" Companies. If an N.V. or a B.V. is a "large" company, special rules apply with regard to the powers of the supervisory board. These special rules supplement the rules for ordinary corporations. In the event of a conflict, the special rules prevail (see supra Chapter 8.1.b). The special rules must be incorporated into the articles within three years after the corporation gives notice to the Commercial Register that it qualifies as a "large" company (see infra Chapter 12.2).

The special powers of the supervisory board vary, according to whether the "large" company is non-exempt or partially exempt (see supra Chapter 8.1.b.iv). The supervisory board of a non-exempt "large" company has the following special powers:

- (a) the power to appoint, suspend and remove the managing directors (see supra Chapter 8.2.c);
- (b) the power to adopt the annual accounts (see supra Chapter 7.1.b);
- (c) the power to approve or reject certain specified actions of the management board (see supra Chapter 8.2.a.ii); and
- (d) the power to fill its own vacancies (see infra Chapter 8.3.c.ii).

The special powers of the supervisory board of a partially exempt "large" company are limited to those set forth under (c) and (d) above. The powers of a supervisory board of a corporation that has adopted the "large" company status voluntarily (see supra Chapter 8.1.a) are at least equal to the powers of a supervisory board in a partially exempt "large" company. The appointment of managing directors

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<sup>518</sup> BW art. 2:146/256.

<sup>519</sup> BW art. 2:134(4)/244(4).

<sup>520</sup> BW art. 2:393(2).

and adoption of the annual accounts may remain within the domain of the shareholders<sup>521</sup>.

**b Structure of the Supervisory Board.** Unlike the management board, which in the Netherlands may have corporate members, the supervisory board must consist of individuals.<sup>522</sup> Supervisory directors may be Dutch or foreign, resident or non-resident. The number of supervisory directors is determined by the articles or by a shareholders' resolution. The supervisory board may consist of a single supervisory director, unless it is a "large" company, in which case it must have at least three supervisory directors.<sup>523</sup>

Although all supervisory directors, including the chairman of the supervisory board, have equal powers and duties, the articles may provide in certain cases for a "designated supervisory director" (gedelegeerd commissaris). This designated supervisory director represents the supervisory board in the period between meetings and supports the management board in its daily executive responsibilities.

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<sup>521</sup> See Chapter 8.1.b.i regarding the new "large" company rules, as proposed. Under the new rules:

- (a) The supervisory directors shall be appointed by the shareholders' meeting, pursuant to a nomination made by the supervisory board. The nomination must be explained and will be notified to both the shareholders and the Works Council. Before the supervisory board is able to make a nomination, it must give both the shareholders' meeting and the Works Council the opportunity to recommend a candidate for the nomination. Advance notice must be given by the supervisory board to the shareholders' meeting and the Works Council, stating which profile the candidate should have. For one-third of the number of supervisory directors the nomination must include the recommendation of the Works Council, unless the supervisory board objects to the recommendation on the basis that the candidate "would not be suitable" or because after the appointment of such candidate the supervisory board "would not be properly constituted" (quotations from the draft statute). The shareholders' meeting may overrule the nomination with a two-thirds majority representing one-third of the issued capital. This system for the appointment of supervisory directors may be set aside by resolution of the shareholders with the prior approval of the supervisory board and the consent of the Works Council (Proposal to amend BW arts. 2:158/268).
- (b) The supervisory board shall have the power to approve the annual accounts; the shareholders' meeting shall adopt the annual accounts. (Proposal to amend BW arts. 2:101/210 paragraph 3).

<sup>522</sup> BW art. 2:140(1)/250(1).

<sup>523</sup> BW art. 2:158(3)/268(3).



The chairman of the supervisory board often acts as the chairman of the shareholders' meeting. The articles, however, may provide for a different chairman. In a "large" company, certain persons are ineligible for the office of supervisory director.<sup>524</sup> These include employees of the corporation or of other corporations in which the corporation holds at least half of the issued capital, as well as officials or employees of any trade union that is a party to a collective bargaining agreement covering any employees of the corporation. The supervisory directors' names, residential addresses, and other particulars must be entered in the Commercial Register (see infra Chapter 12.2).

### **c Appointment, Compensation, Suspension and Removal**

i Appointment in Regular N.V.s and B.V.s. The initial supervisory board, if there is to be one, is appointed by the founders when the corporation is incorporated.<sup>525</sup> Thereafter, supervisory directors are appointed by the shareholders' meeting. If the articles so provide, a maximum of one-third of the members of the supervisory board may be appointed by someone other than the shareholders' meeting.<sup>526</sup> The basic rules concerning nominations and qualifications for the appointment of members of the management board (see supra Chapter 8.2.c.i) apply equally to members of the supervisory board. The articles may, however, provide that holders of certain classes or types of share, or other persons, have the power to nominate all or part of the supervisory board. However, any such nomination can be rejected by the shareholders' meeting through a two-thirds qualified majority vote representing more than half of the issued share capital.<sup>527</sup> A classified supervisory board is not allowed.

The proposal or nomination of a candidate for appointment to the board must state the candidate's age, his occupation, his ownership (if any) of shares in the corporation, other relevant positions currently or previously held, and the names of

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<sup>524</sup> BW art. 2:160/270.

<sup>525</sup> BW art. 2:142(1)/252(1).

<sup>526</sup> BW art. 2:143/253.

<sup>527</sup> BW arts. 2:142(2)/252(2) and 2:133/243.

other corporations in which he serves as a supervisory director. The reasons for the proposal or nomination must be given.<sup>528</sup>

Supervisory directors are usually appointed for a specific period of time, often between three and six years. When a term of office expires, the member may be re-appointed, unless the articles provide otherwise.<sup>529</sup> The articles usually provide for a staggered appointment of the supervisory board, whereby a proportion of the supervisory directors will be appointed over two or more years.

ii Appointment in "Large" Companies. The supervisory directors of "large" companies are appointed for a four-year term by the existing supervisory directors.<sup>530</sup> This rule does not apply at the incorporation stage, when the founders appoint the first supervisory directors, or in the initial three-year period during which the corporation qualifies as a "large" company but is not yet subject to the special statutory rules (see supra Chapter 8.1.b.iii).<sup>531</sup> During this period, the shareholders' meeting retains the right to appoint supervisory directors.<sup>532</sup> A supervisory director will resign at the latest at the end of his four year term. He may be reappointed immediately.

The supervisory board can only appoint new supervisory directors after complying with the following procedure.<sup>533</sup> The supervisory board must first notify the shareholders' meeting, the management board and the Works Council (see infra Chapter 13.1) of an anticipated vacancy. In this way it solicits recommendations for candidates. After considering any recommendations, the supervisory board informs the shareholders' meeting and the Works Council of the candidate it intends to

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<sup>528</sup> BW art. 2:142(3)/252(3).

<sup>529</sup> See Chapter 8.1.b.i regarding the new "large" company rules as proposed. Under the new rules, the proposal to appoint or reappoint a supervisory director must be explained. If it concerns a reappointment, the new law will require that the previous performance of his duties as a supervisory director must be taken into account (Proposal to amend BW arts. 2:142/252). This provision will apply to all corporations.

<sup>530</sup> BW arts. 2:158(2)/268(2) and 2:161(1)/271(1).

<sup>531</sup> BW art. 2:154/264.

<sup>532</sup> See Chapter 8.1.b.i regarding the new "large" company rules, as proposed, and note 90 of this chapter for the proposed completely new system regarding the appointment of supervisory directors of "large" companies.

<sup>533</sup> BW art. 2:158/268.

appoint. The shareholders or the Works Council may veto the appointment only if the abovementioned procedure was not properly observed, or if they believe that the candidate is not qualified to serve as a supervisory director or that, as a result of the candidate's appointment, the supervisory board will not meet the test of being "properly constituted".<sup>534</sup> The appointment by the supervisory board is not limited to those recommended by the shareholders' meeting, the management board or the Works Council. If the supervisory board insists on appointing its candidate, the veto of the shareholders' meeting or the Works Council may be submitted to the Enterprise Chamber, a division of the Amsterdam Court of Appeal (see infra Chapter 10.2.e), which may declare either that the veto is unfounded or that it should be upheld.<sup>535</sup> This appointment procedure cannot be made subject to nominations or other involvement in appointments by a specific class or type of shareholder.

iii Compensation. A supervisory director is not considered an employee. The relationship between the supervisory director and the corporation is deemed to be an assignment (opdracht).<sup>536</sup> This applies equally to a designated supervisory director (see supra Chapter 8.3.b), despite the fact that this office may in fact be a full-time position.

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<sup>534</sup> Decision of 27 Sept. 1983, SER, 61 DE NAAMLooZE VENNOOTSCHAP 233 (1983). The Works Council of Cyanamid prevailed in its claim that the supervisory board would not be properly constituted if the proposed person were appointed supervisory director. If the proposal had been confirmed, the supervisory board would have consisted of three supervisory directors, two of whom had never worked in the Netherlands, were therefore unaware of social relations in the Netherlands, and who were employed by the parent company; Judgment of 2 Feb. 1989, Ger. Amsterdam, 1990 NJ No. 86. The Works Council of Kodak prevailed in its claim that the supervisory board must be sufficiently independent vis-à-vis all interests and persons involved with the corporation, including interests and persons of the parent company. Officers of the parent companies and of other companies of the same group are not disqualified per se as supervisory directors, but a majority of such persons in the supervisory board may cause the board not to be "properly constituted".

<sup>535</sup> Most vetos are filed by the Works Council. They purport to express the desire of the Works Council to have one or more persons on the supervisory board who have their special confidence.

<sup>536</sup> ASSER MAEIJER 2, III, supra p. 23 at note 6 §351. BW art. 7:400.

Any remuneration paid to the supervisory board is determined by the shareholders' meeting unless the articles provide otherwise.<sup>537</sup> The supervisory directors are entitled to be reimbursed for their costs, including out-of-pocket expenses. The aggregate compensation for supervisory directors must be disclosed in the notes to the annual accounts.<sup>538</sup>

iv Suspension and Removal. A supervisory director of a "regular" N.V. or B.V. may be suspended or removed at any time by the appointing authority without any compensation. In the majority of the cases that will be the shareholders' meeting.<sup>539</sup> In cases of mismanagement, a supervisory director may be removed by the Enterprise Chamber, a division of the Amsterdam Court of Appeal (see infra Chapter 10.2..v).

Any suspension or removal must be recorded in the Commercial Register (see infra Chapter 12.2). A supervisory director of a "large" company can only be suspended by the supervisory board.<sup>540</sup> The removal of a supervisory director of a "large" company prior to the end of his term of office falls under the exclusive jurisdiction of the Enterprise Chamber, and is based on a petition filed by the supervisory board, the shareholders, or the Works Council.<sup>541</sup> The grounds for removal are dereliction of duties or other serious lapses, or any drastic change of circumstances as a result of which the corporation cannot reasonably be required to keep the supervisory director in office.

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<sup>537</sup> BW art. 2:145/255.

<sup>538</sup> BW art. 2:383(1) and BW arts. 2:383b and 383g.

<sup>539</sup> BW art. 2:144/254. See supra Chapter 8.3.c.i and note 95.

<sup>540</sup> BW art. 2:161(3)/271(3). See Chapter 8.1.b.i regarding the new "large" company rules, as proposed. Under the new rules, if the shareholders' meeting no longer has any confidence in the entire supervisory board, it can dismiss it by resolution taken with a majority of two-thirds of the votes cast representing at least one-third of the issued capital. In that case, the Enterprise Chamber may, in anticipation of a new appointment procedure, appoint one or more temporary supervisory directors (Proposal to add new BW arts. 2:161a/271a). This right of the shareholders' meeting does not exist for the dismissal of a part of the supervisory board.

<sup>541</sup> BW art. 2:161(2)/271(2).

**d Resolutions by the Supervisory Board.** The rules concerning meetings of and resolutions by the management board (see supra Chapter 8.2.d) apply similarly to the supervisory board, except that individual supervisory directors cannot act on behalf of the supervisory board without specific authorisation (see supra Chapter 8.3.b).

## 9 DUTIES OF BOARD MEMBERS<sup>512</sup>

### 9.1 Introduction

**a Fiduciary Duties.** With regard to the fiduciary duties of directors, common law jurisdictions traditionally distinguish between the duty of care and the duty of good faith (also known as the duty of loyalty). In the Netherlands, the duty of care is expressed in terms of a duty to "properly perform" management or supervisory duties.<sup>542</sup> A breach of these duties may give rise to an action by the corporation. An action by the corporation may be instituted either by the supervisory board or another corporate body (or person) authorised to represent the corporation when the management board has a conflict of interests (see supra Chapter 8.2.e), by a subsequent management board, a moratorium trustee (bewindvoerder) (jointly with the managing directors), or a trustee in bankruptcy (curator). The duty of good faith is part of the reasonableness and fairness requirement that Netherlands' corporate law imposes on relationships between the management board, the supervisory board, shareholders, holders of depository receipts issued with co-operation of the corporation, certain pledgees,<sup>543</sup> certain usufructuaries,<sup>544</sup> and the Works Council<sup>545</sup> (see supra Chapter 4.6.3.b)<sup>546</sup> and that general contract law imposes on the parties to a contract.

Good faith principles govern situations in which a board member obtains personal benefit at the corporation's expense, as well as those in which the management board denies shareholders, or the supervisory board, any powers, rights or benefits to which they are entitled. The first category includes transactions in which a director has a personal interest (self-dealing), in which he obtains "soft" loans from the corporation, or in which he is personally or through other business enterprises in

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<sup>542</sup> BW arts. 2:9, 2:138/248 and 2:149/259.

<sup>543</sup> BW art. 2:89(4)/198(4).

<sup>544</sup> BW art. 2:88(d)/197(4).

<sup>545</sup> BW art. 2:8.

<sup>546</sup> Resolutions or actions of the management board which would result in an unreasonable violation of the rights of any of the parties involved may be subject to nullification. BW arts. 2:15(1)(b) jo 8.

competition with the corporation (corporate opportunity). The second category relates to the protection of minority shareholders, power struggles among managing directors or between managing directors and shareholders or supervisory directors, the validity of anti-takeover devices, and the proper use of pre-emption rights. Insider dealing to the detriment of the corporation or the other shareholders can also be considered a breach of the duty of good faith.

These actions may be based on specific statutory provisions concerning breach of contract or general tort liability. A breach of the duty of care may give rise to a cause of action for mismanagement (see infra Chapter 4.10.2.b.i). Current Netherlands' law does not provide for shareholders' derivative suits.

**b     Creditor Protection.**     In the 1980s, the financial collapse of several large Dutch business empires, as well as considerable abuse of the corporate form (especially the B.V. form), provided the impetus in the Netherlands to further protect the interests of creditors. This desire for protection requires a review of the prior records of prospective corporate founders (see supra Chapter 3.3.b.iv), and imposes personal liability on directors for acts of mismanagement (see infra Chapter 10.2), for non-compliance with critical rules concerning the formation of the corporation (see infra Chapter 9.3.b) or its capital structure (see infra Chapter 9.3.d), for failure to notify the appropriate authorities of the corporation's inability to pay taxes and social security premiums (see infra Chapter 9.3.c) and for inadequate bookkeeping or disclosure of the annual accounts of the corporation (see infra Chapter 9.3.a).

**c     Litigation.**     The Enterprise Chamber, a division of the Amsterdam Court of Appeal, has exclusive jurisdiction over disputes concerning financial reporting (see infra Chapter 10.2.d), as well as over specific investigation proceedings into the affairs of the corporation (also called enquête, see infra Chapter 10.2.b.v), and has the power to force the corporation to take corrective action. The findings and actions of the Enterprise Chamber do not in themselves impose liability on directors, but very often form the basis for subsequent lawsuits. Liability actions are pursued in the courts of ordinary jurisdiction.

**d     The Director-Corporation.**     In the Netherlands a corporation can be appointed managing director of another corporation. In these cases, which are not

uncommon in group structures, the individual directors of the director-corporation may be personally liable, jointly with the director-corporation.<sup>547</sup>

**e Foreign Corporations.** In determining the nationality of a corporation, Netherlands' law follows the "incorporation theory". Foreign corporations can therefore operate in the Netherlands under their own national corporate laws (lex societatis). However certain Dutch statutory rules concerning directors' liability for mismanagement do apply to directors of foreign corporations (see infra Chapter 9.2). For the statute that intends to counter the evasion of Dutch corporate formalities by foreign corporations operating in the Netherlands, see supra Chapter 2.2.a.

**f Supervisory Directors.** Implicit in the two-tier system of management, which is mandatory for "large" companies (see supra Chapter 8.1.b.ii), is the personal liability of supervisory directors. Liability may be incurred particularly when the supervisory board temporarily assumes the powers of the management board (see supra Chapter 8.3.a.i; see also infra Chapter 9.2.b.iv), when the annual accounts are erroneous or misleading (see infra Chapter 9.3.a), or when the members of the supervisory board fail to perform their duties properly.

## 9.2 Liability for Mismanagement

**a General.** The statutory requirement to "properly perform" management or supervisory duties, as the case may be, requires each director to discharge his duties with care, skill and diligence. His tasks include properly implementing the provisions of the law and the articles, as well as actions initiated by the shareholders. It is not sufficient for a board member to argue that he performed his tasks to the best of his ability. On the other hand, he is not expected to guarantee the success of his actions. Each individual action must be judged on its own merits. There is no general standard similar to the "business judgment rule" in the United States. However, courts are generally not inclined to second-guess actions that under similar circumstances could reasonably have been taken by other, well-informed and diligent executives in similar positions in similar types of industry or trade<sup>548</sup>. In addition, the courts are not allowed to judge management conduct with the benefit of hindsight. Generally, legal

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BW art. 2:11.



theory distinguishes between liability towards the corporation and liability towards third parties.

## **b Liability to the Corporation**

i Proper Performance of Management Duties. The duties assigned to the management board and to each of its members are only partially defined by law. Most of these duties emanate from business practices or from a board manual or regulation. In order for liability to arise there must be serious negligence.<sup>549</sup> As a general rule, the responsibility of the management board is of a collective nature (see supra Chapter 8.2.a.i). Each managing director is also responsible to the corporation for the proper performance of the specific duties assigned to him. In-house manuals or regulations may have a significant impact on the distribution of powers and responsibilities within the board. If a matter falls within the scope of responsibility of two or more managing directors, they are jointly and severally liable, unless one can prove that any shortcoming is not attributable to him.<sup>550</sup> In his defence he must show first that he was not personally negligent, and second that he did not fail in his duty to take action to avoid or prevent the consequences of the mismanagement.

ii Discharge. The managers of the board can be discharged from their liability towards the corporation.<sup>551</sup> On the agenda of the shareholders' meeting a separate item should then be included to discharge managing directors from their liability towards the corporation for the performance of their duties during the last financial year. By tabling the discharge at the shareholders' meeting, it can require the management board to give account of the management of the corporation during the last financial year. The discharge does not release the managing directors from their liability for

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<sup>548</sup> Judgment of 6 June, 1996, HR, 1996 NJ No. 695.

<sup>549</sup> Judgment of 10 Jan. 1997, HR, 1997 RvdW 16.

<sup>550</sup> BW art. 2:9. Legal commentators do not agree to what extent a management board may indeed distribute powers and authorities to the various members of the management board and what would be the result in terms of liability of an individual member if such distribution of powers and authorities took place. The relevant case law has been interpreted in different ways.

<sup>551</sup> BW art. 2:101(3)/210(3).

unlawful actions towards third parties (including individual shareholders and the trustee in bankruptcy claiming the shortfall).<sup>552</sup>

Since the Dutch Civil Code does not contain provisions specifically dealing with discharge of managing directors, this subject is governed by case law.

The discharge obtained by the managing directors is limited to facts disclosed to the shareholders' meeting in the annual accounts and the annual report or otherwise.<sup>553</sup> The managing directors are not discharged from legal acts unknown to the shareholders' meeting if those actions are intentionally withheld by the managing directors and the shareholders had no reason to suspect such.<sup>554</sup> Recently the Supreme Court held that, as a general rule, a discharge does not release the managing directors from liability for acts which the shareholders could reasonably have known about.<sup>555</sup> However, if legal acts which could be harmful to the corporation were known by the shareholders' meeting and the managing directors were discharged for those acts, any interested party could invoke the discharge on the grounds of the good faith requirements.<sup>556</sup> The shareholders' resolution to relieve the managing directors of their liability towards the corporation can be voided by the court or by the Enterprise Chamber (a division of the Amsterdam Court of Appeal) following an investigation into the affairs of the corporation (*see infra* Chapter 10.2.b.v). An appeal against the discharge of the managing directors can result in the discharge being rejected on grounds of violation of the good faith requirements.

iii Amount of the Claim. The claim by the corporation or by the trustee of the bankrupt corporation based on internal liability is for damages suffered by the corporation as a consequence of the mismanagement. The amount of damages is determined according to ordinary rules of the Netherlands' law of remedies.

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<sup>552</sup> BW art. 2:138(6)/248(6).

<sup>553</sup> Judgment of 10 Jan. 1997, HR, 1997 NJ No. 360.

<sup>554</sup> Judgment of 20 June 1924, HR, 1924 NJ No. 1107.

<sup>555</sup> Judgment of 10 Jan. 1997, HR, 1997 NJ No. 360.

<sup>556</sup> Judgment of 20 Oct. 1989, HR, 1990 NJ No. 308. The relevant statute of limitation is one year, BW art. 2:15.

iv The Supervisory Board. Management of the corporation is the responsibility of the management board, and actions for mismanagement will therefore, in most cases, be directed against the managing directors. There are, however, circumstances under which the supervisory directors may be held liable.<sup>557</sup> This is particularly likely when supervisory directors, instead of the management board, act on behalf of the corporation, for example, in cases of a conflict of interest between the management board (or one of its members) and the corporation (see supra Chapter 8.2.e). The act of approving or authorising management decisions does not in itself constitute an act of management by the supervisory board.<sup>558</sup> A negligent or improper decision of the management board is not, therefore, automatically attributable to the supervisory board merely by reason of its approval of the relevant action or decision of the management board. However, the members of the supervisory board have a fiduciary duty (see supra Chapter 8.3.a) to perform their duties as attributed to them by law and the articles. Negligence in the proper performance of those duties may result in liability for damages incurred by the corporation.<sup>559</sup> Under a separate item on the agenda of the shareholders' meeting, it can give discharge to the supervisory directors from their liability to the corporation for the performance of their supervisory duties during the relevant financial year.

v The Incorporator. The incorporators may be held liable if they have bound the corporation at its incorporation. Examples of this ground for liability relate to such issues as the appointment of managing directors, the acceptance of contribution in kind, and not proceeding with proper caution.<sup>560</sup>

## **c Liability for Non-Payment of Taxes and Premiums**

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<sup>557</sup> BW arts. 2:9 and 2:149/259.

<sup>558</sup> BW art. 2:151(2)/261(2).

<sup>559</sup> BW art. 2:9.

<sup>560</sup> BW art. 93(4)/203(4)

i Grounds for Liability. If certain taxes or premiums (e.g., wage tax, value added tax, social security premiums and premiums for mandatory old age pension funds) are not paid when due, the managing directors are personally liable for the full amount of taxes and premiums outstanding if non-payment is caused by the "apparent negligence" of the management board over the three-year period prior to the due date.<sup>561</sup>

If the corporation is unable to pay its taxes or social security or pension premiums it must notify the tax collector or the social security agency within 14 days after the due date of its inability to pay. The notice must give reasons for its inability to pay and subsequent inquiries must be answered. The notice of non-payment by the corporation is critical. In case of failure to notify the competent authorities the managing directors are jointly and severally liable for the taxes or premiums. An individual managing director can escape liability only by proving that the failure to notify was not his fault and that the failure to pay is not imputable to him. An individual managing director can exculpate himself for the lack of proper notification only if he was physically or mentally unable to give the notice.

ii Scope of Liability. The law focuses on the managing directors (the law does not apply to supervisory directors, unless they act as de facto managers) who were in office at any time during the three-year period prior to the due date, but any executives, shareholders or others who have de facto managed the corporation in that period may be held liable as well. Most legal commentators take the view that instructions by a parent to a subsidiary do not constitute "management" for this purpose. However, the statutory language is ambiguous and there is no case law on this issue. Managing directors of foreign corporations that are subject to Dutch taxes and premiums are also liable. Local managers of these foreign corporations may be held liable as if they were managing directors (see supra Chapter 2.2.a).

iii Amount of the Claim. The claim of the tax collector and the social security agency will be for the full amount of taxes and premiums due. The managing directors

<sup>561</sup> Invorderingswet 1990 (Tax Collection Act) [Inv.], arts. 36, 37, 55 and 57, 1990 S. 221, as amended; Coördinatiewet Sociale Verzekeringen (Coordination Act Social Insurance), arts. 16c, 16d, 16g and 16h, 1966 S. 64, as amended; Wet betreffende Verplichte Deelneming in een Bedrijfspensioenfonds (Act on Mandatory Participation in a Pension Fund), arts. 18a, 18b and 18c, 1945 S. J121, as amended.

have the right to seek recovery from the corporation. To the extent they fail, they must share liability for the shortfall equally among themselves.

**d Liability arising from Bankruptcy**

i Grounds for liability. If the corporation is declared bankrupt ("staat van faillissement")<sup>562</sup> and if the bankruptcy is, to a significant extent, caused by "apparent negligence" by the management board<sup>563</sup> during the three-year period prior to the date of bankruptcy, the members of the management board are personally liable for the deficit in bankruptcy. The law imposes the obligation to keep financial records such that all assets and liabilities can be determined at any time and that the annual accounts and other financial information are filed with the Commercial Register within 13 months of the end of the financial year. If either or both of these two obligations (referred to below as "primary obligations") have not been fulfilled, two statutory presumptions take effect:

- (a) the irrebuttable presumption that there has been apparent negligence; and
- (b) the rebuttable presumption that the apparent negligence is a significant cause of the bankruptcy.<sup>564</sup>

If both primary obligations have been complied with the receiver in the bankruptcy has the burden of proof that the bankruptcy was caused by apparent negligence and that this apparent negligence was a significant cause of the bankruptcy.

ii Defence. An individual managing director can exonerate himself only by showing that he himself was not negligent, and that he did not fail in his duty to take action to avoid or prevent the consequences of the mismanagement.<sup>565</sup>

If the corporation is bankrupt and one or both of the primary obligations have not been complied with, negligence is assumed by law. Currently, the only defence an individual member will have under those circumstances is to prove that the

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<sup>562</sup> Bankruptcy in this sense is akin to "liquidation" as set forth in Chapter 7 of the US Bankruptcy Code.

<sup>563</sup> BW art. 2:138(1)/248(1).

<sup>564</sup> BW art. 2:138(2)/248(2).

<sup>565</sup> BW art. 2:138(3)/248(3).

bankruptcy was to a significant extent caused by an external factor, such as collapse of the relevant market.

A court will allow a managing director to present all the evidence that may be beneficial to his personal defence.

iii Scope of Liability. The law imposes liability on managing and supervisory directors, as well as executives, shareholders and others who have de facto managed the affairs of the corporation. The supervisory directors may be held liable in the same way as described above if the bankruptcy is caused, to a significant extent, by apparent negligence in the supervision on the management of the corporation.<sup>566</sup> Directors of foreign corporations that are declared bankrupt in the Netherlands and are subject to Dutch corporate income tax (whether or not any tax is actually owed) are also liable. Local managers of these foreign corporations may be held liable as if they were managing directors.<sup>567</sup>

Incorporators may be held liable if they directly bound the corporation at the incorporation<sup>568</sup> by an action which was taken with apparent negligence and which was a significant cause of the bankruptcy and this action occurred less than three years prior to the date of the bankruptcy.<sup>569</sup>

iv Amount of the Claim. The claim will be for the full amount of the shortfall in the liquidation, all to the benefit of creditors rather than the shareholders. However, only the receiver in bankruptcy is authorised to initiate a procedure under these statutory provisions. The court is free to reduce the amount of the claim.<sup>570</sup> The receiver may initiate a procedure as described in this paragraph simultaneously with a procedure for damages due to mismanagement.<sup>571</sup> As described above under [b], in mismanagement litigation the bankruptcy receiver may claim damages which

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<sup>566</sup> BW art. 2:149/259.

<sup>567</sup> GLCA art. 5(1) and PFEA art. 6.

<sup>568</sup> BW art. 2:93/203(4).

<sup>569</sup> BW art. 2:93(4)/203(4).

<sup>570</sup> BW art. 2:138(4)/248(4).

<sup>571</sup> BW art. 2:9.

may exceed the deficit of the bankrupt estate. Therefore, this procedure may be beneficial for the shareholders of the corporation who, not being creditors of any kind, may otherwise not receive any form of damage compensation (see infra Chapter 10.2).

### 9.3 Liability for Violation of other Statutory Provisions

**a Liability for Annual Accounts.** If the annual accounts, including any interim figures that the corporation produces (e.g., quarterly reports) or the annual report are erroneous or misleading with respect to the state of affairs of the corporation, each managing director and, where applicable, supervisory director may be liable for damages incurred by third parties.<sup>572</sup>

**b Defective Formation of the Corporation.** If the court declares that, in the absence of a valid certificate of no objection granted by the Ministry of Justice at the time the deed of incorporation was executed or in the absence of an executed deed of incorporation by a Dutch notary, the corporation never came into existence, persons who acted in the name of the non-existent corporation will be personally bound to fulfil all of its agreements with third parties.<sup>573</sup>

**c Liability after Incorporation of the Corporation.** The managing directors must ensure that the following formalities are complied with:<sup>574</sup>

- (a) submission of the first filing with the Commercial Register (see supra Chapter 3.3.b.v);
- (b) paid-in capital plus statutory reserves on the date of formation are at least equal to the amount of the minimum capital as prescribed by law (see supra Chapter 4.3.c); and
- (c) at least one-quarter of the issued capital must be paid in (see supra Chapter 3.3.b.v).

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<sup>572</sup> BW arts. 2:139/249, 2:150/260.

<sup>573</sup> BW art. 2:4(4).

<sup>574</sup> BW art. 2:69(2)/180(2).

As long as these formalities have not been completed, the managing directors are jointly and severally liable, together with the corporation, for all obligations arising out of legal acts of the corporation.

**d Pre-Formation Transactions.** The founders, their representatives, and others who entered into agreements with third parties on behalf of the corporation to be formed are, unless specifically agreed otherwise, personally bound by pre-incorporation transactions until the date of ratification by the corporation (see supra Chapter 3.4.b)<sup>575</sup> following its incorporation. If, following ratification, the corporation fails to perform such obligations, the persons who acted on behalf of the corporation may be liable if they knew or ought to have known that the corporation would not be able to comply with these obligations. Knowledge of the corporation's inability to comply will be presumed if the corporation is declared bankrupt within one year of formation.<sup>576</sup> In addition, the management board may be held liable if at the moment it ratified such transactions it knew, or reasonably should have known, that the corporation would not be able to meet these obligations.

**e Capitalisation.** As previously explained, the rules concerning capitalisation of the corporation are of critical importance (see supra Chapter 4). Non-compliance can result in personal liability of the managing directors for any shortfall and for damages incurred by third parties. Furthermore, managing directors will be personally liable for reimbursement to the corporation of the value of treasury shares being held by the corporation in excess of the thresholds of respectively 10 per cent. (for the N.V.) and 50 per cent. for the B.V., starting three years after the date on which the corporation acquired such shares by universal succession of title or without consideration.<sup>577</sup>

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<sup>575</sup> BW art. 2:93(2)/203(2).

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<sup>577</sup> BW art. 98a(3)/207a(2).



**f General Tort Provision.** An important legal basis for directors' liability is tort.<sup>578</sup> Creditors of the corporation may hold a managing director liable in tort if he entered into a transaction on behalf of the corporation when he knew or should reasonably have known that the corporation would not be able to fulfil its obligations arising out of that transaction<sup>579</sup> and would not be able to pay any damages which the third party would incur due to non-performance (for more details see Chapter 10.2.f). Directors may also incur liability in tort in the event of environmental pollution, fraudulent conveyance of assets or publication of a misleading prospectus.

#### 9.4 Criminal Liability<sup>580</sup>

**a General.** Netherlands' law accepts the theory that a corporation can commit a crime. The individual directly responsible for the corporation's criminal behaviour may face penalties as well. This criminal liability can occur if the individual concerned (despite being authorised and reasonably bound to do so) omits to take preventive measures and knowingly accepts the substantial risk that illicit behaviour will occur. There are numerous statutes that impose specific criminal sanctions on the directors of business enterprises and on those who authorise or are otherwise responsible for offences relating to import and export, hazardous products, pharmaceutical and edible products, fair trade, business practices, wage and price controls, transportation, antitrust, taxation, zoning, protection of the environment and insider dealing.

**b Violations of Statutory Corporate Law.** Civil liability for non-compliance with statutory corporate law has been supplemented by certain criminal sanctions. To the extent the violation constitutes an offence under the Act on Economic Offences, it may result in imprisonment, a penalty and several severe civil sanctions. Other punishable offences include the following:

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<sup>578</sup> BW art. 6:162.

<sup>579</sup> Judgment of 6 Oct. 1989, HR, 1990 NJ 286; Judgment of 10 June 1994, HR, 1994 NJ No. 766.

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- (a) intentionally publishing inaccurate annual accounts;<sup>581</sup>
- (b) involvement of a managing or supervisory director of the corporation in situations that are illegal or in conflict with the articles, resulting in serious harm to the corporation;<sup>582</sup>
- (c) prior to or during bankruptcy proceedings, disguising profits or losses, or fraudulently disposing of assets;<sup>583</sup>
- (d) prior to or during bankruptcy proceedings, disposing of assets at significantly less than their value;<sup>584</sup>
- (e) prior to or during bankruptcy proceedings, giving preferential treatment to certain creditors in a manner detrimental to other creditors;<sup>585</sup>
- (f) prior to bankruptcy proceedings, failure, or gross neglect, by the corporation in keeping proper records;<sup>586</sup> and
- (g) borrowing money with the purpose of forestalling bankruptcy, with knowledge that bankruptcy is unavoidable.<sup>587</sup>

## 9.5 Insurance; Indemnification

Insurance for civil liability claims against managing and supervisory directors is available in the Netherlands. The standard insurance policy available in the Netherlands to cover this liability (Bestuurders en Commissarissen Aansprakelijkheids Polis) contains many exclusions and limitations.

There are no statutory provisions or case law with regard to the validity and enforceability of indemnities by the corporation, whether contained in the articles or

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<sup>581</sup> Wetboek van Strafrecht [WvS] (Criminal Code) art. 336, 1996 S. 64, as amended.

<sup>582</sup> WvS art. 347.

<sup>583</sup> WvS art. 343(1).

<sup>584</sup> WvS art. 343(2).

<sup>585</sup> WvS art. 343(3).

<sup>586</sup> WvS arts. 342, 343(4).

<sup>587</sup> WvS art. 342(2).

in a contract between the corporation and the director. Indemnification clauses are rare because of their limited effectiveness.<sup>588</sup>

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<sup>588</sup> For a more detailed analysis of directors' liability (including the insurance and indemnity aspects), see H.A. DE SAVORNIN LOHMAN, DUTIES AND LIABILITY OF DIRECTORS AND SHAREHOLDERS UNDER NETHERLANDS LAW, PIERCING THE CORPORATE VEIL, 1996, Kluwer Law International (London, The Hague, Boston).

## **10 CORPORATE LITIGATION**

### **10.1 Jurisdiction**

The Enterprise Chamber, a division of the Amsterdam Court of Appeal, has an important role in the resolution of various disputes arising within and concerning the corporation. The Enterprise Chamber is made up of five judges with expertise in corporate affairs. Three legally-trained judges are accompanied by two lay judges, who in practice are experts in business, socio-economic, accounting and tax matters.<sup>589</sup> The Enterprise Chamber has exclusive jurisdiction over disputes concerning the form and content of the annual accounts, over appeals by a Works Council against certain proposed actions of the management board, and over the composition of the supervisory board of "large" companies (see supra Chapter 8.3.c.ii). It can further order a legal person to take corrective measures in cases of mismanagement (see infra Chapter 10.2.b.v). Any action taken by a corporation in violation of an order by the Enterprise Chamber is null and void.

Actions for damages, as well as most other types of dispute, fall under the jurisdiction of the District Courts, except for certain disputes with the Works Council, which fall under the statutory jurisdiction of the Cantonal Judge.

### **10.2 Litigation directed against Legal Entities and their Business Operations**

The latter type of litigation may take various forms, may be based on various legal grounds and may be instituted by various different parties. The five different forms will be described below in the subparagraphs (a) to (e). As a matter of legal principle, the corporation is responsible and liable for its own actions, not its shareholders. Consequently, the theory of piercing the corporate veil, whereby the separate existence of a corporation is ignored, has very limited application in the Netherlands. The theory in its purest form makes the shareholders fully responsible for the actions of the corporation under certain defined circumstances. This theory is approximated in Netherlands' law in cases involving abuse of a subsidiary by a parent corporation. The parent corporation may then be liable for damages to creditors of the

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Wet op de Rechterlijke Organisatie [RO] (Act on the Judiciary) art. 72(2), 1827 S. 20, as amended.

subsidiary. This is, in fact, brought as a tort claim against the parent for abuse of its power as the controlling shareholder of the subsidiary.<sup>590</sup> Moreover, a parent which had actual involvement in the management of the affairs of the subsidiary may be held liable if it allowed the subsidiary to incur debts knowing that the creditors of the subsidiary will remain unsatisfied.<sup>591</sup> Successor liability has consistently been denied by the Supreme Court.<sup>592</sup>

A mismanagement claim, therefore, is not directed against the parent, but against the board of the mismanaged corporation. The board may be responsible to the corporation for damages (see infra Chapter 10.2.b). Furthermore, a corporation that serves as a director of another corporation may be liable for mismanagement and, by analogy, the individual directors of the "director-corporation" may also be personally liable (see supra Chapter 9.1.d). If a bankruptcy is caused by "apparent negligence" in the three-year period prior to the date of bankruptcy, members of the management and supervisory board may be held personally liable for the deficit, as well as others (such as shareholders) who de facto managed the affairs of the corporation (see supra Chapter 9.2.d). The Court actions can be based on the following grounds:

**a Non-Compliance with the Works Councils Act.** Certain decisions by the management board that have a potentially major impact on the corporation or its employees must be submitted to the Works Council for its prior advice (see infra Chapter 13.2.d.iii).<sup>593</sup> If the procedural rules are not properly complied with, or if the contemplated action by the management board could not reasonably have been taken if the board had "weighed all interests involved", the Enterprise Chamber may

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<sup>590</sup> Judgment of 25 Sept. 1981, HR, 1982 NJ No. 443; Judgment of 2 Nov. 1984, HR, 1985 NJ No. 446; Judgment of 9 May 1986 HR, 1986 NJ No. 792; Judgment of 19 Feb. 1988, HR, 1988 NJ No. 487; Judgment of 6 Oct. 1989, HR, 1990 NJ No. 286; Judgment of 8 Nov. 1991, HR 1992 NJ No. 174; Judgment of 18 Nov. 1994, HR 1995 NJ No. 170. Denial of parent liability: Judgment of 16 June 1995, HR, 1996 NJ No. 216. Confirmation of parent liability: Judgment of 12 June 1998, HR, 1998, NJ No. 727.

<sup>591</sup> Judgment of 19 Feb. 1988, HR, 1988 NJ No. 487. Judgment of 18 Nov. 1994, HR, 1995 No. 170.

<sup>592</sup> Judgment of 3 Nov. 1995, HR, 1996 NJ No. 215.

<sup>593</sup> WOR art. 25(1).

prohibit or order the reversal of the action by the management board.<sup>594</sup> Certain management decisions require the consent of the Works Council (see infra Chapter 13.2.d.iv). The Cantonal Judge may enforce this right of the Works Council by ordering that those decisions cannot be made or implemented without the approval of the Works Council.<sup>595</sup>

**b Mismanagement.** Netherlands' law recognizes four different legal grounds for shareholders and other interested parties to sue managing directors for damages incurred through mismanagement of the corporation and one very specific procedure to establish mismanagement. They are described below in subparagraphs (i) to (v). Members of the supervisory board may incur similar liability if they have not properly performed their duties attributed by the law and the articles. Basically, a distinction should be made between the following scenarios:

i Liability for Improper Performance. A claim for mismanagement may be instituted on the basis that all or certain members of the management board did not properly perform the specific duties attributed to them by law<sup>596</sup> (see Chapter 9.2.b.i)<sup>597</sup>. This action can only be instituted by the corporation itself. The corporation will then be represented by the supervisory board or, as the case may be, by a person specifically appointed because of a conflict of interests (see Chapter 8.2.e.ii) or in the event of bankruptcy by the receiver<sup>598</sup>. Litigation on this basis shall be based on liability of the managing directors for the damages incurred through their negligence. Damages are due to the corporation only.

Shareholders do not have a direct interest in any litigation on the basis of mismanagement.<sup>599</sup> Recent case law<sup>600</sup> indicates, in general terms, that if a specific

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<sup>594</sup> WOR art. 26(4).

<sup>595</sup> WOR art. 27.

<sup>596</sup> BW art. 2:9.

<sup>597</sup> In order for liability to arise there must be serious negligence.

<sup>598</sup> BW art. 2: 138/248(8).

<sup>599</sup> Judgment of 13 Oct. 2000, HR, 2000 NJ No. 699.

<sup>600</sup> Judgment of 2 Dec. 1994, HR, 1995 NJ No. 288.

duty of care has been violated by all or certain members of the management board of the corporation and this specific duty of care bears a relationship towards the shareholder, the shareholder may have a claim against the members of the management board. Specifically, this will be the case in the event that the damages incurred by the shareholder are not recoverable on any other grounds and are of a definitive nature. In this case, however, the members of the management board are not only considered to have violated the duty of care vis-à-vis the corporation only, but also vis-à-vis the shareholder.

Therefore, any claims of shareholders shall not be based on article 2:9 BW but based on tort, committed against the shareholder personally. Essentially, Netherlands' law allows neither for derivative suits, whereby a shareholder plaintiff sues in a representative capacity on the basis of an action belonging to the corporation, nor for class actions.

ii      Liability in Bankruptcy. A claim for mismanagement may also be instituted by the receiver in the event of bankruptcy of the corporation. As described in more detail in Chapter 9.02[d], the receiver has to prove that the management board has apparently failed in the proper performance of its duties during the three-year period prior to the bankruptcy and that this failure has been a major cause of the bankruptcy of the corporation. Other than the procedure for the general mismanagement claim described under (i) above, where the board members are sued for specific damages incurred by the corporation, the liability in bankruptcy may create a joint and several liability of the board members for the deficit in bankruptcy. This procedure is available to the receiver only.

iii      Liability for Improper Confirmation of Actions performed on behalf of a Corporation in Formation. As described in Chapter 3.4, it is possible to act on behalf of a corporation which is still in the process of being incorporated. After the incorporation, the corporation shall only be bound to these actions if the management board of the corporation ratifies the transactions performed prior to its incorporation. When ratifying these transactions, the management board must consider whether the transactions are in the interests of the corporation, and whether the corporation can fulfil its obligations arising from these transactions. In the event that the corporation

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cannot fulfil its obligations under the ratified agreement, the managing directors may be held liable<sup>601</sup> for damages incurred by the other party to the transaction on the basis of tort.<sup>602</sup> Furthermore, an improper ratification may be a ground for an action by the corporation against the managing directors as described under b[i].

iv Misleading Financial Information<sup>603</sup> in the Annual Accounts. If the publicly disclosed annual accounts, interim figures or the annual report of the corporation provide misleading information about the financial situation of the corporation and its prospects, the managing directors<sup>604</sup> may be liable vis-à-vis third parties for damages incurred by these third parties as a result of this misleading information.<sup>605</sup> This liability also extends to the supervisory directors of the corporation. However, if a member of the supervisory board is able to prove that the distribution of misleading information cannot be attributed to the absence of his supervision, he will not be held liable.

v Enquête: Inquiry into the Affairs of the Corporation. The law<sup>606</sup> provides for a uniquely Dutch procedure regarding an inquiry into the affairs of the corporation (below referred to as the "inquiry procedure"). This inquiry procedure is divided into two distinct stages (see infra). Both stages fall under the jurisdiction of the Enterprise Chamber<sup>607</sup> of the Amsterdam Court of Appeal (see supra Chapter 10.1).

A The First Stage: Initiating the Official Inquiry. The inquiry procedure starts with a written request (verzoekschrift) by the petitioner to the Enterprise Chamber to

<sup>601</sup> BW art. 2:93/203(3).

<sup>602</sup> Judgment of 28 Mar. 1997, HR, 1997 NJ 1997 No. 582.

<sup>603</sup> BW art. 2:139/249.

<sup>604</sup> BW art. 150/260 BW.

<sup>605</sup> As explained earlier (supra Chapter 7.1.b) the annual accounts are prepared by the management board and signed by each member. Each managing director thereby assumes responsibility for the accounts. If a member of the management board does not agree with the annual accounts, he should refrain from signing and state the reasons for his refusal to sign.

<sup>606</sup> BW arts. 2:344 through 358.

<sup>607</sup> The Enterprise Chamber is the only competent court for matters of fact. Decisions of the Enterprise Chamber are subject to appeal by the Supreme Court with regard to matters of law only.



initiate an investigation into the policies of the corporation and the general course of its affairs.<sup>608</sup> From that moment onwards the Enterprise Chamber takes charge of the procedure and may pursue the matter sua sponte. This investigation may relate to all or part of the "policy" of the corporation, an undefined term which includes implemented or anticipated decisions or events, and a single action or series of actions within a specific period of time or not. It is not limited to the policy of the management board. It may concern every corporate body or person who holds office in any such corporate body and who is involved with the policy of the corporation. The investigation may concern the legal entity of the corporation or the enterprise which it operates.

The law defines the persons who are authorised to file such a request. The petition can also be filed by the Attorney General in the public interest, by the shareholders or holders of depository receipts issued with the co-operation of the corporation, and certain pledges and usufructuaries representing the lower of either 10 per cent. of the issued shares or a nominal value of € 225,000 (or any lower percentage or amount provided in the articles), by a trade union with members employed by the company, or by any others who, by virtue of the articles or an agreement with the corporation, have been granted this right.<sup>609</sup>

The Enterprise Chamber shall only honour the petition if there are substantial reasons to doubt the policy of the corporation.<sup>610</sup> This means that there must be circumstances which justify the assumption that there is a reasonable chance that after investigating the matter the conclusion of the inquiry will be that the corporation was not following a proper policy. It is at the sole discretion of the Enterprise Chamber to determine whether substantial reasons for doubt exist.<sup>611</sup>

Before submitting the request to the Enterprise Chamber, the petitioner must notify the management board and the supervisory board, if there is one, in writing as to the complaints made against the policy of the corporation. In the absence of this

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<sup>608</sup> BW art. 2:345.

<sup>609</sup> BW arts. 2:346, 2:347.

<sup>610</sup> BW art. 2:350.

<sup>611</sup> In the event that this test is not met and as a result the Enterprise Chamber declines the petitions the corporation has the right to claim damages from the persons requesting the investigation. BW art. 2:350 (2).

notice the request will be inadmissible.<sup>612</sup>

The corporation must be given a reasonable period of time to investigate the complaints and to take measures<sup>613</sup> as a result thereof. If the Enterprise Chamber sustains the request for an official inquiry, it will appoint one or more independent investigators.<sup>614</sup>

The investigators will be free to conduct the investigation in any way they wish, and may determine what information they want access to or who they want to cross-examine as a witness.

The investigators will then prepare a report which shall contain the findings of the inquiry. This report will be filed with the court. The persons who had petitioned for the official inquiry will be sent a copy of the report. The official report will be open to public inspection, if so ordered by the Enterprise Chamber.

With the official report being filed, the first stage of the official inquiry is concluded.

B        The Second Stage concerns the Measures to be Taken once an Instance of Improper Policy has been determined. After the filing of an official inquiry report that finds that there was an instance of improper policy within the corporation, the petitioners and all other parties named above may request the Enterprise Chamber to take certain actions. This additional request must be filed separately to put in the same form as the initial request for the investigation. If the Enterprise Chamber shares the view that improper policy has been followed within the corporation the Enterprise

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<sup>612</sup> BW art. 2:349.

<sup>613</sup> BW art. 2:349(1). A trade union must first solicit the views of the competent Works Council as well (BW art. 2:349(2)).

<sup>614</sup> The remuneration for the investigators shall be paid by the corporation. However, if it is concluded that the inquiry has not been made on reasonable grounds, i.e., there are no reasons to doubt the policy of the corporation, then the corporation may seek compensation for the costs incurred in connection with the inquiry from the requesting persons. If the report of the investigators indicates that certain officers of the corporation, i.e., managing directors, supervisory directors or someone else employed with it, are responsible for the improper policy, the corporation may request that these officers cover the costs paid by the corporation with respect to the investigation.

Chamber may take one or more of the following measures: <sup>615</sup>

- (a) the suspension or nullification of a resolution of the management board, the shareholders' meeting or any other corporate body;
- (b) the suspension or removal of one or more managing directors or supervisory directors;
- (c) the temporary appointment of one or more managing directors or supervisory directors;
- (d) the temporary deviation from such provisions of the articles as shall be specified by the Enterprise Chamber;
- (e) the temporary transfer of shares to a nominee;
- (f) the dissolution of the corporation. <sup>616</sup>

Case law<sup>617</sup> confirms that the Enterprise Chamber can only determine an instance of improper policy following the conclusion of an inquiry, as explained above, and only then can the Enterprise Chamber take any of the measures stated above upon request of the petitioner.

However, at any stage during the proceedings the Enterprise Chamber may, upon request, take preliminary measures, if the prevailing circumstances within the corporation so dictate or if this is in the interests of the proper conduct of the proceedings. These preliminary measures will last for the term of the proceedings. They may differ from the final measures as stated above. For instance, the Enterprise Chamber may determine that all actions arising from a certain agreement which the petitioners argue to constitute improper policy are to be suspended until the proceedings are completed. <sup>618</sup>

As explained above, the concept of improper policy is not limited to improper management by the management board of the corporation, but may also relate to other corporate bodies and to the shareholders or to certain shareholders. The cases vary in nature. By way of illustration, a conclusion of improper policy may be arrived at in

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<sup>615</sup> BW art. 2:356.

<sup>616</sup> This latter sanction cannot be imposed if this would be contrary to the interests of the shareholders or the employees or contrary to the public interest (BW art. 2:357(6)).

<sup>617</sup> Judgment of 27 Sept. 2000, 2000 NJ No. 653.

<sup>618</sup> Judgment of 4 July 2001, Enterprise Chamber.

the event that a managing director has violated the principles of sound entrepreneurship.<sup>619</sup>

In a significant number of the cases where a conclusion of improper policy was arrived at, there was a deadlock situation, with the effect that the corporation was completely unmanageable and therefore could not properly function as a legal entity. Other cases in which a conclusion of improper policy was arrived at related to violations of the mandatory rules of law or the articles of the corporation concerning the distribution of powers of the various corporate bodies within the corporation. Furthermore, a conclusion of improper policy may be arrived at in the event that the interests of the corporation has become subordinate to a personal interest or that the distinction between the interests involved has not been properly made.

Increasingly, the inquiry procedure has been enacted in the hostile environment of take-overs.

Recently, this procedure has been used because (certain) shareholders were of the opinion that the management board did not give sufficient information to the shareholders' meeting regarding a certain matter.<sup>620</sup>

Whether in a specific case the Enterprise Chamber may hold that improper policy was being followed within the corporation depends on the facts at hand and the circumstances prevailing prior to and during the proceedings.

The inquiry procedure will not result in a court decision that imposes liability on certain persons for the improper policy. Claims for damages resulting from the improper policy must be instituted by way of a separate civil case before the competent court to adjudicate the relevant claim.

**c Violation of Good Faith Principles, the Articles and Procedures Required by Law.** Mismanagement is generally caused by a failure of the management board to exercise proper care in managing the corporation's affairs or by failure of the supervisory board to exercise proper care in supervising the management board. This

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<sup>619</sup> Judgment of 10 Jan. 1990, HR, 1990 NJ No. 466.

<sup>620</sup> Judgment of 22 Jan. 2002, Enterprise Chamber 810/2001 OK.

duty of proper care for the business must be distinguished from the duty to observe standards of good faith in taking resolutions that affect the interests of other managing directors, the shareholders, holders of depository receipts issued with co-operation of the corporation, certain pledgees and usufructuaries, the supervisory board or the Works Council.<sup>621</sup> The resolutions of the shareholders and the supervisory board are also subject to good faith principles. Resolutions taken in violation of good faith principles may be voided by the court<sup>622</sup> (see Chapter 6).

Resolutions by the supervisory or management board or the shareholders' meeting which are in violation of public order, substantive mandatory rules of law or provisions of the articles are void.<sup>623</sup> Certain corporate resolutions that are void in principle can be ratified<sup>624</sup> by the competent corporate body with retroactive effect, provided that interested parties that could have invoked their nullity consider such actions valid. When resolutions of shareholders or the board are subject to resolutions of other corporate bodies, these resolutions can be ratified by those other corporate bodies, but are otherwise void.<sup>625</sup> All other procedural deficiencies in the decision-making process are avoidable by order of the court, but not void *per se*.<sup>626</sup> The petition to the court must be brought within one year after the date on which the corporate resolution has been taken or has come to the attention of the interested party.<sup>627</sup>

Transactions with a third party that were entered into without a valid resolution of the corporation will be enforceable against the corporation if the third party had no knowledge, actual or imputed, of the invalidity of that action.<sup>628</sup> Under certain circumstances negligence in or omission of taking a certain resolution by the competent corporate body may constitute tort of the corporation<sup>629</sup>.

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<sup>621</sup> BW art. 2:8(1).

<sup>622</sup> BW art. 2:15(1)(b).

<sup>623</sup> BW art. 2:14(1).

<sup>624</sup> BW arts. 2:15(6), 3:58(1).

<sup>625</sup> BW art. 2:15(6).

<sup>626</sup> BW art. 2:15(1)(a).

<sup>627</sup> BW art. 2:15(5).

<sup>628</sup> BW art. 3:35. Judgment of 17 Dec. 1982, HR, 1983 NJ No. 480.

**d Annual Accounts.** All disputes concerning the form and contents of the annual accounts, as well as the standards applied, are subject to the exclusive jurisdiction of the Enterprise Chamber (see supra Chapter 10.1).<sup>630</sup> This procedure may be instituted by any interested party.<sup>631</sup>

Actions concerning compliance with audit rules, the involvement of auditors,<sup>632</sup> and the filing of the annual accounts<sup>633</sup> and other financial information, fall within the jurisdiction of the District Courts. Any interested party (e.g., shareholders, Works Council, etc.) may bring actions before the District Court.

**e Composition of the Supervisory Board of a "Large" Company.** As explained above (see supra Chapter 8.3.b), the supervisory board of a "large" company must consist of qualified individuals, and must be "properly" constituted. A veto by the shareholders or the Works Council of a proposal by the existing supervisory board for the appointment of a new supervisory director (see supra Chapter 8.2.c.ii) may be reversed by the Enterprise Chamber (see supra Chapter 10.1).<sup>634</sup> The removal of a supervisory director of a "large" company also requires an action by the Enterprise Chamber.<sup>635</sup> However, violations of statutory or other procedural rules for the appointment are brought before the District Courts.

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<sup>629</sup> Judgment of 29 Nov. 1996, HR, 1997 NJ No. 345. In light of this judgment, there has been a discussion in the legal literature on the question of whether the corporation itself on the basis of mismanagement (BW art. 2:8) may claim pursuant to the principles of reasonableness and fairness that a corporate body should take a resolution and that, if this corporate body fails to do so, the corporation may request the court to adopt the resolution instead. BW art. 3:300.

<sup>630</sup> Rv art. 3:1000.

<sup>631</sup> Rv art. 3:999(1). The law does not define who are considered to be an interested party. The Enterprise Chamber has limited in various decisions the circle of parties who are considered interested parties under this procedure. Judgment of 23 Dec. 1987, HR, 1988 NJ No. 680: Former shareholder is not an interested party, a shareholder is. Judgment of 3 Feb. 1988, HR, 1989 NJ No. 225: The fact that the petitioner is a creditor of the corporation does not mean as such that he is an interested party. Judgment of 20 May 1987, HR, 1987 NJ No. 973: An employee of the corporation may be an interested party if he has a positive interest in the procedure.

<sup>632</sup> BW art. 2:393(7). RvBrv art. 999.

<sup>633</sup> BW art. 2:394(7).

<sup>634</sup> BW art. 2:158(9)/268(9).

**f Tort.** Under certain circumstances it is possible to hold a person who participates in a corporate body personally liable on the basis of tort. Although the actions were performed in the capacity of that office and as a result should be primarily considered to be actions in tort or breach of the corporation.

In several judgments, the Supreme Court has set out certain basic rules which may lead to this personal liability of a managing director on the basis of tort. This personal liability may exist, inter alia, for damages due to failure by the corporation to meet its contractual obligations when the managing director knew, or reasonably should have known, at the moment he committed the corporation to these obligations that it could not meet them at all, or not within a reasonable period of time. It is a precondition that a third party would not otherwise be able to recover the damages as a consequence of the breach by the corporation.<sup>636</sup> Normally, a third party suffering damages must demonstrate that the managing director had this knowledge at the moment of entering into the agreement. However, under certain circumstance the court may reverse the burden of prove which means that the managing director must prove that he did not know nor reasonably could have known that the corporation could not meet its obligations.<sup>637</sup>

With respect to the imputed knowledge, the Supreme Court ruled that, given all circumstances of the case concerned, the question should be whether a managing director acting with reasonable skill could anticipate the fact that the corporation could not meet its obligations.<sup>638</sup>

Management liability based on tort may also exist if a managing director procures or allows the corporation not to fulfil its obligations under an agreement, causing damages to a third party.<sup>639</sup>

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<sup>635</sup> BW art. 2:161(2)/271(2). See also Chapter 7 note 109 regarding the new "large" company rules, as proposed.

<sup>636</sup> Judgment of 10 June 1994, HR, 1994 NJ No. 766.

<sup>637</sup> Judgment of 20 Nov. 1998, HR, 1998 RvdW No. 219.

<sup>638</sup> Judgment of 14 Nov. 1997, HR, 1998, RvdW No. 230.

<sup>639</sup> Judgment of 18 Feb. 2000, HR, 2000 NJ No. 295.

A managing director is only liable on the basis of tort, if he could be blamed in person for the damages of a third party. This means that in the event that a management board consists of more than one member, only the acting managing director who was actually involved in the execution of the agreement may be held liable. The other managing directors are in principle not liable on the basis of tort unless they are in some other way implicated in the transaction and as such could be personally blamed for the breach by the corporation and the resulting damages to a third party (but only if these damages cannot be recovered from the corporation).<sup>640</sup> Similar liability could exist for persons who are not officially managing directors of the corporation but are de facto acting as if they are managing directors and as such have control over the corporation.<sup>641</sup>

### **3 Litigation between Shareholders**

**a General.** Proxy solicitations and proxy battles are unusual in the Netherlands. Securities listed on Euronext Amsterdam N.V. are traded either in the form of bearer shares or in the form of bearer depository receipts (BDRs). This situation may change in the near future.<sup>642</sup> All B.V. shares and certain N.V. shares are in registered form. The shareholders' register is open for inspection by all shareholders (see supra Chapter 5.2.b). Force-outs of unwanted shareholders by means of a merger are impossible. A minority of five per cent. or less can be forced out under a special procedure (see supra Chapter 5.4.d.ii). Disputes between shareholders may be the focus of attention in an investigation (enquête) conducted under the supervision of the Enterprise Chamber (see supra Chapter 10.2.b.v). The actions that the Enterprise Chamber can take to remedy mismanagement include dissolution of the corporation.

**b Intolerable Behaviour; Force-Out.** Any one or more shareholders representing at least one-third of the issued capital of a B.V., as well as of certain

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<sup>640</sup> Judgment of 8 Jan. 1999, HR, 1999 NJ No. 318.

<sup>641</sup> Judgment of 15 Jan. 1993, HR, 1993 NJ No. 301.

<sup>642</sup> Pursuant to an amendment to the Wet Giraal Effectenverkeer WGE, effective 20 Nov. 2000 which governs the clearing system for most listed corporations, it is now possible to use this system to trade in listed registered shares as well.



N.V.s, may require another shareholder to sell and transfer his shares if the other shareholder by his conduct prejudices the "interests of the corporation" (see supra Chapter 1.2) to such an extent that his continued shareholding cannot reasonably be tolerated.<sup>643</sup> Likewise, any shareholder of a B.V. corporation or of certain N.V. corporations may require one or more other shareholders to acquire his shares if that other shareholder is prejudicing his rights or interests to such an extent that continued shareholding cannot reasonably be expected from him.<sup>644</sup> The first shareholder may in turn require other shareholders to join him as a party in the proceedings. The shares shall be allocated by the court with due observance of any right of first refusal contained in the articles (see supra Chapter 5.4.c).

The price to be paid for the shares shall be determined by the court, which will appoint either one or three experts to assess the price, in accordance with the clause in the articles which restricts the transfer of shares.<sup>645</sup>

If a pledge or life interest is created (see supra Chapter 5.3) it may be agreed that the voting rights of the shares are to be exercised by the pledgee or beneficiary. If the conduct of the pledgee or beneficiary prejudices the "interests of the corporation", and the exercise of its voting right cannot reasonably be tolerated, the voting rights may, by court order, be returned to the shareholder.

The District Court in the district in which the corporation has its seat shall have jurisdiction over these proceedings, with appeal only available to the Enterprise Chamber.<sup>646</sup>

These provisions apply only to corporations of a closed nature, that is to B.V. corporations and to N.V. corporations which have registered shares, no depository receipts, and a transfer restriction clause in their articles.<sup>647</sup> Moreover, these provisions do not apply when either the articles or a shareholders' agreement contain a clause

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<sup>643</sup> BW art. 2:336(1).

<sup>644</sup> BW art. 2:343(1).

<sup>645</sup> Judgment of 9 Mar. 2000, Enterprise Chamber, 2000 JOR No. 167. In vaguely defined circumstances the price shall not be determined by experts, but be based on the intentions of the parties involved.

<sup>646</sup> BW art. 2:336(2).

<sup>647</sup> BW art. 2:335.

providing for the resolution of shareholders' disputes,<sup>648</sup> unless it can be demonstrated that under the circumstances such clause cannot be applied.

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<sup>648</sup>

BW art. 2:337.

## **11 MAJOR CORPORATE CHANGES: AMENDMENTS; STATUTORY MERGERS; STATUTORY SPLIT-UPS, DIVISIONS AND DEMERGERS; ADOPTION OF DIFFERENT LEGAL FORM; DISSOLUTION AND TRANSFER OF CORPORATE SEAT**

### **11.1 General**

Currently,<sup>649</sup> a Dutch legal entity cannot be merged under the statutory procedure (see infra Chapter 11.3) with a legal entity formed under foreign law nor can a statutory split-up (see infra Chapter 11.4) be effected between Dutch and foreign legal entities, nor can a Dutch legal entity adopt another legal form than those available under Netherlands' law (see infra Chapter 11.5).

### **11.2 Amendments (Statutenwijzigingen)**

The articles may be amended upon a resolution by the shareholders and the subsequent execution of a notarial deed containing the amended provisions.<sup>650</sup> Any amendment requires a certificate of no objection from the Ministry of Justice (see supra Chapter 3.3.b.iv).<sup>651</sup> The amendment becomes effective by the execution of the notarial deed or, if the certificate of no objection is applied after this, upon receipt of this certificate.<sup>652</sup> The articles may contain provisions that restrict or exclude the right to amend all or certain provisions. An amendment of these provisions is nevertheless possible, by a unanimous vote of a meeting at which all shareholders are present or represented.<sup>653</sup> Unless the articles state otherwise, no qualified majority or quorum is required for the amendment of any other provision, including the provisions

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<sup>649</sup> European legislation to this effect will come into force on 8 Oct. 2004, the effective date of the European Company (S.E.) Directive. See supra Chapter 1.3.n.

<sup>650</sup> BW art. 2:124(1)/234(1).

<sup>651</sup> BW art. 2:125(1)/235(1).

<sup>652</sup> BW art. 2:124(1)/234(1).

<sup>653</sup> BW art. 2:121(3)/231(3).

concerning the corporate name, capital, purposes, quorum requirements and distributions.

If the articles require a quorum, and at the first properly notified shareholders' meeting no quorum is present, a second meeting can, unless the articles provide otherwise, ignore the quorum requirement and take a valid vote, provided that the notice for the second meeting specifically refers to this objective.<sup>654</sup>

No amendment can abrogate, without their consent, the rights of third parties under the articles.<sup>655</sup> For example, directors' bonus provisions contained in the articles cannot be changed without the approval of each managing director who is effectively or potentially entitled to a bonus payment under the articles (unless the articles provide otherwise).

Shareholders adversely affected by a shareholders' resolution cannot insist on receiving payment of the fair market value of their shares. They may, however, seek a court order invalidating the shareholders' resolution on the basis that the resolution violates good faith principles (see supra Chapter 6 and Chapter 10.2.c).<sup>656</sup>

If a proposed amendment appears on the agenda of a shareholders' meeting, this must be set out in the notices of the meeting. The text of any proposed amendments must be made available to the shareholders in a timely fashion at the main office of the corporation, and copies must be available upon request.<sup>657</sup>

An amendment may be proposed by any party entitled to convene a shareholders' meeting (see supra Chapter 7.2.a). If the amendment involves a reduction of capital, special rules for the protection of creditors must be satisfied (see supra Chapter 4.3).

The complete amended text of the articles must be filed with the Commercial Register. Only upon this filing will the amendment have effect with respect to third parties.

### 11.3 Statutory Mergers (Juridische Fusies) and Consolidations

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<sup>654</sup> BW art. 2:120(3)/230(3).

<sup>655</sup> BW art. 2:122/232.

<sup>656</sup> BW arts. 2:92(2)/201(2), 2:8, 2:15(1)(b).

<sup>657</sup> BW art. 2:123/233.

## **a Introduction**

i Types of Statutory Mergers. The statutory merger<sup>658</sup> is a means of obtaining control over other business operations. The same economic result can often be reached by framing the transaction in the form of a share acquisition or an asset acquisition. Statutory mergers may take place between N.V.s, B.V.s, associations, co-operations, mutuals and foundations (see supra Chapter 2.5.a and b), provided that, in the latter three cases, as a general rule, the merging entities must have the same legal form (see supra Chapter 2.5.a and b).<sup>659</sup> Only the forms of statutory mergers involving N.V.s and B.V.s as constituent legal entities are discussed here. Under current Netherlands' law, a statutory merger is not (yet) possible between a Dutch and a foreign legal person.<sup>660</sup> Consequently, a Dutch statutory merger cannot be used as a device for changing the law governing the legal person.

A statutory merger can take several different forms. For example, a corporation (the "surviving corporation") absorbs another corporation, so that the second corporation ceases to exist as a distinct corporation by operation of law, and the shares of the absorbed corporation are exchanged for shares in the surviving corporation by operation of law.<sup>661</sup> An "upstream merger" is an example of a type of merger, involving a parent corporation that absorbs a subsidiary, so that the subsidiary ceases to exist. Alternatively, in a "downstream merger", the subsidiary is the surviving entity and the parent corporation ceases to exist.

A triangular merger is slightly more complicated. The surviving corporation absorbs one or more corporations, which cease to exist by operation of law, and the shares of the absorbed corporations are, by operation of law, exchanged for shares in a third corporation (the "acquiror") that belongs to the same group as the surviving corporation. All of the shares of the surviving corporation must be held by the

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<sup>658</sup> The provisions concerning the statutory merger were introduced into Netherlands' law to implement the Third EC Company Law Directive (see supra Chapter 1.3.c).

<sup>659</sup> BW arts. 2:308(1), 2:310(1),(3). BW art. 2:310(4) provides an exception to this general rule.

<sup>660</sup> See note 1 of this Chapter. See also supra Chapter 1.3.n regarding the future of international mergers.

<sup>661</sup> BW art. 2:309.

acquiror, either alone or together with another corporation that is part of its group (see supra Chapter 3.1.b).<sup>662</sup> Through the use of a triangular merger, a parent corporation can avoid the existence of minority interests in one of its subsidiaries.

In a consolidation, a new corporate entity is formed upon the merger of two or more constituent corporations that are absorbed by the new corporation, so that the absorbed corporations cease to exist.<sup>663</sup> References to statutory mergers include consolidations, and the same rules apply to both legal forms, unless otherwise indicated.

A "sister merger" is deemed to exist with respect to a statutory merger between two or more wholly-owned subsidiaries.<sup>664</sup>

For "short-form" mergers, with simplified procedures, see infra Chapter 11.3.e.

ii No "Merger Force-Outs". Netherlands' law does not recognise the right to "force out", "freeze-out" or "squeeze-out" unwanted shareholders by means of a merger (see supra Chapter 5.4.d.ii) for force-outs of small minorities), and a merger can be used only to a limited extent to compel certain shareholders to accept cash or notes for their shares.<sup>665</sup> A statutory merger is not, therefore, the appropriate mechanism for either eliminating public shareholders in a "going private" effort or for forcing shareholders to accept a tender offer on penalty of being "mopped up" later for a less attractive consideration subsequent to the merger of the target into the aggressor corporation (known in the U.S. as a "front-end loaded" tender offer).

iii Trade Unions; Works Council. The Merger Code applies to the acquisition of direct or indirect control (more than 50 per cent.) over all or part of the activities of another enterprise as well as the formation of a co-operation of enterprises (the definition includes joint ventures between two or more corporations). The Merger Code must be observed in any merger involving one or more enterprises that (i) are established in the Netherlands and regularly employ 50 employees or more, or (ii)

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<sup>662</sup> BW art. 2:334.

<sup>663</sup> BW art. 2:309.

<sup>664</sup> BW art. 2:333(2).

<sup>665</sup> BW art. 2:325(1).

belong to a group of enterprises with one or more enterprises established in the Netherlands that in aggregate employ 50 employees or more.<sup>666</sup>

If the Merger Code applies, trade unions must be consulted.<sup>667</sup> The Works Councils Act requires prior consultation of the Works Council in several situations, including: the transfer of control of all or part of the enterprise; the establishment, takeover or relinquishment of control of another enterprise, or; the establishment, substantial modification or discontinuation of long-term co-operation with other enterprises, including a substantial financial participation by or on behalf of such an enterprise (see infra Chapter 13.2.d.iii).<sup>668</sup> A merger almost invariably falls within the scope of these provisions. No merger can be effected before completion of the consultation process,<sup>669</sup> which may take considerable time.

Collective bargaining instruments may also have independent provisions requiring prior consultation with the trade unions or the Works Council in the event of mergers and consolidations. Any written opinion given by the Works Council or the trade unions must be disclosed to shareholders (see infra Chapter 11.3.d.ii).

iv Tax Considerations. By virtue of a statutory merger; assets and liabilities can be transferred tax-free to another corporation, provided certain conditions are met.<sup>670</sup>

**b Legal Effect.** Upon the statutory merger taking effect, by operation of law:

(a) the absorbed corporation(s) cease(s) to exist;<sup>671</sup>

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<sup>666</sup> SER Fusiegedragsregels 2000 (Merger Code) effective as at 5 Sept. 2001, art. 2.

<sup>667</sup> Merger Code art. 4. The consultation must take place in such manner that the opinion of the trade unions can still be of significance with respect to the proposed merger and its structuring.

<sup>668</sup> WOR art. 25(1). Article 4.7 of the Merger Code states that the parties will allow the relevant Works Councils to take notice of the opinion of the trade unions in order to enable the Works Councils to take that opinion into account in their advice under WOR art. 25.

<sup>669</sup> WOR art. 25(2).

<sup>670</sup> See infra Chapter 14.2.f.ii.

<sup>671</sup> BW art. 2:311(1).

- (b) all of the assets and liabilities of the disappearing corporation(s) are absorbed by the surviving corporation by way of universal succession of title, thereby becoming part of its own assets and liabilities;<sup>672</sup>
- (c) except in certain limited cases defined by law (see infra Chapter 11.3.c and e), the shareholders of the disappearing corporation(s) become shareholders of the surviving corporation.<sup>673</sup>

### **c Consideration**

i Shares. A statutory merger is essentially an exchange of shares, and cash is used only to account for exchange ratio discrepancies, such as when the value of each newly-issued share in the share capital of the surviving corporation is less than the value of each share in the absorbed corporation. The total amount of cash or promissory notes involved in the transaction cannot exceed 10 per cent. of the aggregate nominal value of the newly-issued share capital.<sup>674</sup> In making payments in cash to third party minority shareholders, the good faith requirements (see supra Chapter 10.2.c), in this context meaning the requirement of equal treatment of shareholders, should be applied to the extent possible.<sup>675</sup> This precludes the use of high nominal value shares exclusively to create a "merger force-out" of minority shareholders. Property cannot be used as consideration for these discrepancies.

No shares in the capital of a surviving corporation will be received in the case of a "sister merger", an "upstream merger" involving wholly-owned subsidiaries or a triangular merger (see supra Chapter 11.3.a.i).<sup>676</sup>

ii Treasury Shares. The merger deed by which the merger is completed (see infra Chapter 11.3.d.iv) may provide for a cancellation by the surviving corporation of treasury shares or other shares in the surviving corporation held by the absorbed

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<sup>672</sup> BW art. 2:309.

<sup>673</sup> BW art. 2:311(2).

<sup>674</sup> BW art. 2:325(1).

<sup>675</sup> ASSER-MAEIJER 2, III, supra p. 23 at note 6, § 576.

<sup>676</sup> BW art. 2:311(2).



corporation, but not in excess of the total nominal value of the newly issued share capital.<sup>677</sup> The detailed statutory provisions for a reduction of issued capital (see Chapter 4.6) are not applicable.

#### **d Procedure**

i Plan of Merger. The "plan of merger" is a joint proposal by the management boards of the absorbed and surviving corporations.<sup>678</sup> It forms the basis for the notarial deed that completes the merger procedure. The plan must be signed by all managing directors and approved and signed by all supervisory directors, where applicable. If a director fails to sign, a reasoned explanation of this refusal is required.<sup>679</sup> Drawing up a plan of merger is a prerequisite to a statutory merger. The joint nature of the required plan makes a statutory merger inconceivable as part of a hostile acquisition.

The plan of merger must describe in detail the proposed actions, including, as a minimum.<sup>680</sup>

- (a) the legal form, name and statutory seat of the corporations to be merged;
- (b) the articles of the acquiror in their then existing form and in their post-merger form or, if the acquiror is newly-established, the draft deed of incorporation;
- (c) the rights or compensatory payments which are chargeable to the acquiror and which are granted to persons who, other than as shareholders, have special rights vis-à-vis the corporations ceasing to exist, such as profit rights or share subscription rights, and their effective date;
- (d) the benefits in connection with the merger, conferred on managing directors, supervisory directors or other persons involved in the merger;
- (e) the proposed composition of the management board and the supervisory board, if there is to be one;

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<sup>677</sup> BW art. 2:325(2).

<sup>678</sup> BW art. 2:312(1).

<sup>679</sup> BW arts. 2:312(4), 2:326(2).

<sup>680</sup> BW arts. 2:312(2), 2:326(1).

- (f) in respect of each of the corporations ceasing to exist, the effective date from which financial information shall be incorporated in the annual accounts or other financial accounts of the acquiror;
- (g) the proposed measures in connection with the transfer of the share ownership of the absorbed corporations;
- (h) the proposed continuation or discontinuation of the business activities of the absorbed corporations;
- (i) who must approve the merger resolution;
- (j) the proposed exchange ratio for the shares, and any cash consideration;
- (k) the date from which and extent to which the shareholders of the absorbed corporation will share in the profits of the surviving corporation;
- (l) the impact of the merger on the amounts in the balance sheet for goodwill, capital surplus and distributable reserves of the surviving corporation; and
- (m) the number of shares that will be cancelled (see supra Chapter 11.3.c.ii).

ii Supporting Documents. The plan of merger must be supported by an explanatory memorandum prepared by the management boards of each corporation involved. This memorandum must describe the reasons for the merger and must comment on the legal, economic and employment ramifications of the merger.<sup>681</sup> It must also explain: the method or methods applied in determining the exchange ratio for the shares, whether such method or methods are justified under the circumstances; the valuation resulting from each method applied; if more than one method has been applied, whether the relative weights attributed to the valuation methods applied may be considered generally acceptable; and whether there have been any particular difficulties in the valuation and the determination of the exchange ratio.<sup>682</sup>

If more than six months of a corporation's financial year have elapsed by the time the plan of merger and accompanying documentation are filed with the Commercial Register (see infra Chapter 12.1.a), its management board must prepare either annual accounts or an interim statement of assets and liabilities, consistent with

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<sup>681</sup> BW art. 2:313(1).

<sup>682</sup> BW art. 2:327.

the applied valuation methods, as of a date which is not earlier than the first day of the third month preceding the month of the filing.<sup>683</sup>

Each corporation must retain an auditor to examine the plan of merger and certify whether in his opinion the exchange ratio for the shares is reasonable.<sup>684</sup> The auditor must also certify that the equity of the absorbed corporation is as a minimum equal to the aggregate nominal value of the shares that will be issued, plus any cash consideration. He must also give an opinion on the statements made in the explanatory memorandum with respect to the valuation method or methods.<sup>685</sup> The auditors must have access to the books and records of all corporations involved.<sup>686</sup>

Each corporation must file with the Commercial Register the plan of merger, the annual accounts for the three preceding years together with the relevant auditors' opinions, the annual reports for the three preceding years, and any interim statements or annual accounts not yet adopted. These documents, together with the explanatory memorandum, as well as any advice or recommendations of the Works Council and the trade unions, where applicable, must also be deposited at the corporations head offices for inspection by shareholders and others who have a similar interest vis-à-vis the corporation. A notice that the filings have been made, the "notice of deposit", must be published in a daily newspaper with national circulation.<sup>687</sup>

iii Authorisation. As a general rule, a merger resolution must be taken by the shareholders' meeting.<sup>688</sup> No resolution can be taken on the merger within the one-month period following the publication in a national newspaper referred to above

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<sup>683</sup> BW art. 2:313(2).

<sup>684</sup> BW art. 2:328(1).

<sup>685</sup> BW art. 2:328(2).

<sup>686</sup> BW art. 2:328(3).

<sup>687</sup> BW art. 2:314.

<sup>688</sup> BW art. 2:317(1). The shareholders' meeting does not have the right to amend the merger plan (BW art.2:317(2)). See Chapter 8.1.b regarding the new "large" company rules as proposed. The proposal includes for all corporations a new BW arts. 2:107a/217a by which certain resolutions of the management board need the shareholders' approval. Although not specifically mentioned in the proposal, a resolution of the management board to authorise the merger may fall under the scope of these proposed articles.

under [ii] (for timing, see infra iv).<sup>689</sup> A merger resolution is similar to a resolution to amend the articles (see supra Chapter 11.2), except that if less than one-half of the issued capital is represented at the shareholders' meeting, a qualified majority of two-thirds of the votes is required.<sup>690</sup> The surviving corporation may authorise the merger by resolution of its management board, provided that this procedure is not opposed by shareholders representing five per cent. or more of the issued capital, and provided the articles so permit and the intention to do so has been stated in the notice of deposit see supra ii.<sup>691</sup>

iv Timing. Creditors may oppose the proposed merger and require the posting of a bond. The Works Council, where applicable, and, if the Merger Rules apply, the trade unions have the right to be consulted well in advance of the resolution or the authorisation (see supra Chapter 11.3.a.iii).<sup>692</sup> Parties to contracts with the absorbing corporation or the disappearing corporation who may be detrimentally affected by the merger may have their contracts amended or rescinded by court order, and damages may be awarded.<sup>693</sup> This course of action does not arise until the merger is completed, but it may be prudent to attempt to avoid it in advance. Pledgees and beneficiaries of a life interest (see supra Chapter 3.3.d.iv) in shares of the disappearing corporation will, as a general rule, receive a similar right in shares of the surviving corporation.<sup>694</sup> If an amendment to the articles of the surviving corporation is required, a certificate of no objection (see supra Chapter 3.3.b.iv) must be obtained from the Ministry of Justice prior to the execution of the notarial deed of merger.<sup>695</sup>

The merger is completed by the execution of a deed before a Dutch civil law notary, effective the following day.<sup>696</sup> The deed must be executed within six months of the date of the notice of deposit see supra ii. The civil law notary is responsible for

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<sup>689</sup> BW art. 2:317(2).

<sup>690</sup> BW arts. 2:317(3) and 2:330(1).

<sup>691</sup> BW art. 2:331.

<sup>692</sup> Their recommendations must be deposited for shareholder inspection (see supra ii).

<sup>693</sup> BW art. 2:322.

<sup>694</sup> BW art. 2:319(1).

<sup>695</sup> BW art. 2:332.

compliance with the mandatory statutory requirements and the requirements of the articles and must render an opinion that all requirements have been satisfied.<sup>697</sup> Within an eight-day period following the execution of the merger deed, the surviving corporation must file a certified copy of the merger deed with each of the Commercial Registers (see infra Chapter 12.1.a) with which filings have been made by any of the corporations involved.<sup>698</sup>

**e "Short-Form" Merger.** A "short-form" merger, with simplified procedures, is available, inter alia, for upstream mergers of a corporation with a wholly-owned subsidiary and for "sister mergers", i.e., statutory mergers between two or more wholly-owned subsidiaries.<sup>699</sup>

The simplified procedures for a "short-form" merger entail exemptions for: (i) the items in the merger plan see supra paragraph d.i (j) to (m); (ii) the approval of the plan of merger by the supervisory directors; (iii) the explanatory memorandum for the absorbed corporation;<sup>700</sup> (iv) the valuation statements in the explanatory memorandum; and (v) the auditors' reports (see supra Chapter 11.3.d.ii).<sup>701</sup>

## 11.4 Statutory Divisions (Juridische Splitsingen)

### a Introduction

i General. By the end of 1997 a statute was adopted<sup>702</sup> (the "Legal Division Act") amending, inter alia, the Civil Code with respect to the implementation of the Sixth

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<sup>696</sup> BW art. 2:318(1).

<sup>697</sup> BW art. 2:318(2).

<sup>698</sup> BW art. 2:318(3).

<sup>699</sup> BW art. 2:333(2).

<sup>700</sup> This exemption does not apply if other parties than the surviving corporation have a special right vis-à-vis the corporation ceasing to exist, such as profit rights or share rights.

<sup>701</sup> BW art. 2:333, 2:313(3).

<sup>702</sup> Statute of 24 Dec. 1997 S. 776.

Company Law Directive (see supra Chapter 1.3.f). This new legislation came into force on 1 February 1998. In this paragraph references to articles are references to articles of the Civil Code.

Statutory divisions may take place between N.V.s, B.V.s, associations, co-operatives, mutuals and foundations (see supra Chapter 2.5.a and b), provided that in the latter three cases, as a general rule, the parties to the division have the same legal form.<sup>703</sup> Only the forms of divisions involving N.V.s and B.V.s as constituent legal entities are discussed here. Under Netherlands' law, a division involving Dutch and foreign legal persons is not possible.

Although a statutory division can take several forms (see infra ii), it basically entails the absorption of the whole or a distinct part of the business of a corporation by one or more other corporations (the "recipient corporations") through the exchange of shares. For consideration other than in shares, see infra Chapter 11.4.c. By means of a statutory division economic groups can be restructured or broken-up and joint ventures formed or terminated by means of one single legal act whereby assets and liabilities are transferred by operation of law.

Netherlands' tax legislation provides for a roll-over exemption in the case of a division provided certain conditions are met.<sup>704</sup>

To a certain extent, a statutory division is the mirror of a statutory merger. In particular, this is the case with respect to the prescribed procedure (see infra Chapter 11.4.d). Moreover, the consultation requirements with the trade unions and Works Councils (see supra Chapter 11.3.a.iii) are similarly applicable in the context of divisions. However, whereas in a statutory merger one or more businesses are transferred in their entirety to one corporation, in a statutory division there may often be a transfer of part of the assets and liabilities of a corporation to more than one recipient corporation. This requires specific forms of protection for third parties (see infra Chapter 11.4.f).

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<sup>703</sup>

BW arts. 2:308 and 2:334b(1),(3). BW art. 2:334b(4) provides for an exception to this general rule.

<sup>704</sup>

See infra Chapter 14.02.f.ii.

ii Types of Statutory Divisions. The Legal Division Act distinguishes between two different methods of a division: the division (zuivere splitsing) and the demerger (afsplitsing).<sup>705</sup>

In a division, two or more recipient corporations absorb all assets and liabilities of an existing corporation (the "dividing corporation"), such that the dividing corporation by operation of law ceases to exist as a distinct corporation.<sup>706</sup> As a general rule, the shares of the dividing corporation are exchanged for shares in the recipient corporations (for exceptions, see infra Chapter 11.4.c). A species of this form is the "qualified division" whereby different shareholders of the dividing corporation receive shares in different recipient corporations.<sup>707</sup>

In a demerger, one or more recipient corporations absorb the whole, or a distinct part, of the assets and liabilities of an existing corporation (the "demerging corporation"), whereby the demerging corporation does not cease to exist as a distinct corporation (such corporation after the demerger the "surviving corporation"). In a demerger the shareholders of the demerging corporation receive shares in all of the recipient corporations, or one more recipient corporations will be incorporated by the demerging corporation in the demerger.<sup>708</sup> For "short-form" demergers, with simplified procedures, see infra Chapter 11.4.e.

In a triangular division, the shares of the dividing or demerging corporation are by operation of law exchanged for shares in a third corporation that belongs to the same group (see supra Chapter 3.1.b) as the recipient corporation.<sup>709</sup> All of the shares of the recipient corporation must be held by the group company, either alone or together with another corporation in the group of the recipient corporation.<sup>710</sup> For "short form" demergers, with simplified procedures, see infra Chapter 11.4.f).

In both a division or a demerger, the recipient corporations can be existing corporations or can be incorporated at the time of the division. While the Legal

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<sup>705</sup> BW art. 2:334a(1).

<sup>706</sup> BW art. 2:334a(2).

<sup>707</sup> BW art. 2:334cc.

<sup>708</sup> BW art. 2:334a(3).

<sup>709</sup> BW art. 2:334ii(1).

<sup>710</sup> BW art. 2:334ii(2).

Division Act defines the dividing or demerging corporation and every recipient corporation (with the exception of corporations that are incorporated at the time of the division) as a "party to the division", such parties to the division may also be referred to as "corporations involved" below.<sup>711</sup>

- b Legal Effects.** Upon the division taking effect, by operation of law:
- (a) the dividing corporation ceases to exist (only in case of a division);<sup>712</sup>
  - (b) the transferred assets and liabilities of the dividing or demerging corporation are absorbed by the recipient corporation(s), so becoming part of its, or their, respective assets and liabilities;<sup>713</sup>
  - (c) except in certain limited cases defined by law (see infra Chapter 11.3.c and [e]) the shareholders of the dividing corporation become shareholders of (all) the recipient corporation(s).<sup>714</sup>

**c Consideration.** A statutory division is essentially an exchange of shares, and cash is used only to account for exchange rate discrepancies, such as when the value of each newly-issued share in the share capital of the recipient corporation(s) is less than the value of each share in the dividing corporation. The total amount of cash or promissory notes involved in the transaction cannot exceed 10 per cent. of the aggregate nominal value of the newly-issued share capital.<sup>715</sup> In making payments in cash to third party minority shareholders, the good faith requirements (see supra Chapter 10.2.c), in this context meaning the requirement of equal treatment of shareholders, should be applied to the fullest extent possible (see supra Chapter 11.3.c.i).

No shares in the capital of a recipient corporation will be received for shares in the capital of a dividing corporation that are held by or on behalf of such recipient or dividing corporation.<sup>716</sup> Furthermore, the shareholders of the dividing corporation will not become shareholders of all the recipient corporations (a) in the case of the

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<sup>711</sup> BW art. 2:334a(4).

<sup>712</sup> BW art. 2:334c(1).

<sup>713</sup> BW art. 2:334a(2),(3).

<sup>714</sup> BW art. 2:334e(1).

<sup>715</sup> BW art. 2:334x(2).



recipient corporations being incorporated at the time of the division and the dividing corporation receiving all their shares, (b) in the case of a "qualified division" or (c) in the case of a triangular division (see supra Chapter 11.4.a.ii).<sup>717</sup>

The division deed (see infra Chapter 11.4.d.iv) may provide for a cancellation by a recipient corporation of shares in its own capital that it holds or will receive pursuant to the split-up, but not in excess of the total nominal value of the newly-issued share capital. The detailed statutory provisions for a reduction of issued capital (see supra Chapter 4.6) are not applicable here.<sup>718</sup>

#### **d Procedure**

i Division Plan. The "division plan" (voorstel tot splitsing) is a joint proposal by the management boards of the corporations involved.<sup>719</sup> It forms the basis for the notarial deed that completes the division procedure. The plan must be signed by all managing directors and approved and signed by all supervisory directors, where applicable.<sup>720</sup> If a director fails to sign, a reasoned explanation of this refusal is required.<sup>721</sup>

The plan must describe in detail the proposed actions, including, as a minimum.<sup>722</sup>

- (a) the legal form, name and statutory seat of the corporations involved and the corporations to be incorporated at the time of the division, where applicable;
- (b) the articles of the recipient corporations and the surviving corporation in their then existing form and in their form after the division or, if the

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<sup>716</sup> BW art. 2:334e(2).

<sup>717</sup> BW art. 2:334e(3).

<sup>718</sup> BW art. 2:334x(3).

<sup>719</sup> BW art. 2:334f(1).

<sup>720</sup> BW art. 2:334f(3),(4).

<sup>721</sup> BW art. 2:334f(3),(4).

<sup>722</sup> BW arts. 2:334f(2) and (4), 2:334y.

recipient corporations are newly established, the draft deed of incorporation;

- (c) whether all assets and liabilities of the dividing corporation will be transferred or only part thereof;
- (d) a description on the basis of which it can be accurately determined which assets and liabilities of the dividing corporation will be transferred to each of the recipient corporations and, if not all assets and liabilities of the dividing corporation will be transferred, which assets and liabilities will remain with the surviving corporation, as well as a pro forma profit and loss account of the recipient corporations and the surviving corporation;
- (e) the value of the assets and liabilities that each of the recipient corporations will receive and of the assets and liabilities that will remain with the surviving corporation, as well as the value of the shares in the capital of the recipient corporations that the surviving corporation will receive in the division;
- (f) the rights or compensatory payments which are chargeable to the recipient corporations and which are granted to persons who, other than as shareholders, have special rights vis-à-vis the dividing corporation, such as profit rights or share subscription rights, and their effective date;
- (g) the benefits in connection with the division, conferred on managing or supervisory directors of the corporations involved or other persons involved in the division;
- (h) the proposed composition of the management boards and the supervisory boards of the recipient corporations and the surviving corporation, where applicable;
- (i) the effective date from which financial information regarding the relevant parts of the assets and liabilities to be transferred shall be incorporated in the annual accounts of the recipient corporations;
- (j) the proposed measures in connection with the receipt by the shareholders of the dividing corporation of shares of the recipient corporations;
- (k) the proposed continuation or discontinuation of business activities;
- (l) who must approve the division resolution;
- (m) the proposed exchange ratio for the shares, and any cash consideration;

- (n) the date from which, and extent to which, the shareholders of the dividing corporation will share in the profits of the recipient corporations;
- (o) the number of shares that will be cancelled (see supra Chapter 11.4.c); and
- (p) the impact of the division on the amounts of goodwill and the distributable reserves of the recipient corporations and the surviving corporation.

In the case of a qualified division the division plan must state which shareholders will become shareholders in the respective recipient corporations.<sup>723</sup>

ii Supporting documents. The division plan must be supported by an explanatory memorandum prepared by the management boards of each corporation involved. This memorandum must describe the reasons for the division and must comment on the legal, economic and employment ramifications of the division.<sup>724</sup> It must also explain: the method or methods applied in determining the exchange ratio for the shares;<sup>725</sup> whether such method or methods are justified under the circumstances; the valuation resulting from each method applied, and, if more than one method has been applied, whether the relative weights attributed to the valuation methods applied may be considered generally acceptable; and whether there have been any specific difficulties in the valuation and the determination of the exchange ratio.<sup>726</sup> In case of a qualified division the memorandum must also state the criteria for the allocation of the shareholders between the respective recipient corporations.<sup>727</sup>

If more than six months of a corporation's financial year have elapsed by the time the division plan is filed at the Commercial Register (see infra Chapter 12.1.a),

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<sup>723</sup> BW art. 2:334cc sub a.

<sup>724</sup> BW art. 2:334g(1).

<sup>725</sup> In the case where shares, or depository receipts issued in respect of a splitting corporation are listed on a stock exchange, the exchange ratio may be made dependent on the price of the shares (or depository receipts) on that exchange at one or more dates preceding the division date and determined in the division plan (BW art. 2:334x(1)).

<sup>726</sup> BW art. 2:334z.

<sup>727</sup> BW art. 2:334cc sub b.

its management board must prepare either annual accounts or an interim statement of assets and liabilities as of a date which is not earlier than the first day of the third month preceding the month of filing.<sup>728</sup>

Each corporation must retain an auditor to examine the division plan and certify whether in his opinion the exchange ratio for the shares is reasonable.<sup>729</sup> In the case of a demerger, the auditor must also certify that the value of the assets and liabilities that shall remain with the surviving corporation, together with the value of the shares in the capital of the recipient corporations to be received pursuant to the demerger, is as a minimum equal to the issued and called-up part of the capital, increased by the reserves that the corporation must have by law or the articles immediately following the demerger.<sup>730</sup> The auditor must also give an opinion on the statements made in the explanatory memorandum with respect to the valuation method or methods.<sup>731</sup> The auditors must have access to the books and records of all parties to the division.<sup>732</sup> In the case of a qualified division the auditor must also certify that the allocation of the shareholders of the dividing corporation between the respective recipient corporations is reasonable.<sup>733</sup>

Each corporation involved must file with the Commercial Register (see infra Chapter 12.1.a): the division plan; the annual accounts for the three preceding years together with the relevant auditors' opinions; the annual reports for the three preceding years; and any interim statements or annual accounts not yet adopted.<sup>734</sup> These documents, together with the explanatory memorandum, as well as any advice or recommendations by the Works Council and the trade unions, where applicable, must also be deposited at the corporations head offices for inspection by shareholders and

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<sup>728</sup> BW art. 2:334g(2).

<sup>729</sup> BW art. 2:334aa(1).

<sup>730</sup> BW art. 2:334aa(2).

<sup>731</sup> BW art. 2:334aa(3).

<sup>732</sup> BW art. 2:334aa(5).

<sup>733</sup> BW art. 2:334cc sub c.

<sup>734</sup> BW art. 2:334h(1).

others who have a special right vis-à-vis the corporation.<sup>735</sup> A notice that the filings have been made must be published in a daily newspaper with national circulation.<sup>736</sup>

iii Authorisation. As a general rule, a division resolution must be taken by the shareholders' meeting.<sup>737</sup> No resolution can be taken on the division within the one-month period following the publication in a national newspaper (see supra ii (for timing, see infra iv)).<sup>738</sup> A division resolution is similar to a resolution to amend the articles (see supra Chapter 11.2), except that if less than one-half of the issued capital is represented at the shareholders' meeting, a qualified majority of two-thirds of the votes is required.<sup>739</sup> A division resolution for a qualified division can only be taken by a majority of three-quarters of the votes cast in a meeting where at least 95 per cent. of the issued capital is represented.<sup>740</sup>

A recipient corporation may authorise the division by resolution of its management board, provided that this procedure is not opposed by shareholders representing five per cent. or more of its issued capital, and provided the articles so permit and the intention to do so has been stated in the notice of deposit referred to above under [ii]. The same applies to a demerging corporation, provided all recipient corporations are incorporated at the time of the demerger and the demerging corporation will become their sole shareholder.<sup>741</sup>

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<sup>735</sup> BW art. 2:334h(2),(4).

<sup>736</sup> BW art. 2:334h(3).

<sup>737</sup> BW art. 2:334m(1). The shareholders' meeting does not have the power to amend the split-up plan (id.).

<sup>738</sup> BW art. 2:334m(2).

<sup>739</sup> BW arts. 2:334m(3) and 2:334ee(1).

<sup>740</sup> BW art. 2:334cc sub d.

<sup>741</sup> BW art. 2:334ff. See Chapter 8.1.b regarding the new "large" company rules as proposed. The proposal includes for all corporations new BW arts. 2:107a/217a by which certain resolutions of the managing board need the shareholders' approval. Although not specifically mentioned in the proposal, a resolution of the management board to authorise the merger may fall under the scope of these proposed articles.

iv Timing. The Works Council, where applicable and, if the Merger Rules apply, the trade unions, have the right to be consulted well in advance of the vote or the authorisation (see supra Chapter 11.3.a.iii).<sup>742</sup>

The division is completed by the execution of a deed before a Dutch civil law notary, effective the following day.<sup>743</sup> If an amendment to the articles of the recipient corporations is required, a certificate of no objection (see supra Chapter 3.3.b.iv) must be obtained from the Ministry of Justice prior to the execution of the notarial division deed.<sup>744</sup>

The deed cannot be executed until any creditor opposition (see infra Chapter 11.4.f) has been withdrawn or upon a court order setting aside such opposition has become enforceable.<sup>745</sup> The notarial deed must be executed within six months of the notice of deposit (see supra ii) or, in case this is not possible as a result of creditor opposition, within one month following the withdrawal or setting aside of such creditor opposition.<sup>746</sup> The civil law notary is responsible for compliance with the mandatory statutory requirements and the requirements of the articles and must render an opinion that all requirements have been satisfied.<sup>747</sup> Within an eight-day period following the execution of the division deed, each of the recipient corporations and the surviving corporation, where applicable, must file a certified copy of the division deed with the competent Commercial Registers (see infra Chapter 12.1.a).<sup>748</sup>

**e "Short-Form" Demerger.** A "short-form" demerger, with simplified procedures, is available for demergers in which all recipient corporations are

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<sup>742</sup> Their recommendations must be deposited for shareholder inspection (see supra ii).

<sup>743</sup> BW art. 2:334n(1). The description of assets and liabilities referred to in paragraph [i] (d) is attached to the deed (BW art. 2:334n(2)).

<sup>744</sup> BW art. 2:334gg.

<sup>745</sup> BW art. 2:334l(3).

<sup>746</sup> BW art. 2:334n(1).

<sup>747</sup> BW art. 2:334n(2).

<sup>748</sup> BW art. 2:334n(3). With respect to the corporation that has disappeared as a result of a division, this obligation lies on each of the recipient corporations.

incorporated at the time of the demerger and the demerging corporation will become their sole shareholder pursuant to the demerger.<sup>749</sup>

The simplified procedures for a "short-form" division entail exemptions for: (i) the items in the division plan mentioned above in paragraph [d][i] (m) to (o); (ii) the approval of the division plan by the supervisory directors; (iii) the valuation statements in the explanatory memorandum; and (iv) the auditors' reports.<sup>750</sup>

**f Third Party Protection.** To a large extent third parties derive protection from the detailed procedural rules for a division. However, the Legal Division Act contains specific additional provisions with respect to third party protection.

Firstly, contractual relations (to which the dividing corporation is a party) can only be transferred in their entirety.<sup>751</sup> However, if a contractual relation is inherent to assets or liabilities that will be transferred to different recipient corporations, the contractual relation may be divided between the recipient corporations pro rata to its connection with the assets and liabilities that each recipient corporation will receive.<sup>752</sup>

Secondly, upon request of a creditor of one of the parties to the division, at least one of the corporations involved must provide security for, or otherwise guarantee, the payment of the creditors' claim. This is not required if the payment of the creditor's claim is sufficiently secured or if the financial condition of the debtor after the division does not provide less security for the payment of the claim.<sup>753</sup> During a one-month period following the notice of deposit by the corporations involved (see supra Chapter 11.4.d.ii), a party to a contract with any of them may, by filing a petition with the District Court, oppose the division proposal on the grounds that it infringes the allocation rules with respect to that party's contractual relation or that the requested security or guarantee was not given.<sup>754</sup>

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<sup>749</sup> BW art. 2:334hh.

<sup>750</sup> BW art. 2:334hh.

<sup>751</sup> BW art. 2:334j(1).

<sup>752</sup> BW art. 2:334j(2). The same principle applies to contractual relations that are partly connected to assets and liabilities that will remain with the surviving corporation (BW art. 2:334j(3)).

<sup>753</sup> BW art. 2:334k.

Thirdly, pledgees and beneficiaries of a life interest in shares of the dividing corporation will, as a general rule, receive a similar right in shares of the recipient corporations.<sup>755</sup> Alternatively, a person who, other than as a shareholder, has a special right vis-à-vis a dividing corporation, such as profit rights or share subscription rights, must either receive (i) rights in the recipient corporations that, together with the rights vis-à-vis the surviving corporation (where applicable), are equivalent to his rights prior to the division, or (ii) compensation.<sup>756</sup>

Fourthly, parties to contracts with a party to the division may have their contracts amended or rescinded by court order and damages may be awarded.<sup>757</sup>

Fifthly, the Legal Division Act contains detailed rules in a case where the description of the allocation of assets and liabilities is not clear. In a case where all the assets and liabilities of the dividing corporation have been transferred, the recipient corporations are jointly entitled to the assets and jointly and severally liable for the debts.<sup>758</sup> With respect to the assets the entitlement of each recipient corporation is proportional to the value of its part of the assets, and liabilities received. In a case where not all the assets and liabilities have been transferred, the entitlement to the assets lies with the surviving corporation.<sup>759</sup>

Finally, the Legal Division Act provides that the recipient corporations and the surviving corporation are jointly liable for the performance of the obligations of the surviving corporation at the time of the demerger.<sup>760</sup> For indivisible obligations this liability is several.<sup>761</sup> For divisible obligations either the recipient corporation or the

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<sup>754</sup> BW art. 2:334l(1). Prior to its ruling, the court may enable the corporations involved to amend their division plan (and publish the same in accordance with the publication requirements discussed above in Chapter 11.4.d.ii) or to give a security or guarantee (BW art. 2:334l(2)).

<sup>755</sup> BW art. 2:334o(1). In the case of a surviving corporation, the existing pledge or life estate will remain in place (id.)

<sup>756</sup> BW art. 2:334p(1).

<sup>757</sup> BW art. 2:334r(1),(3).

<sup>758</sup> BW art. 2:334s(2),(4).

<sup>759</sup> BW art. 2:334s(3).

<sup>760</sup> BW art. 2:334t(1).

<sup>761</sup> BW art. 2:334t(2).



surviving corporation, depending on whom the obligation was transferred to, is liable for the whole.<sup>762</sup> For other corporations, liability for divisible obligations is limited to the value of the assets and liabilities received or retained in the division.<sup>763</sup>

### 11.5 Adoption of Different Legal Form (Omzetting)

An N.V. can be converted into a B.V. and a B.V. into an N.V. by amending the articles.<sup>764</sup> The required certificate of no-objection from the Ministry of Justice (see supra Chapter 3.3.b.iv) concerns the conversion and the amendments of the articles.<sup>765</sup> The amendment must incorporate all statutory provisions specifically required for the newly-adopted corporate form. The conversion does not in any way affect the identity or continued existence of the corporation,<sup>766</sup> and it continues to have the same assets and liabilities, tax status, managing directors, and, where applicable, supervisory directors. Associations, co-operatives, mutuals and foundations (stichtingen) can also be converted into N.V.s or B.V.s, and vice versa. For the conversion of a stichting to another legal entity, the conversion of another legal entity to a stichting, and the conversion of an N.V. or B.V. to an association, the conversion is subject to court approval.<sup>767</sup>

For a conversion of an N.V. to a B.V., and vice versa, the law requires an opinion from a Dutch registered accountant that confirms that the equity on a date within the five-month period preceding the conversion date was equal to or in excess of the issued and called up capital.<sup>768</sup> A similar provision exists for all other types of conversions.<sup>769</sup>

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<sup>762</sup> BW art. 2:334t(3).

<sup>763</sup> BW art. 2:334t(3). These other corporations are required to perform these obligations only upon failure of the recipient corporation or the surviving

<sup>764</sup> BW arts. 2:18(1),(2) and 2:72(1)/183(1).

<sup>765</sup> BW arts. 2:72(1)(a)/183(1)(a), 2:72(2)(a)/183(2)(a).

<sup>766</sup> Judgment of 17 July 1980, Ger. Amsterdam, 1981 NJ No. 214.

<sup>767</sup> BW art. 2:18(4).

<sup>768</sup> BW art. 2:72(1)(b)/183(1)(b).

<sup>769</sup> BW art. 2:72(2)(b)/183(2)(b).

## 11.6 Sale of Assets; Dissolution; Winding Up

**a Sale of Assets.** A sale of all or substantially all of the corporation's assets may preclude the corporation from continuing the business it has been operating. There is no statutory provision covering this specific event, but certain legal commentators consider it a matter outside the realm of powers of the management board and consider it an action equivalent to dissolution of the corporation, which requires a shareholders' resolution.<sup>770</sup> The question as to whether the transfer conflicts with the corporation's purposes has limited importance in practice, as an action on the basis of ultra vires (see supra Chapter 3.5) can only be instituted by the corporation itself. However, any minority shareholder of the seller may challenge the sale of the seller's business to an acquiror on the basis of an alleged violation of the good faith requirements (see supra Chapter 10.2.c). Such claim is more likely to be successful if the majority shareholder has a special relationship with the acquiror that would benefit from a sale on terms other than at arm's length. In such a case, the rules of an indirect conflict of interest may be applicable i.e., any member of the management board may be precluded from acting (see supra Chapter 8.2.e). To avoid legal disputes, it may be advisable to have the business to be transferred appraised by an independent expert.

### **b Dissolution**

**i Voluntary Dissolution.** Shareholders may adopt a resolution to dissolve the corporation,<sup>771</sup> with the result that the liquidation proceeds, if any, will be distributed to shareholders in accordance with the articles. Certain shareholders, usually owners of preference shares, may have preferential rights to these distributions. Unless the articles require a qualified majority, any affirmative vote of the shareholders' meeting

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<sup>770</sup> ASSER-MAEIJER 2, III, supra p. 23 at note 6, §§ 258, 259; HANDBOEK, supra p. 27 at note 6, § 231. See Chapter 8.1.b regarding the new "large" company rules. With respect to all corporations, new BW arts. 2:107a/217a are proposed by which, inter alia, a resolution of the management board to transfer the entire or substantially all of the enterprise of the corporation requires the shareholders' approval.

<sup>771</sup> BW art. 2:19(1)(a).

is sufficient to bring the corporation into a state of dissolution. The action is irreversible.<sup>772</sup> There are no special statutory notice or quorum requirements. For an N.V. or B.V. that is not "large", no authorisation by the management board or the supervisory board is required. To put a proposal to dissolve a "large" company on the agenda of the shareholders' meeting, the management board needs the prior approval of the supervisory board.<sup>773</sup>

ii Involuntary Dissolution. The law does not require a corporation to be dissolved once it becomes insolvent.<sup>774</sup> However, any creditor, or the corporation, may file for bankruptcy once the corporation fails to pay two or more of its creditors.<sup>775</sup> Unless the articles provide otherwise, the management board requires an affirmative resolution of the shareholders, authorising it to file for bankruptcy (in the case of a liquidation).<sup>776</sup> This shareholders' resolution is also required when the corporation has the status of a "large" company (see supra Chapter 8.2.a.ii), in which case the prior approval of the supervisory board must also be obtained.<sup>777</sup> For the liability of managing directors and supervisory directors in case of bankruptcy, see supra Chapter 9.2.d. Bankruptcy (in the case of liquidation) has the effect of dissolving the corporation.

A court may also order the dissolution of a corporation in an action brought by the public prosecutor in the event that the corporation has an illegal purpose,<sup>778</sup> and also by an action of an interested party, if, inter alia: its articles do not comply with the statutory requirements; or the corporation is grossly violating either its articles<sup>779</sup>; or the critical rules concerning the preservation of capital or the rules concerning the

<sup>772</sup> Judgment of 26 May, HR, 2000 JOL No. 313.

<sup>773</sup> BW art. 2:164(1)(h)/274(1)(h).

<sup>774</sup> Once the equity of an N.V. falls below 50 per cent. of its issued capital, the management board must convene a shareholders' meeting to discuss appropriate steps (BW art. 2:108a).

<sup>775</sup> Faillissementswet [Fw.] (Bankruptcy Act) art. 1, 1983 S. 140, as amended.

<sup>776</sup> BW art. 2:136/246.

<sup>777</sup> BW art. 2:164(1)(i)/274(1)(i).

<sup>778</sup> BW art. 2:20(2).

<sup>779</sup> BW art. 2:21(1).

minimum capital (see supra Chapter 4.3.b);<sup>780</sup> or if the corporation is no longer in a financial position to conduct business in accordance with its purposes; or is no longer in business.<sup>781</sup> This latter provision is of particular importance in view of the current trend of dissolving "dormant" corporations, thereby precluding founders from using corporate vehicles which have not been properly screened through the process of obtaining a certificate of no-objection (see supra Chapter 3.3.b.iv). The public prosecutor will notify the competent Chamber of Commerce of its intention to bring an action for dissolution of the company.<sup>782</sup> This provision is intended to co-ordinate actions by the public prosecutor and the Chamber of Commerce, which has been given the power to dissolve dormant companies by an administrative decision in order to combat fraud and clean-up the Commercial Register.

The Chamber of Commerce (see infra Chapter 12.1.a) must dissolve a corporation, co-operative or mutual upon the occurrence of two or more of the following conditions:<sup>783</sup>

- (a) the legal entity has not paid its filing fees for one year or more after registration;
- (b) the legal entity has not registered any managing directors for one year or more, or the managing director is deceased, could not be reached for one year or more at the address registered with the Commercial Register, nor at the register of his municipality, or his address was not registered at all with the Commercial Register for one year or more;
- (c) the legal entity has not published its annual accounts in accordance with the law; or
- (d) the legal entity has not complied with the obligation to file a return for corporate income tax for one year or more.

For registered associations or foundations that do not conduct a registered business enterprise (see supra Chapter 2.5.a.vii and Chapter 2.5.b), the non-payment of the respective filing fees in combination with one of the events mentioned above

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<sup>780</sup> BW art. 2:74(2)/185(2).

<sup>781</sup> BW art. 2:74(1)/185(1).

<sup>782</sup> BW art. 2:75(1)/185(1).

<sup>783</sup> BW art. 2:19a(1).

under (b) will trigger an action for dissolution by the Chamber of Commerce.<sup>784</sup> The Chamber of Commerce must notify the legal entity and its registered managing directors of its intention to take the dissolution action, including the grounds for such action and will publish this notification in the Government Gazette. If the legal entity has not properly registered any managing directors for a period of one year or more, as outlined under (b) above, the Chamber of Commerce will also publish this event in the Government Gazette.<sup>785</sup> Unless the grounds for dissolution have been remedied in a timely manner, the Chamber of Commerce will dissolve the legal entity by administrative decision after a period of eight weeks following the date of notification.<sup>786</sup> The administrative decision can be appealed against at the Court of Appeal from Decisions of the SER, Product and Trade Boards (College van Beroep voor het bedrijfsleven).<sup>787</sup>

The public prosecutor, or an interested party, may also petition the court to order dissolution if the corporation was formed in violation of the rules concerning the formation of corporations<sup>788</sup> or to order nullification of a purported corporation if business was conducted in the name of a corporation that was never formed.<sup>789</sup> The Enterprise Chamber can also order the corporation to be dissolved if an investigation into the affairs of the corporation shows mismanagement and the Chamber deems dissolution the most appropriate solution (see supra Chapter 10.2.b.v).<sup>790</sup>

**c Winding Up.** The resolution to dissolve the corporation does not bring the existence of such corporation to an end. However, the nature of the corporation in liquidation changes. The object of the corporation in liquidation is from then onwards to wind up its affairs. Upon dissolution other than in the context of bankruptcy, the

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<sup>784</sup> BW art. 2:19a(2).

<sup>785</sup> BW art. 2:19a(3).

<sup>786</sup> BW art. 2:19a(4). The administrative decision will be notified to the legal entity and its registered managing directors, if any (BW art. 2:19a(5)).

<sup>787</sup> BW art. 2:19a(8).

<sup>788</sup> BW art. 2:21(1)(a).

<sup>789</sup> BW art. 2:4(1),(3).

<sup>790</sup> BW art. 2:356(f).

corporate affairs must be wound up by a liquidator. In the case of a voluntary dissolution, the articles will usually empower the shareholders' meeting to appoint the liquidator in charge of the winding up process (see supra Chapter 11.6.b.i). If no liquidator is appointed or designated, the managing directors will serve as liquidators of the estate of the dissolved company.<sup>791</sup> If no liquidators can be appointed or designated on the basis of the above, the Chamber of Commerce will serve as the liquidator.<sup>792</sup> The estate of a company dissolved by court order (see supra Chapter 11.6.b.ii) will be wound up by one or more liquidators appointed by the court.<sup>793</sup> If the corporation is dissolved by court order, the liquidator will be designated in the order.

After discharging all liabilities of the corporation, or making adequate provisions for discharge, the corporation may distribute the remainder of its assets to its shareholders,<sup>794</sup> in accordance with the articles of the corporation. In the event of disputed creditors or claims, and unidentifiable shareholders, the liquidator may, after a certain period of time, deposit funds with the court that are adequate to meet these claims to the extent they are entitled to share in the distribution.<sup>795</sup>

The liquidator must give an account of the liquidation and, if there are more than two persons entitled to the liquidation surplus, also prepare a plan of distribution. Both the account and the plan of distribution must be filed at both the offices of the corporation and the Commercial Register (see infra Chapter 12.1.a). The liquidator must announce the filings in newspapers and, if required by the court, in the Government Gazette.<sup>796</sup> Any creditor or person entitled to the liquidation surplus may oppose the plan of distribution by submitting objections to the District Court within two months after the announcement was made in the newspaper and the Government

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<sup>791</sup> BW art. 2:23(1).

<sup>792</sup> BW art. 2:19a(7).

<sup>793</sup> BW art. 2:23(1).

<sup>794</sup> BW art. 2:23b(1).

<sup>795</sup> BW art. 2:23b(8).

<sup>796</sup> BW art. 2:23b(4). A violation of these provisions is a criminal offense, see WED art. 1(4).

Gazette.<sup>797</sup> No distribution to persons entitled to the liquidation surplus can be made without the consent of the District Court during the two-month period after filing.<sup>798</sup>

After the two month opposition period has elapsed, the liquidator may make the final distributions to the parties entitled to them. At that precise moment, when no assets or benefits are known to the liquidator, the corporation ceases to exist. This event must be filed with the Commercial Register, together with notification of the identity of the keeper of the books of the corporation. These books must be stored for a period of seven years.

Liquidation of Dutch corporations may require the assistance of tax counsel. The shares of a Dutch corporation continue in existence until the corporation as a legal entity ceases to exist, i.e., until the moment that no assets of the corporation are any longer known to the receiver.

If after the date the corporation ceases to exist, a creditor or a person potentially entitled to the liquidation surplus appears, or an asset belonging to the liquidated corporation becomes known, any interested party may request the court to reopen the liquidation. The requesting party must demonstrate an apparent claim or interest. Recently, the procedure has been used by a victim of asbestos-related illness, who was successful in his claim to reopen the liquidation of the corporation which as his former employer was liable for damages to him. The victim claimed that the corporation had insurance coverage which could be used compensate him.<sup>799</sup>

The revival of the corporation will only be for the purpose of settling the claim after which, the corporation will again cease to exist.

The fact that the corporation ceases to exist at the moment no assets are known to the liquidator has resulted in a legal constraint that is often called a "turbo liquidation".<sup>800</sup>

If this corporation has no assets or liabilities at the moment that the shareholders' meeting adopts the resolution to dissolve the corporation the corporation immediately cease to exist. There will be no liquidation procedure and no opposition period. Creditors should not be prejudiced. Because no opposition period was observed, the

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<sup>797</sup> BW art. 2:23b(5).

<sup>798</sup> BW art. 2:23b(6).

<sup>799</sup> Judgment of 31 Oct. 1997, HR, NJ 1998 No. 258.

<sup>800</sup> BW art. 2:19(5).

courts may be more easily persuaded to reopen the liquidation. If the liquidator notes that the debts would exceed the assets of the corporation, he must file for bankruptcy.<sup>801</sup>

### 11.7 Transfer of Seat (Zetelverplaatsing)

**a Extraordinary Events.** Under Netherlands' law, the statutory seat of a corporation must be in the Netherlands in order for it to be recognised as a Dutch corporation.<sup>802</sup> Normally, the transfer of the seat of a Dutch corporation to another country is not possible under Netherlands' law. However, upon the occurrence of certain "extraordinary" events, such as war, immediate danger of war, revolution and similar situations, a "transfer of seat" is possible to other parts of the Kingdom, i.e., the Netherlands Antilles and Aruba,<sup>803</sup> or to other countries.<sup>804</sup> For a transfer of seat, the anticipated transfer must also be in "the interests of the corporation" (see supra Chapter 1.2).<sup>805</sup>

**b Transfer of Seat to Other Parts of the Kingdom of the Netherlands.** The legal effect of this transfer of seat is somewhat similar to a conversion from an N.V. into a B.V. (see supra Chapter 11.5). The Dutch N.V. or B.V. becomes an Antillean N.V. or Aruban N.V., and from that moment is governed by the laws of the Netherlands Antilles or Aruba.<sup>806</sup> It continues, however, to be the same corporation and retains all of its assets and liabilities.

The procedure for this transfer of seat basically involves an amendment to the articles, subject to significantly different rules as compared to ordinary amendments (see supra Chapter 11.2). Whereas an ordinary amendment requires a certificate of no-objection (see supra Chapter 3.3.b.iv), a transfer of seat requires either the "approval"

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<sup>801</sup> BW art. 23a(4).

<sup>802</sup> BW art. 2:66(3)/177(3).

<sup>803</sup> Rijkswet vrijwillige zetelverplaatsing van rechtspersonen [RVZ] (Act on Voluntary Transfer of Seat) art. 1(2), 1967 S. 161, as amended.

<sup>804</sup> Stb. 2000, 283.

<sup>805</sup> RVZ art. 6(1)(a).

<sup>806</sup> RVZ art. 18(1).



of the Minister of Justice in the Netherlands prior to the execution of the transfer of seat deed, or the "confirmation" of the duly executed transfer of seat deed by the Minister of Justice in the Netherlands Antilles or Aruba, as the case may be.<sup>807</sup> The procedure for obtaining this governmental approval or confirmation is discussed below. The power to make the amendment is also different. While a regular amendment requires the authorisation of the shareholders' meeting,<sup>808</sup> a resolution to transfer the seat may come from any of the following corporate bodies, at their option and without any specific provision to that effect being required in the articles: the shareholders' meeting, the management board,<sup>809</sup> any person designated for the purpose by the shareholders' meeting or the management board,<sup>810</sup> and each individual managing director.<sup>811</sup>

The amendment must be incorporated in a transfer of seat deed which also restates the articles of the corporation under the laws of the Netherlands Antilles or Aruba.<sup>812</sup> The deed can also state who will be the managing directors upon the transfer of seat.<sup>813</sup> The transfer of seat becomes effective upon the notarial execution of the transfer of seat deed, on the effective date stated in the deed, or on the occurrence of a certain conditions specified in the deed.<sup>814</sup> The deed must be executed by a notary in either the Netherlands, the Netherlands Antilles or Aruba.<sup>815</sup> The tax effects require close consideration.

If at the time of the application for the approval, no events have occurred that qualify as extraordinary events justifying the transfer (see supra Chapter 11.7.a), the approval of the Dutch Ministry of Justice may be granted conditionally, subject to the

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<sup>807</sup> RVZ art. 3(1).

<sup>808</sup> BW art. 2:121(1)/231(1).

<sup>809</sup> RVZ art. 1(2).

<sup>810</sup> RVZ art. 1(3).

<sup>811</sup> RVZ art. 1(6).

<sup>812</sup> RVZ art. 8(1).

<sup>813</sup> RVZ art. 1(8).

<sup>814</sup> RVZ arts. 2(2) and 21.

<sup>815</sup> RVZ arts. 2(1) and 21(1).

occurrence of such event.<sup>816</sup> A serious drawback of this approval procedure is that approval might subsequently be cancelled or revoked by any revolutionary government or a government that is under pressure from foreign political powers.<sup>817</sup> The alternative to the approval procedure is a confirmation by the Minister of Justice of the Netherlands Antilles or Aruba, as the case may be, that an extraordinary event has occurred. The application for confirmation must be made subsequent to the execution of the transfer of seat deed, and within 30 days the occurrence of one or more of the extraordinary events.<sup>818</sup> If the confirmation is not obtained, the seat will automatically return to the Netherlands.<sup>819</sup>

**c Transfer of Seat to Third Countries.** The procedure for the transfer of seat to countries outside the Kingdom of the Netherlands is similar to the procedure mentioned above in Chapter 11.7.b. The procedure can be applied by corporations, co-operatives, mutuels and foundations (stichtingen).<sup>820</sup> No provisions with respect to the legal implications of the transfer of seat to third countries are given. The action to transfer the seat may come from the shareholders' meeting, the management board or any person designated for that purpose by the shareholders' meeting or the management board by means of a deed executed before a Dutch civil law notary.<sup>821</sup> The action is subject to an extraordinary event (see supra Chapter 11.7.a). Any such action must either be in the form of a deed executed before a Dutch civil law notary, or be in compliance with such formalities required in the host country for an amendment of the articles. Upon transfer of seat, the legal person becomes a similar type of legal person in the country to which it has transferred its seat and is governed by the laws of that host country.<sup>822</sup> No approval of the Minister of Justice in the Netherlands is needed for the transfer to a third country. If the seat of the legal person

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<sup>816</sup> RVZ art. 6(1)(a), 6(3).

<sup>817</sup> RVZ art. 7(1).

<sup>818</sup> RVZ art. 5(1).

<sup>819</sup> RVZ art. 5(2).

<sup>820</sup> WVZ art. 1(1).

<sup>821</sup> WVZ art. 2(1).

<sup>822</sup> WVZ art. 3(2).

is transferred back to the Netherlands, the legal person has to re-register with the Commercial Register and has to take on the same legal personality as it had prior to the transfer of seat.<sup>823</sup> The resolution to transfer for seat back to the Netherlands must be approved by the Minister of Justice. This approval will be refused only if (a) the re-transfer action is not in compliance with applicable law, (b) the articles violate Netherlands' corporate law, and (c), in case of an N.V. or B.V.: (i) the corporation does not meet the minimum capital rules (see supra Chapter 4.3.c); or (ii) a danger exists that, in light of the prior records of those who will determine or take part in the determination of the corporate policy, the corporation will be used for unlawful activities, or creditors will be prejudiced by its activities. The notarial deed containing the articles that will apply upon the re-transfer to the Netherlands must be executed before a Dutch civil law notary.<sup>824</sup>

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WVZ art. 5(2).

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WVZ art. 5(3).

## 12 COMMERCIAL REGISTER; PUBLIC FILLINGS

### 12.1 The Commercial Register

**a Introduction.** The Netherlands is divided into districts, each having its own Chamber of Commerce and Industry, non-governmental agencies established under the Chamber of Commerce and Industry Act.<sup>825</sup>

Each Chamber maintains an on-line Commercial Register. All Dutch and foreign-owned business organisations, corporations, EEIGs with their statutory seat in the Netherlands, general and limited partnerships, commercial agents, distributors and other commercial representatives meeting the requirements set forth in the Commercial Register Act 1996<sup>826</sup> must register and disclose an extensive amount of information. Corporations, mutuals, co-operatives, certain associations and foundations that conduct a business enterprise (*see supra* Chapter 2.5.a.vii and Chapter 2.5.b) and limited partnerships, whose fully liable partners are foreign corporations, must also file their annual accounts.<sup>827</sup> The criteria vary, depending on the legal form in which the business is conducted or the agent is operating, but essentially all business forms, agents and representatives are subject to the registration requirements once they have an address in the Netherlands. The legal and commercial effects of these disclosures are significant. Third parties acting in good faith may rely on the filed statements, even if the filings are erroneous, or filed without proper corporate authority. The commercial effect is that disclosure makes it possible to analyse the financial strength of public and non-public corporations, including competitors, and that for almost every business operation, basic corporate information is freely accessible to outsiders.

**b Where to File.** As a general rule, under the Commercial Register Act 1996, a single filing in the district in which a legal person has its official seat or its principal

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<sup>825</sup> Wet op de Kamers van Koophandel en Fabrieken (Chambers of Commerce and Industry Act), 1997 S. 783, as amended.

<sup>826</sup> HrW 1996 arts. 1,3 and 4.

<sup>827</sup> BW arts. 2:394(1), 2:360.

place of business suffices.<sup>828</sup> Formal foreign corporations (see supra Chapter 2.2.a) with no actual seat in the Netherlands must file with the Commercial Register in Rotterdam.

The information filed may be viewed at nominal cost by any person, without any requirement that a particular interest be demonstrated.<sup>829</sup> Copies of the filings and extracts from the filings of certain corporate information can also be obtained at nominal cost.<sup>830</sup>

**c     Registration Number on Letterhead.** Each business organisation must state its registration number on its letterhead stationery, invoices, order forms, as well as any offering and tender documents.<sup>831</sup>

**d     Duty to Register.** Each managing director, owner of a business enterprise, person responsible for the Dutch business or branch of a foreign organisation<sup>832</sup> is under a statutory duty to make filings within one week of the occurrence of any event that triggers the filing requirement.<sup>833</sup>

The Chamber may also, at its own initiative, amend certain registrations concerning a business enterprise.<sup>834</sup> The Chamber of Commerce and every interested party may also petition the Cantonal Judge to rectify a registration.<sup>835</sup>

In addition, the Enterprise Chamber may, at its own initiative or at the request of any interested person,<sup>836</sup> require certain registrations to be made (see supra Chapter

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<sup>828</sup> HrW 1996 art. 6(1).

<sup>829</sup> HrW 1996 art. 14; HrB 1996 art. 36.

<sup>830</sup> HrW 1996 art. 15; HrB 1996 arts. 37,38.

<sup>831</sup> HrW 1996 art. 25(1). A violation of this provision is a criminal offense, see WED art. 1(4).

<sup>832</sup> HrW 1996 art. 5.

<sup>833</sup> HrW 1996 art. 9.

<sup>834</sup> HrW 1996 arts. 10 and 11. The Chamber must notify the person having the primary responsibility for filing such amendments (HrW 1996 art. 10(4)).

<sup>835</sup> HrW 1996 art. 23.

<sup>836</sup> HrW 1996 art. 23.

10.2.b). Compliance with the registration requirements is enforced by the Chamber of Commerce, and a violation of the provisions of the Commercial Register Act is an economic offence.<sup>837</sup>

## 12.2 Information to be Disclosed

Disclosures are made in the form of registrations and filings with the competent Commercial Register and in the form of publications that the Chamber makes in the Government Gazette. The publications in the Government Gazette refer to the vast majority of the data that a corporation must file.<sup>838</sup>

The information that must be registered and filed differs for the various legal forms in which a business enterprises can be conducted, and agents, distributors and other legal representatives are likewise subject to their own requirements.

For each business enterprise, principal place of business or Dutch branch of a foreign company, the following information must be filed:<sup>839</sup>

- (a) trade name(s);
- (b) address and, where applicable, postal address (including, if possible, postal code), as well as the address of authorised trade agents representing the business enterprise in the Netherlands;
- (c) telephone number, as well as, where applicable, facsimile number and e-mail address;
- (d) summary of business activities;
- (e) the commencement date of trading.

For business enterprises conducted in the form of corporations, the following additional information must be provided:<sup>840</sup>

- (a) the name of the corporation and its statutory seat;
- (b) personal data for each managing director and supervisory director, including the date on which these positions were obtained and whether

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<sup>837</sup> WED art. 1(4).

<sup>838</sup> HrW 1996 art. 17(1).

<sup>839</sup> HrB 1996 art. 9(1)

<sup>840</sup> HrB 1996 art. 14(1)

- the managing directors are solely or jointly authorised to represent the corporation (see supra Chapter 8.2.e.iii);
- (c) personal data for persons other than managing directors who have been granted the authority to represent the corporation, as well as the terms of such powers (see supra Chapter 8.2.e.iv);
  - (d) the authorised capital, as well as, at least once a year, the amount of the issued capital and the paid-up part thereof, divided by type of shares, where applicable;
  - (e) in the case of issued shares that have not been fully paid-up: personal data for the holders of such shares, including the number of shares held by each such holder and the amounts contributed to such shares (changes in this information must be filed at least once a year);
  - (f) in the case of an investment company with variable capital (see supra Chapter 3.1.c), changes in the registered capital must be filed at least once a year;
  - (g) personal data for the holders of all shares in the capital of the corporation, disregarding the shares held by the corporation itself or any of its subsidiaries;
  - (h) where applicable, that the articles of the corporation are in conformity with the articles for a "large" company.

### 12.3 Legal Effect

Disclosures in the Commercial Register and the Government Gazette create a high degree of certainty about what third parties will be presumed to know.<sup>841</sup> Registration of certain facts with the Commercial Register and the subsequent announcement in the Government Gazette gives a certain protection to both the corporation and to parties who have entered, or want to enter, into a contractual relationship with the corporation. This statutory presumption is nevertheless subject to limitations. Information required to be disclosed may not be asserted against third parties who were not aware of it until this information is actually disclosed in accordance with the Commercial Register Act.<sup>842</sup> Furthermore, if a required publication was made in a Government Gazette that the third party could not possibly have read (e.g., due to a postal

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<sup>841</sup>

BW art. 2:6(4).

strike), then the statutory presumption has no effect with respect to events that occurred during the 15 days following the date of publication.<sup>843</sup> The corporation or owner of a business organisation cannot validly argue that a third party should not have relied on disclosed information that proves to be erroneous or incomplete.<sup>844</sup>

Under certain circumstances, the corporation may not claim the protection of the registration with the Commercial Register regarding the way the corporation can be legally bound and by whom, inter alia,:

- (i) if it would be contrary to the general good faith principles to provide legal protection to the corporation on the basis of its registration with the Commercial Register in view of the misunderstandings about the prevailing acts that were caused by the corporation;
- (ii) if a third party may assume the authority of the acting person to bind the corporation on the basis of the job or position of the acting person under the specific circumstances of the case and the appearance of such authorisation (i.e., apparent authority).<sup>845</sup>

## 12.4 Filing Fees

The Chambers of Commerce are largely self-supporting as a result of which the Commercial Registers are dependent on registration fees from the parties making the filings, fees from third parties requesting information and annual registration levies.<sup>846</sup> The annual registration levies differ for each Chamber, but remain within limits determined by Government Decree.<sup>847</sup> All relevant publications in the Government Gazette are made by the Chamber at the expense of the corporation concerned.<sup>848</sup>

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<sup>842</sup> HrW 1996 art. 18(1), BW arts. 2:6(2), 3:61(3).

<sup>843</sup> HrW 1996 art. 18(2).

<sup>844</sup> HrW 1996 art. 18(3); BW art. 3:6(3).

<sup>845</sup> Judgment of 23 Oct. 1998, HR, 1999 NJ No. 582.

<sup>846</sup> Wet op de Kamer van Koophandel en Fabrieken art. 32.

<sup>847</sup> Besluit Heffingen Kamer van Koophandel en Fabrieken 1997 (Government Decree regarding Levies Chambers of Commerce and Industry).

<sup>848</sup> HrW 1996 art. 17(3).



## 13 WORKS COUNCILS

### 13.1 General

Netherlands' law does not entitle employees to representation on the management board of an enterprise (no *Mitbestimmung*), nor does it entitle employees to determine the allocation of profits.<sup>849</sup>

The most important body through which labour participation is exercised at an enterprise level is the Works Council, which possesses the powers vested in it by the Works Councils Act (WOR). The Works Council is an integral part of corporate governance, and its mandatory involvement in decision-making processes makes it part of the Netherlands' laws of business organisations (*ondernemingsrecht*). A Works Council is mandatory for each enterprise in the Netherlands, which has 50 or more employees<sup>850</sup>, regardless of its legal form or nationality.

The Dutch legislature has implemented the Directive for the European Works Council (see *infra* Chapter 13.3). A company with a Community-scale dimension may, instead of forming a European Works Council, comply with this directive by instituting certain information and consultation procedures, negotiated between that company and a so-called Special Negotiating Body. Compared with the powers of the Dutch Works Council, the powers of a statutory European Works Council are restricted.

### 13.2 Works Councils

#### a Scope

- i General. The "entrepreneur", defined as the natural or legal person that maintains the qualifying business enterprise, must set up a Works Council.<sup>851</sup>

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<sup>849</sup> Reference is made to L. G. VERBURG, Works Councils in: DUTCH BUSINESS LAW, LEGAL AND TAX ASPECTS OF DOING BUSINESS IN THE NETHERLANDS (S.R. Schuit, Ed.), looseleaf, Kluwer Law International (The Hague, London, New York), Chapter 11.

<sup>850</sup> Wet op de ondernemingsraden [WOR] (Works Council Act), 1971 S. 54, art. 2(1).

<sup>851</sup> <sup>3</sup> WOR art. 1(1)(d).

For an incorporated business enterprise, the entrepreneur for the purposes of the WOR is the corporation, represented by its management. For convenience, whenever a reference under the WOR is made to "entrepreneur", references in this chapter will be to "management" or the "company".

The WOR defines "enterprise" as every organisation operating as an independent organisation in which work is performed on the basis of an employment agreement or an appointment as civil servant (for this purpose, including persons employed by any governmental instrumentality on a contractual basis).<sup>852</sup> Consequently, governmental agencies and non-profit organisations must also apply the WOR. Further references to "enterprise" mean that this term is confined to business enterprises only.

- ii Applicability to Foreign Companies. A Dutch enterprise may be owned by a Dutch company, or a foreign company through its Dutch branch office. In conformity with the Dutch rules for the conflicts of law, only enterprises located in the Netherlands fall within the scope of the WOR. The activities of a Dutch enterprise outside the Netherlands may be taken into account for the applicability of the WOR only if they are managed directly by the Dutch organisation and are considered activities inherently connected with the Dutch labour organisation.<sup>853</sup>

**b Joint, Group and Central Works Councils.** If a company or a group of affiliated companies owns two or more enterprises employing 50 employees or more, it must set up a Joint Works Council for all or several of these enterprises "if this would advance the proper implementation of the Works Councils Act".<sup>854</sup>

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<sup>852</sup>  
5 WOR art. 1(1)(c).

<sup>853</sup> <sup>6</sup> However, the Works Council of a Dutch enterprise has the right to render advice on proposed management actions relating to the establishment, takeover or relinquishment of control over a foreign enterprise, or to important modifications in the co-operation with or participation in such foreign enterprise, if it can reasonably be anticipated that the proposed action will have significant implications for the Dutch enterprise (WOR art. 25(1)(b); see infra Chapter 13.2.d.iii).

<sup>854</sup> <sup>7</sup> WOR art. 3(1),(2).

Alternatively, the management of an enterprise with 50 employees or more must set up a separate Works Council for any substantial part of that enterprise "if it would advance the proper implementation of the Works Council Act within its enterprise".<sup>855</sup>

A company or group which has established two or more Works Councils must establish a Central Works Council for the enterprises involved, if this would advance the proper implementation of the WOR. In the case of more than two Works Councils within the same divisional structure of a group, a Group Works Council must be established for this division if this would advance the proper implementation of the WOR.<sup>856</sup> The Central or Group Works Council only handles matters which are of common interest to the enterprises for which they are established, irrespective of any powers of the individual Works Councils in these matters.<sup>857</sup> Any powers of the individual Works Councils with regard to matters of common interest are by operation of law vested in the Central or Group Works Councils, with the Group Works Councils in turn being subordinate to the Central Works Council.<sup>858</sup>

This distribution of Works Councils' powers at different levels of the corporate hierarchy has in the past led to various conflicts between them.<sup>859</sup>

**c Organisation.**

- i Composition, Committees and Experts. The Works Council consists of elected employees only, with a minimum of three members where there are fewer than

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<sup>855</sup> 8 WOR art. 4(1).

<sup>856</sup> 9 WOR art. 33.

<sup>857</sup> 10 WOR art. 35(1).

<sup>858</sup> 11 WOR art. 35(2).

<sup>859</sup> 12 For example, in the case of an anticipated acquisition, the Central Works Council of the seller may be inclined to give positive advice (see infra Chapter 13.2.d.iii) on the grounds that the acquisition would be beneficial to the group of enterprises as a whole, while the Works Council of a certain enterprise may try to oppose the acquisition on the grounds that this would be disadvantageous to that enterprise (see Judgment of 30 Aug. 1984, Ger. Amsterdam (Enterprise Chamber), 1985 NJ No. 475). For the delineation of powers between the Works Councils, Group Works Councils and Central Works Councils, see Judgment of 10 May 1990, Enterprise Chamber, 1992 NJ No. 126 and Judgment of 10 July 1997, Enterprise Chamber, 1997, NJ No. 669.

50 employees, and a maximum of 25 members where there are 7,000 or more employees.<sup>860</sup>

The Works Council may establish standing committees to address matters involving such groups of employees or issues as it may designate, committees for separate locations of the enterprise, and committees to prepare certain issues for its consideration.<sup>861</sup>

The Works Council may invite one or more experts to attend a meeting.<sup>862</sup>

- ii Election. The members of the Works Council are elected by, and must be employees of, the enterprise.<sup>863</sup> They are elected from a list of candidates, who may be submitted by:<sup>864</sup>
  - a a trade union which is active in the relevant enterprise or type of industry and has among its members employees in the enterprise qualified to vote; or
  - b the lesser of thirty persons or one-third of the number of employees qualified to vote, who are not members of a trade union that has submitted a list of candidates as described under (a).
- iii Job Protection. Except for "urgent cause", an employee who is a member of the Works Council, or who has a special relationship with the Works Council cannot be dismissed without the involvement of the Cantonal Sector of the District Court.<sup>865</sup> The Court shall ensure that the reason for the dismissal shall not relate to membership of the Works Council.
- iv Secrecy. The members of the Works Council, as well as its committees or experts retained (see supra (i)), are under a strict obligation of secrecy.<sup>866</sup> This obligation survives the termination of membership of the Works Council.

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<sup>860</sup>13 WOR art. 6(1).

<sup>861</sup>14 WOR art. 15.

<sup>862</sup>15 WOR art. 16(1).

<sup>863</sup>16 WOR art. 6(1). The members of the Works Council are elected by employees of at least six months' standing (WOR art. 6(2)). Membership is open only to employees with at least one year's standing (WOR art. 6(3)).

<sup>864</sup>17 WOR art. 9(2).

<sup>865</sup>18 BW arts. 7:670 (4), 7:670 and 7:670 (b) as well as BW 7:685 (1).

<sup>866</sup>19 WOR art. 20(1).

**d Powers of the Works Council.**

- i Information. The Works Council and its committees are entitled to receive from management all information reasonably required for the performance of their duties, including financial and business information and information on social policies. The information must be in writing if so requested.<sup>867</sup> At the beginning of each term of office of the Works Council and as soon as possible after any change, the company must provide information about the corporate form, the contents of the Articles of Association and the names and addresses of the members of the supervisory and management boards. If the entrepreneur is a group company, the Works Council must be informed of the identities of the companies comprising that group, the allocation of control and the names and addresses of those who, as a result of such allocation, may exercise direct control over the company. With respect to financial data, the Works Council of a group company must (inter alia) be given such written information as will enable it to determine the extent to which the company for which it was established has contributed to the aggregate result of the group to which the company belongs.
- ii Consultation Process. Consultations between management and the Works Council take place at consultation meetings held within two weeks following a request from either management or the Works Council.<sup>868</sup> The general business of the enterprise must be discussed at least twice per calendar year.<sup>869</sup> At these meetings, management must inform the Works Council about operations and results of the company over the intervening period and about any actions proposed with respect to matters requiring prior consultation with, or consent of, the Works Council (see infra (iii) and (iv)). The parties shall actively try to agree at what stage and in which manner the Works Council shall be engaged in the decision-making process with respect to such matters.<sup>870</sup>

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<sup>867</sup> 20 WOR art. 31(1).

<sup>868</sup> 21 WOR art. 23(1). Management is represented by "the person who either alone or jointly with others in an enterprise, directly exercises the highest authority in the management of the work" (WOR arts. 1(1)(e), 23(4)).

<sup>869</sup> 22 WOR art. 24(1).

<sup>870</sup> 23 WOR art. 24(1).

- iii Matters Requiring Prior Consultation. Management must give the Works Council the opportunity to give advice on any proposed action<sup>871</sup> involving:<sup>872</sup>
- a the transfer of control over the enterprise or any part of it;
  - b the establishment, take-over or relinquishment of control over another enterprise, or the formation, substantial modification or discontinuation of any long-term co-operation with other enterprises, including the formation, substantial modification or discontinuation of a substantial financial participation by or on behalf of such enterprise;
  - c the discontinuation of the activities of the enterprise or of a major part of these activities;
  - d a substantial change in the activities of the enterprise;
  - e a substantial change in the organisation of the enterprise or in the allocation of responsibility within the enterprise;
  - f a change of the location at which the enterprise carries on its activities;
  - g the recruitment or subcontracting of groups of workers;
  - h any major capital investment made by the enterprise;
  - i the seeking of substantial credit by the enterprise;
  - j the granting of substantial credit and provision of security for substantial debts of another company, unless within the ordinary course of business of the enterprise;
  - k the introduction or modification of a major technological facility;
  - l major initiatives by the enterprise regarding care for the environment, including introducing or modifying any policy and any organisational or administrative facility relating to the environment;
  - m the adoption of an arrangement relating to the bearing of certain risks related to allowances to be paid to disabled employees as referred to in Article 75 (3) Disability Insurance Act; and
  - n the retention of and the terms of reference for any outside expert to provide advice on any of the matters above.

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<sup>871</sup> <sup>24</sup> The WOR specifically refers to "proposed decisions" of management. The term "decisions", in fact, includes actions, whether or not formalised, for which management is responsible.

<sup>872</sup> <sup>25</sup> WOR art. 25(1).

In addition, management and the Works Council may, with agreement to that effect (see infra Chapter 13.2.f), expand the list of matters that require the advice of the Works Council and the provisions of the Works Council will apply accordingly to these additional matters.<sup>873</sup>

The substantiality test depends, inter alia, on the size and nature of the enterprise.<sup>874</sup> The provisions under (b) and (n) above, insofar as the latter relate to any matter referred to under (b), are not applicable if the other enterprise is or is to be established abroad, and if it cannot be reasonably expected that the proposed management action will lead to changes under paragraphs (c) to (f) above with regard to an enterprise in the Netherlands.<sup>875</sup>

Any request for advice must be made in writing and at a time that such advice can have a significant influence on the proposed action.<sup>876</sup>

In practice, the decision as to when the Work Council's advice should be requested is not always an easy one. In the case of an anticipated acquisition or joint venture, advice must be sought prior to initialling or signing a binding letter of intent. However, advice should not be requested too early either, as would be the case if the proposed action is not sufficiently clear and its consequences cannot be sufficiently assessed.<sup>877</sup>

The request for the Works Council's advice must be accompanied by a detailed summary of the reasons for the proposed action, the anticipated consequences for the employees of the enterprise and the proposed measures to be taken in relation to the proposed action.<sup>878</sup>

The Works Council may not give its advice until there has been at least one

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<sup>873</sup> 26 WOR art. 32(2).

<sup>874</sup> 27 A change in the activities of the enterprise that does not entail important and direct consequences may nevertheless be considered "substantial" for this purpose because of its long-term structural consequences (Judgment of 19 Feb. 1981, Enterprise Chamber, 1982 NJ No. 244) and Judgment of 15 May 1997, Enterprise Chamber, 1997 Jurisprudentie Arbeidsrecht [JAR] No. 141.

<sup>875</sup> 28 WOR art. 25(1).

<sup>876</sup> 29 WOR arts. 25(2), 30(2).

<sup>877</sup> 30 Judgment of 25 Apr. 1991, Ger. Amsterdam, 1992 NJ No. 271.

<sup>878</sup> 31 WOR art. 25(3).

consultation meeting on the subject.<sup>879</sup> The Works Council must give its advice within a "reasonable" time, depending, *inter alia*, on the complexity of the matter, the urgency involved, and the speed with which the information has been provided by the company.

Only after the Works Council has given its advice may management take the proposed action. The Works Council must be notified of this promptly in writing. If the Works Council's advice is not followed or is only partially followed, the Works Council must be informed as to the reason why.<sup>880</sup> If the advice is not or only partly followed, the implementation of the action must be suspended for one full month following notice.<sup>881</sup> During this one-month period, the Works Council is entitled to appeal against the action (*see infra* Chapter 13.2.e).

Management must also seek the advice of the Works Council prior to any action involving the appointment or removal of a managing director of the enterprise.<sup>882</sup> However, the Works Council is not entitled to appeal against a decision by the entrepreneur to appoint or remove a managing director contrary to the Works Council's advice.

- iv Matters Requiring Prior Consent. There are a number of matters that cannot be undertaken by management without the prior consent of the Works Council. These include the introduction, modification or repeal of:<sup>883</sup>
- a arrangements involving pension funds, profit-sharing plans or savings plans;
  - b rules pertaining to working hours or vacation policy;
  - c remuneration or job classification systems;
  - d rules pertaining to safety, health or welfare in connection with work or

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<sup>879</sup> 32 WOR art. 25(4).

<sup>880</sup> 33 WOR art. 25(5).

<sup>881</sup> 34 WOR art. 25(6). Non-compliance with this suspension requirement is a criminal offense, *see* WED art. 1(4).

<sup>882</sup> 35 WOR art. 30(1). With respect to the proposed appointment or removal of a managing director, the entrepreneur must provide the Works Council with the reasons for the decision and, in the event of an appointment, with information on the basis on which the Works Council can form an opinion about the person involved and about his future position within the enterprise (WOR art. 30(3)).

<sup>883</sup> 36 WOR art. 27(1).



- absence through illness;
- e rules pertaining to hire, dismissal or promotion policies;
- f rules pertaining to employee training;
- g rules pertaining to employee performance review;
- h rules pertaining to industrial social work;
- i rules pertaining to work consultation;
- j rules pertaining to the handling of complaints;
- k rules pertaining to the registration, use and protection of personal data of the enterprise's employees; and
- l rules pertaining to the facilities aimed at or suitable for observation or control of presence, behaviour or performance of the employees.

However, the Works Council is not required to approve matters if, and to the extent that, those matters which would ordinarily require the consent of the Works Council have already been covered in appropriate detail by a collective bargaining agreement.<sup>884</sup>

**e Appeal and Risks of Non-Compliance.**

- i Appeal Regarding Consultation Matters. If management has decided to pursue an action involving one of the matters requiring formal consultation of a Works Council (see supra Chapter 13.2.d.iii) that is contrary to the advice given by that Works Council, or if facts or circumstances become known which, had they been known to the Works Council at the time its advice was given, might have led to a different result, the Works Council may appeal to the Enterprise Chamber within one month following management's written notice of the action.<sup>885</sup>

During this one-month period management must suspend the implementation of the proposed action.<sup>886</sup>

The only available ground for appeal is that management "could not reasonably

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<sup>884</sup> <sup>37</sup> WOR art. 27(3).

<sup>885</sup> <sup>38</sup> WOR art. 26(1).

<sup>886</sup> <sup>39</sup> WOR art. 26 (2). Works Councils often commence preliminary court proceedings to prevent action from becoming irreversible, particularly due to the statutory provisions requiring that the rights of third parties be respected.

have reached the decision had it weighed the interests involved".<sup>887</sup> Because of this limited scope of appeal, appeals are not easily granted on substantive issues. Procedural inadequacies will, however, almost invariably lead to the conclusion that the interests have been improperly weighed and procedural issues (e.g., disputes on whether sufficient information was provided or whether sufficient consultation took place on alternative solutions put forward by the Works Council) are subject to full review by the Enterprise Chamber. If the Enterprise Chamber sustains any claim it may, inter alia, give an order requiring the company to repeal the action, in whole or in part, and to reverse any specific effects of that action, with due respect to the acquired rights of third parties.<sup>888</sup>

- ii Non-Compliance with Consent Requirement. Any decision or management action with respect to any consent matters (see supra Chapter 13.2.d.iv) without the prior approval of the Works Council shall be null and void by operation of law. This nullity is, however, subject to a formal statement to that effect being issued by the Works Council within one month from the date the decision was communicated or (in the absence of such communication) any action by management showing the implementation of that decision.<sup>889</sup>

**f Agreements with the Works Council.** Management and the Works Council may conclude agreements, generally known as convenanten, for a variety of purposes.<sup>890</sup> However, such agreements may not limit or restrict the statutory powers of the Works Council pursuant to the WOR. Many such agreements have been concluded in the restructuring of enterprises or in the merger or joint venture context. Other examples include agreements for the desired "profile" of the supervisory board (in terms of skills and background, etc.) in "large" companies.

In the restructuring of enterprises, one common type of agreement is geared to the situation in which an international group with its parent-holding company in the

<sup>887</sup> 40 WOR art. 26(4).

<sup>888</sup> 41 WOR art. 26(5).

<sup>889</sup> WOR art. 27(5).

<sup>890</sup> P.F. VAN DER HEIJDEN & A.C.B.W. DOUP, MEDEZEGGENSCHAP PER CONVENANT (Sinzheimer Cahiers No. 3, 1st ed. 1991), SDU Juridische en Fiscale Uitgeverij (The Hague).

Netherlands intends to hive down its Dutch activities to a Dutch sub-holding company. In Dutch and international corporate practice, it is often felt that works councils of a specific country should not be in a position to be involved in matters which do not specifically relate to that country. Thus, it is almost standard practice in the Netherlands to resolve this issue by "pushing down" the Works Council to the national level only.

The Dutch Supreme Court ruled that the provisions of the WOR similarly apply to additional powers of the Works Council pursuant to an agreement with management.<sup>891</sup> The WOR states that a Works Council may be granted additional powers either: (i) as provided for in a collective bargaining agreement,<sup>892</sup> or (ii) by means of an agreement between the enterprise and the Works Council.<sup>893</sup> In the case that the agreement provides for additional matters requiring prior consultation with, or consent by, the Works Council, the respective actions for non-compliance are similarly applicable (*see supra* Chapter 13.2.e).<sup>894</sup>

**g Employee Participation in Small Enterprises.**

- i Enterprises with Fewer than 50 but at least 10 Employees. The management of an enterprise with 10 or more, but fewer than fifty employees, and for which no Works Council has been established, is required, as a minimum, to set up bi-annual meetings with its employees.<sup>895</sup>

Management must give the employees an opportunity to give advice on any proposed action that may lead to: (i) the loss of jobs, or (ii) an important change in the nature of work, the working conditions, or the circumstances under which the work is performed for one-quarter or more of the employees.<sup>896</sup>

If management takes action contrary to the advice of its employees, it is not

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<sup>891</sup> Judgment of 17 Mar. 1993, HR, 1993 NJ No. 366.

<sup>892</sup> WOR art. 32(1).

<sup>893</sup> WOR art. 32(2).

<sup>894</sup> WOR art. 32(4). The statutory basis for agreements between the enterprise and the Works Council is similarly applicable to agreements between the enterprise and the *personeelsvertegenwoordiging* (*see supra* Chapter 13.2.e).

<sup>895</sup> WOR art. 35b.

<sup>896</sup> WOR art. 35b(5).

required to suspend the implementation of the action. Moreover, the employees may not appeal against any such management action.

The WOR provides for the optional adoption of a body for employee representation (personeelsvertegenwoordiging), consisting of a minimum number of three people.<sup>897</sup> However, at the request of the majority of the employees, management must institute such body.<sup>898</sup> The personeelsvertegenwoordiging must consent to any introduction, modification or repeal of rules pertaining to (a) working hours or vacation policy, and (b) safety, health or welfare in connection with work or absence through illness.<sup>899</sup>

The WOR provides for a statutory basis for the granting of additional powers to the personeelsvertegenwoordiging.<sup>900</sup>

- ii Enterprises with Fewer than 10 Employees. The management of an enterprise with fewer than ten employees and for which no Works Council has been established may institute a personeelsvertegenwoordiging as discussed above under (i). This personeelsvertegenwoordiging must consent to any introduction, modification or repeal of rules pertaining to working hours or vacation policy.<sup>901</sup>

The WOR provides for a statutory basis for the granting of additional powers to any personeelsvertegenwoordiging.<sup>902</sup>

### 13.3 European Works Councils

**a General.** The Dutch legislature has opted to implement the directive for the European Works Councils by means of a separate statute (the "Act"), in an effort to emphasise that under existing legislation Dutch Works Councils (see supra Chapter 13.2) will not be considered subordinate to European Works Councils.<sup>903</sup> Instead, the

<sup>897</sup> WOR art. 35c.

<sup>898</sup> WOR art. 35c(2).

<sup>899</sup> WOR arts. 27(1), 35c(3).

<sup>900</sup> WOR arts. 32, 35c(3).

<sup>901</sup> WOR arts. 27(1), 35d(2).

<sup>902</sup> WOR arts. 32, 35d(2).

<sup>903</sup> Wet op de Europese ondernemingsraden [WEOR] (Act on the European Works Councils), 1997 S. 32.

powers of the Dutch Works Councils are expanded by additional powers, inter alia, to appoint and remove both the Dutch members to the Special Negotiating Body and the members of the mandatory European Works Council.

For a good understanding of the Act, a distinction must be made between:

- a a Statutory European Works Council, formed in the absence of an Agreed Arrangement;
- b an Agreed European Works Council; and
- c any other Agreed Procedure, concluded pursuant to an Agreed Arrangement.

**b Scope.**

- i General. As a general rule, the obligations stipulated in the Act apply only to the extent no other pre-existing agreements are in place which serve a similar purpose.

The substantive provisions of the Act apply to "Dutch Community-scale" enterprises and "Dutch Community-scale" groups of enterprises.

A Community-scale enterprise or Community-scale group of enterprises is considered "Dutch" for purposes of the Act if:<sup>904</sup>

- a the Community-scale enterprise or the "controlling" enterprise (within a Community-scale group) has its domicile or seat in the Netherlands; or
- b in the situation that the Community-scale enterprise or the "controlling" enterprise has its domicile or seat outside any of the Member States, a branch or group Enterprise, for which the management has been appointed or is considered the "central management" for purposes of the Act, has its residence or seat in the Netherlands.<sup>905</sup>

The law which applies to a certain enterprise determines whether that enterprise qualifies as a "controlling" enterprise.<sup>906</sup>

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<sup>904</sup> WEOR art. 6.

<sup>905</sup> If the branch or group enterprise has the largest number of employees compared to the number of employees in other Member States.

<sup>906</sup> WEOR art. 2.6. If that law is not the law of a Member State, this is determined by the law which applies to the group enterprise whose management represents the "controlling" enterprise for purposes of the Act.

A Dutch enterprise is considered the "controlling" enterprise within a Community-scale group if it can exercise control, directly or indirectly, over another enterprise within a Community-scale group and is not itself an enterprise which is controlled by another enterprise. Control is deemed to exist if such enterprise either alone or jointly with any other enterprises controlled by it:

- a appoints more than half of the members of the administrative, managing or supervisory body of the other enterprise; or
- b exercises more than half of the voting rights in the shareholders' meeting (assuming all votes were cast); or
- c provides more than half of the issued capital of the other enterprise.<sup>907</sup>

An enterprise has a "Community-scale" dimension for the purposes of the Act if, for the two preceding years, it had 150 or more employees in each of two Member States, and, in the aggregate, 1,000 employees or more in all Member States ("Dutch Community-scale Enterprise").<sup>908</sup>

A group of enterprises has a "Community-scale" dimension for the purposes of the Act if it consists of a controlling enterprise and one or more group enterprises of which two or more are established in different Member States and for the two preceding years, at least one enterprise had on average at least 150 employees in one Member State and another enterprise had on average at least 150 employees in another Member State and group enterprises had, in the aggregate, 1,000 or more employees in all Member States ("Dutch Community-scale Group").<sup>909</sup>

The law of each Member State determines whether an individual is considered an "employee". For people working in the Netherlands, the Act defines

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<sup>907</sup> WEOR arts. 2.1, 2.2. If more than one group enterprise meets one or more of these tests, the enterprise which meets the test under (a) is deemed to be the "controlling" enterprise, and the right to appoint managing directors shall prevail. If no enterprise meets the test under (a), the test under (b) shall prevail over the test under (c), without prejudice to the right to establish that yet another enterprise should be considered to be the "controlling" enterprise (WEOR art. 2.7).

<sup>908</sup> WEOR art. 1.1(c).

<sup>909</sup> WEOR art. 1.1(d).

"employees" as people working in a Community-scale Enterprise or Community-scale Group on the basis of an employment agreement.<sup>910</sup>

The obligations of the Act to institute a European Works Council or an Agreed Procedure rest upon the "central management" of the "Dutch Community-scale" Enterprise or "Dutch Community-scale" Group as defined above.

For a Dutch Community-scale Group, "central management" is defined as the central management of the controlling undertaking.<sup>911</sup>

For a Dutch Community-scale Enterprise having its residence or seat outside the Member States, the central management for the purposes of the Act is deemed to be:<sup>912</sup>

- a a person appointed by the Community-scale Enterprise, who is charged with the actual management of (one of) its enterprise(s) within the Netherlands, or, in the absence of such designation;
- b the person or persons who are charged with the actual management of the branch in the Netherlands.<sup>913</sup>

For a Dutch Community-scale Group whose controlling enterprise has its residence or seat outside the Member States, the central management for the purposes of the Act is deemed to be:<sup>914</sup>

- a the management of a group enterprise having its residence or seat in the Netherlands and designated as such by the controlling enterprise, or, in the absence of such designation;
- b the management of such group enterprise in the Netherlands considered as such by the Act as a result of the fact that it employs the largest number of

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<sup>910</sup> WEOR art. 3.1. Individuals employed under Netherlands' law other than civil servants, under a contract or otherwise, are deemed to have an employment agreement, with the exception of temporary employees, contractors and independent consultants.

<sup>911</sup> WEOR art. 1.1(e).

<sup>912</sup> WEOR art. 1.2.

<sup>913</sup> This branch must have the largest number of employees compared to the number of employees in other Member States in order for the Community-scale Enterprise to qualify as "Dutch".

<sup>914</sup> WEOR art. 1.3.

employees compared to the number of employees in other Member States.

The central management of a Dutch Community-scale Enterprise or Dutch Community-scale Group may decide to form a Special Negotiating Body (see infra Chapter 13.3.c) in order to negotiate on the formation of a European Works Council or procedure for providing information to and consulting with its employees concerning transnational matters ("Agreed Arrangements").<sup>915</sup> However, central management must form a Special Negotiating Body upon the written request of 100 employees or more (or of their representatives<sup>916</sup>), provided these employees represent two or more enterprises or branches in two or more different Member States.<sup>917</sup>

Central management is required to establish a European Works Council with the powers accruing to it by operation of the Act (a mandatory European Works Council formed under Netherlands' law ("Statutory European Works Council")) in the event:<sup>918</sup>

a central management has demonstrated its unwillingness to negotiate with a Special Negotiating Body within a six-month period following a request thereto as referred to above; or

b central management and the Special Negotiating Body have not concluded an Agreed Arrangement within the three-year period<sup>919</sup> following such request thereto, or, if central management had indeed formed a Special Negotiating Body, within the three-year period following its formation.<sup>920</sup>

The powers of the Statutory European Works Council (see infra Chapter 13.3.d) are a benchmark for any Agreed Arrangement. Central management must ensure proper compliance with Statutory European Works Councils, Agreed

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<sup>915</sup> WEOR art. 8.1.

<sup>916</sup> For employees working in the Netherlands, the relevant Works Councils are considered their representatives for this purpose (WEOR art. 3.2).

<sup>917</sup> WEOR art. 8.2.

<sup>918</sup> WEOR art. 15.

<sup>919</sup> The Act does not provide for a maximum period for the actual formation of a European Works Council or an Agreed Arrangement.

<sup>920</sup> Unless that Special Negotiating Body had decided not to open or to discontinue negotiations (WEOR arts. 15, 11.2).



Arrangements and, as the case may be, any pre-existing agreements.<sup>921</sup>

- ii **Grandfathering Clause.** Any Dutch Community-scale Enterprise or Dutch Community-scale Group that, prior to 5 February 1997, had concluded an agreement pertaining to the provision of information to and consultation with employees is exempt from the Act, provided such agreement was concluded with a party that the Dutch Community-scale Enterprise or Dutch Community-scale Group could have reasonably considered to be the representative of its employees.<sup>922</sup> A few large Dutch corporate groups have concluded such an agreement.
  
- c **Special Negotiating Body.** The Dutch members of a Special Negotiating Body are elected employees only. They shall be appointed, or their appointment shall be withdrawn, by the Dutch Works Councils of the branches or enterprises in the Netherlands.<sup>923</sup> The Special Negotiating Body must consist of one member of each Member State in which the Dutch Community-scale Enterprise or Dutch Community-scale Group has employees and one, two or three additional members for each Member State in which such Dutch Community-scale Enterprise or Dutch Community-scale Group has at least a quarter or more, one-half or more, or three-quarters or more of its employees respectively.<sup>924</sup>
  
- d **Statutory European Works Councils.**
  - i **General.** The Statutory European Works Council consists of elected employees only. The Dutch members of the Statutory European Works Council shall be appointed, or their appointment shall be withdrawn, by the Dutch Works

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<sup>921</sup> WEOR arts. 11.8, 15, 24.3.

<sup>922</sup> WEOR art. 24.1. In order to remain exempt from the provisions of the Act, such agreements must provide, or be amended to provide, within the five-year period following the effective date of the Act, that the employees (or their representatives) of enterprises or branches which will become part of the Dutch Community-scale Enterprise or the Dutch Community-scale Group within such five-year period will be involved in the renewal or amendment of such agreements or will be represented in the agreed information and consultation procedure (WEOR art. 24.2).

<sup>923</sup> WEOR art. 10.1. In the case that no Dutch Works Council has been established, the Dutch members of the Special Negotiating Body shall be elected by the employees in the Netherlands (WEOR art. 10.5).

<sup>924</sup> WEOR art. 9.1.

Council of the branches or enterprises in the Netherlands.<sup>925</sup> Their appointment shall be for a term of four years.<sup>926</sup> If the Dutch Community-scale Enterprise or Dutch Community-scale Group has less than 5,000 employees, the Statutory European Works Council must consist of one member for each Member State in which such Dutch Community-scale Enterprise or Dutch Community-scale Group has employees and one, two or three additional members for each Member State in which such Dutch Community-scale Enterprise or Dutch Community-scale Group has a quarter or more, one-half or more, or three-quarters or more of its employees respectively.<sup>927</sup> If the Dutch Community-scale Enterprise or Dutch Community-scale Group has 5,000 employees or more, the Statutory European Works Council must consist of one member for each Member State in which such Dutch Community-scale Enterprise or Dutch Community-scale Group has employees and one, three, six or nine additional members for each Member State in which such Dutch Community-scale Enterprise or Dutch Community-scale Group has at least a tenth, a quarter, one-half or three-quarters or more of its employees respectively.<sup>928</sup>

ii Powers

A General Limitation.

The powers of a Statutory European Works Council are limited to information and consultation on issues which are of importance for the whole Dutch Community-scale Enterprise or Dutch Community-scale Group or for at least two branches or enterprises of the group in different Member States. These powers are moreover limited to matters concerning all branches or enterprises of the group or concerning at least two branches or enterprises in different Member States.<sup>929</sup>

B Annual Consultation Meetings.

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<sup>925</sup> WEOR arts. 17.1, 10.1. In the case that no Dutch Works Council has been established, the Dutch members of the Statutory European Works Council shall be elected by the employees in the Netherlands (WEOR arts. 17.1, 10.5).

<sup>926</sup> WEOR art. 17.1.

<sup>927</sup> WEOR art. 16.1.

<sup>928</sup> WEOR art. 16.2.

<sup>929</sup> WEOR art. 19.1.

Central management is required, at least once every calendar year, to inform the Statutory European Works Council in writing and consult with it concerning the general business and anticipated prospects of the Dutch Community-scale Enterprise or the Dutch Community-scale Group. The information and consultations with respect to such Dutch Community-scale Enterprise or Dutch Community-scale Group must in particular address:<sup>930</sup>

- a the structure of the Enterprise or Group;
- b the financial and economic situation of the Enterprise or Group;
- c the anticipated developments in activities, production and sales;
- d capital expenditure;
- e substantial changes in its organisation;
- f the introduction of new work or production methods;
- g its care for the environment;
- h any merger;
- i any relocation;
- j any reductions in the number of or closures of enterprises, branches or important parts of the enterprise or group; and
- k the currently existing status quo of developments in the workforce and any mass lay-offs.

#### C Special Consultation Meetings.

The central management of a Dutch Community-scale Enterprise or Dutch Community-scale Group must inform the Statutory European Works Council of all circumstances and proposed actions which could significantly affect the interests of the employees of two or more branches or enterprises located in different Member States, in particular regarding relocations or closures of branches or any mass lay-offs.<sup>931</sup>

Upon the request of the Statutory European Works Council, central management (or a more appropriate level of management having its own decision-making power) as the case may be, is required to meet with the Statutory European Works Council for consultation regarding the

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<sup>930</sup> WEOR art. 19.2.

<sup>931</sup> WEOR art. 19.3.

circumstances or proposed management actions under discussion on the basis of a written report prepared by management. This meeting must take place sufficiently early so that the provision of information and consultation is still meaningful.<sup>932</sup>

The Statutory European Works Council is entitled to render non-binding recommendations with respect to the report within a reasonable time period following the special consultation meeting.<sup>933</sup>

**D Withholding Information on the Grounds of Secrecy.**

Provided it can reasonably be anticipated that the disclosure of certain information would either seriously prejudice or harm the Dutch Community-scale Enterprise or Dutch Community-scale Group, central management is exempt from the obligation to provide such information to the Statutory European Works Council.<sup>934</sup> Moreover, central management, upon reasonable grounds, is entitled to require that the information that it is to provide be treated as confidential.<sup>935</sup>

**e Minimum Requirements for Agreed Arrangements.** Subject to certain minimum requirements, the Act offers central management and the Special Negotiating Body ample freedom to tailor any Agreed Arrangement, resulting either in an Agreed European Works Council or an Agreed Procedure, to their respective needs.<sup>936</sup>

Central management and the Special Negotiating Body may agree that for parts of the Dutch Community-scale Enterprise or Dutch Community-scale Group separate Agreed European Works Councils shall be established or separate Agreed Procedures shall apply. Alternatively, they may agree that for one or more parts of the Dutch Community-scale Enterprise or the Dutch Community-scale Group, one or more Agreed European Works Councils shall be formed and that one or more Agreed

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<sup>932</sup> WEOR art. 19.4.

<sup>933</sup> WEOR art. 19.4.

<sup>934</sup> WEOR art. 19.5.

<sup>935</sup> WEOR art. 19.5.

<sup>936</sup> WEOR art. 11.

Procedures shall apply to different parts.<sup>937</sup>

However, any Agreed Arrangement must contain provisions regarding the term of the Agreed Arrangement, the manner of negotiating a new Agreed Arrangement and the manner in which the Agreed Arrangement is to be amended to reflect any changes in the structure or size of the Dutch Community-scale Enterprise or Dutch Community-scale Group or in the numbers of employees in the Member States.<sup>938</sup>

**f Job Protection and Secrecy.** Except for "urgent cause", an employee working in the Netherlands who is a member of a Special Negotiating Body or a Statutory Works Council, or who was a member of either during the preceding two-year period, cannot be dismissed without the approval of the Cantonal Sector of the District Court. The Court shall ensure that the reason for the proposed dismissal does not relate to membership of the Special Negotiating Body or the Statutory Works Council.<sup>939</sup>

Members of the Special Negotiating Body and the Statutory Works Council are under a strict obligation of secrecy.<sup>940</sup> The same job protection and secrecy rules apply with respect to members of an Agreed European Works Council or employees involved in an Agreed Procedure.<sup>941</sup>

**g Interaction with the Dutch Works Councils Act.** Employees and their representatives have less powers under the Act than under the Dutch Works Councils Act. Statutory European Works Councils can deliver non-binding recommendations only. Central management may disregard such recommendations and is not required to suspend any actions following a negative recommendation, as is the case where a matter requires the formal advice of a Dutch Works Council (see supra Chapter

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<sup>937</sup> WEOR art. 11.5.

<sup>938</sup> WEOR art. 11.6. If the Agreed Arrangement does not provide that the employees (or their representatives) of enterprises or branches which are to become part of the Dutch Community-scale Enterprise or the Dutch Community-scale Group following its conclusion will be involved in the renewal or amendment of such Agreed Arrangement within a two-year period, or will be represented in the Agreed European Works Council or involved in an Agreed Procedure, central management must, upon the request of 100 or more or such employees (or their representatives), form a new Special Negotiating Body (WEOR art. 11.6).

<sup>939</sup> BW 7:670(4), 7:670a.

<sup>940</sup> WEOR arts. 4.4 to 4.6.

<sup>941</sup> WEOR art. 4.1.

13.2.d.iii).

The Act does not restrict the powers of Dutch Works Councils.

**h Enforcement of Compliance with the Act.** Each interested party<sup>942</sup> is entitled to request that the Enterprise Chamber of the Court of Appeal in Amsterdam enforce the Act, with the exception of matters relating to the job protection and secrecy rules for members of a Special Negotiating Body, a Statutory European Works Council, an Agreed European Works Council and the employees involved in an Agreed Procedure.<sup>943</sup> A Special Negotiating Body, its members and a European Works Council, established by virtue of the Act, cannot be ordered to pay the procedural costs of such an action.

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<sup>942</sup> The Minister for Social Affairs and Employment has indicated that for this purpose "interested parties" include the Special Negotiating Body and the Statutory European Works Council, as well as representatives of employees in other procedures for informing and consultation of employees (Memorie van Toelichting (Explanatory Memorandum) WEOR, No. 24641-3, p. 23). The relevant trade unions would therefore also qualify as "interested parties".

<sup>943</sup> WEOR art. 5.

## 14 TAXATION

### 14.1 General

The most important taxes levied by the Netherlands on companies operating in the Netherlands are:

- a Corporate Income Tax (CIT),<sup>944</sup> which is a tax levied on profits;
- b Dividend Withholding Tax (WHT),<sup>945</sup> which is a tax levied on the distribution of profits by Dutch resident companies;
- c Capital Contributions Tax (CCT),<sup>946</sup> which is a tax levied on capital contributions into Dutch resident companies with capital divided into shares;
- d other taxes like the Value Added Tax (VAT),<sup>947</sup> which is a tax levied on the sales of goods and services; and
- e the Real Property Transfer Tax (RPTT),<sup>948</sup> which is a tax levied in respect of the transfer of Dutch real property or of shares in a real property company.

In addition, some other taxes may be due, such as certain environmental taxes, excise and custom duties and local real property taxes.

### 14.2 Corporate Income Tax (CIT)

#### a Introduction

- i General. In principle, CIT can be qualified as an ordinary profit tax based on the profits realised by companies. In spite of the existence of CIT foreign businesses generally consider the Netherlands an attractive country in which to establish a company. As far as the tax considerations are concerned, this is mainly due to certain specific features, such as the participation exemption (see infra Chapter 14.2.c), the "exemption" of foreign branch income (see infra Chapter 14.2.i.iv), and the absence of withholding taxes on interest and royalty payments.

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<sup>944</sup> Wet op de vennootschapsbelasting [Vpb] (Corporate Income Tax Act), 1969 S. 445, as amended.

<sup>945</sup> Wet op de dividendbelasting [DIV] (Dividend Withholding Tax Act), 1965 S. 621, as amended.

<sup>946</sup> Wet op de belastingen van rechtsverkeer [BRV] (Tax Act Legal Transaction), 1970 S. 611, as amended.

<sup>947</sup> Wet op de omzetbelasting 1968 [OB] (Turnover Tax Act), 1968 S. 329, as amended.

<sup>948</sup> BRV, id.

These features, in combination with favourable tax treaties concluded by the Netherlands with other countries and the possibility to obtain advance rulings from the Dutch tax authorities, may make the Netherlands an attractive location for establishing a business operation.

- ii Resident Companies. Dutch resident companies are subject to CIT on their world-wide income.<sup>949</sup> The definition of "companies" includes, inter alia, corporations (B.V.s and N.V.s), "open" limited partnerships (i.e., limited partnerships where admission and substitution of limited partners is permitted without the consent of all general and limited partners), and any other body the capital of which is wholly or partly divided into shares (including entities organised under foreign law and residing in the Netherlands).<sup>950</sup> For the determination of the place of residence, the place of effective management is the decisive criterion.<sup>951</sup> A company incorporated under Netherlands' law, however, is always deemed to be resident in the Netherlands for CIT purposes.<sup>952</sup>
- iii Non-Resident Companies. Non-resident companies are subject to CIT only in respect of income derived from certain specifically mentioned Dutch sources.<sup>953</sup> These Dutch sources, inter alia, include: (1) business profits realised through a permanent establishment in the Netherlands; (2) income derived from Dutch real property; and (3) capital gains realised on the sale of shares in and dividends and interest derived from a Dutch resident corporation in which the taxpayer has a "substantial interest"<sup>954</sup> which does not belong to the assets of a business enterprise.

## **b Tax Base and Rates**

- i General. The CIT due is calculated on the annual taxable amount (belastbare

<sup>949</sup> Vpb art. 7.

<sup>950</sup> Vpb art. 2.

<sup>951</sup> Algemene Wet inzake Rijksbelastingen [AWR] (General Act on Taxation), 1959 S. 301, as amended, art. 4 and case law, e.g., Judgment of 20 Apr. 1988, HR, 1988 Beslissingen in belastingzaken Nederlandse Belastingrechtspraak [BNB] No. 176.

<sup>952</sup> Vpb art. 2 (4). It should be noted that the scope of this article has been restricted over the last few years, as it does not apply in connection with certain specifically mentioned provisions of the CIT Act.

<sup>953</sup> Vpb art. 17 (3).

<sup>954</sup> Generally, a "substantial interest" exists if the tax payer owns a.o. directly or indirectly five per cent. or more of the share capital of a corporation; see art. 4.6 of the Wet Inkomsten-belasting 2001 [IB] (Individual Income Tax Act 2001), S. 215, as amended.



bedrag), being the taxable profit less loss "carry forwards".<sup>955</sup> The tax rate equals 34.5 per cent. on the taxable amount exceeding € 22,689. The first € 22,689 is taxed at a rate of 29 per cent. If the annual taxable profit constitutes a loss, this loss can be carried back to the three preceding years and any remaining amount can be carried forward indefinitely.<sup>956</sup> The tax year is generally the financial year.<sup>957</sup>

- ii Surtax. Based on a temporary measure that was introduced in order to counteract the postponement of profit distributions to years after 31 December 2000, certain profit distributions that are deemed to be excessive could be subject to an additional 20 per cent. corporate income tax (also referred to as the "surtax").<sup>958</sup> This surtax applies to the excessive profit distributions made between 1 January 2001 and 31 December 2005.
- iii Taxable Profit. The taxable profit is the profit reduced by deductible gifts.<sup>959</sup> Profit is defined as the "total of all income derived from a business, in whatever form and under whatever name it may arise".<sup>960</sup> No distinction is made between ordinary (or trading) income and capital gains. Dutch corporations are deemed to carry on their business with all their assets and liabilities.<sup>961</sup> Consequently, all income derived from these assets and liabilities constitutes profit.

As a general rule, the total profit derived by a corporation is equal to the difference between the equity at the moment the corporation ceases to exist and the equity at the date of its incorporation, as adjusted for (deemed) capital contributions, repayments of capital and (deemed) dividend distributions made during the existence of the corporation. As a general rule, profit must be computed in Euros. However, a functional currency may be applied, provided certain conditions are

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<sup>955</sup> Vpb arts. 7 (1), 7 (2), 17 (1), 17 (2) and 22.

<sup>956</sup> Vpb art. 20 (2). See infra Chapter 14.2.h.

<sup>957</sup> Vpb art. 7 (4).

<sup>958</sup> Invoeringswet Wet inkomstenbelasting 2001 (Implementing Act Individual Income Tax Act 2001) Chapter 2, art. IV. B, S. 216, as amended. The reason for the introduction of this surtax was the fact that the new Individual Income Tax Act 2001 made it beneficial for individuals to receive dividends after 31 Dec. 2000. It was expected that companies would postpone profit distributions to the period after this date. This surtax is currently challenged due to its alleged conflict with the EU Parent Subsidiary Directive.

<sup>959</sup> Vpb art. 7 (3).

<sup>960</sup> Vpb art. 8 (1), IB art. 3.8.

<sup>961</sup> Vpb art. 2 (5).

met.<sup>962</sup>

Shipping companies may elect for a tonnage-based profit determination, provided certain conditions are met.<sup>963</sup>

Due to specific provisions in the law, certain items of income and expenses are not taken into account when determining taxable profits. For example, the benefits derived in connection with a qualifying shareholding (see *infra* Chapter 14.2.c) and the benefits derived as a result of a waiver of an uncollectible loan by a creditor,<sup>964</sup> are generally excluded from the tax base. Moreover, expenses relating to a shareholding in a foreign subsidiary company (see *infra* Chapter 14.2.c.ii) and certain penalties are not always tax deductible.<sup>965</sup> Transactions with group companies should take place under "arm's length conditions".<sup>966</sup> The CIT Act does not include thin capitalisation rules. However, interest expenses due on certain hybrid loans that are treated as equity are not always deductible.<sup>967</sup> Restrictions on the deductibility of interest also apply to certain inter-company loans if these loans relate to inter-company transactions which are considered tax abusive.<sup>968</sup> Such transactions include, *inter alia*, the creation of inter-company loans as a result of dividend payments, capital contributions, capital repayments and the transfer of shares. Under certain conditions, the interest deduction may still be recognised if the corporation can demonstrate that the transaction was occurred for sound business reasons.

Complicated rules apply for the situation where an inter-company receivable with a fair market value below face value is transferred to another party or is converted into capital of the debtor company, and before this transaction a tax deductible provision was made in respect of this receivable. This transfer or conversion may lead to a recapture claim on the entire amount of the deduction taken in the past.<sup>969</sup> The consequence of another provision is that a conversion of a debt into capital (including deemed capital) of the debtor requires the debtor company to recognise

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<sup>962</sup> Vpb arts. 7 (5) and (17 (1).

<sup>963</sup> Vpb art. 8 (1), IB arts. 3.22, 3.23, 3.24.

<sup>964</sup> Vpb art. 8(1), IB art. 3.13 (1) (a).

<sup>965</sup> Vpb art. 8(1), IB art. 3.14 (1) (c).

<sup>966</sup> Vpb art. 8b.

<sup>967</sup> Vpb art. 10(1) (d). In brief, a hybrid loan is generally a loan that has a term that exceeds 10 years and an interest remuneration that depends on the profits or profit distributions of the creditor or an affiliated company (see Vpb art. 10(2), (3) and (4)).

<sup>968</sup> Vpb art. 10a.

<sup>969</sup> Vpb arts. 13b and 13ba.

a gain that is equal to the difference between the book value of the debt in the tax balance sheet of the debtor and the fair market value of the corresponding receivable.<sup>970</sup>

iv      Annual Profit

A    Sound Business Practice.

The total profit made during the existence of the corporation must be allocated to its respective financial years in accordance with sound business practice (goed koopmansgebruik) and consistent accounting methods.<sup>971</sup> The concept of sound business practice is not defined by law. It is a dynamic concept whose meaning constantly changes on the basis of continuous case law resulting from developments in society. Important elements of the sound business concept are:

- a      the principle of matching, i.e., all income and expenses must be allocated to the year in which they arise;
- b      the principle of prudence, i.e., unrealised losses may be recognised, while unrealised profits may be ignored; the continuity of the business enterprise must be observed; and
- c      the principle of simplicity, i.e., the accounting method used must be manageable in view of the applicable circumstances in the situation concerned.

The requirement of consistent accounting methods means that the accounting method used may not be changed, unless this change is compatible with sound business practice and is not aimed at realising an occasional, one time tax benefit. As a general rule, profit computed in accordance with generally accepted accounting principles and adjusted for specific tax rules will be in accordance with sound business practice.

Generally, profit must be recognised when realised. The elements of sound business practice provide for some flexibility as to the moment of recognition. For example, in the situation of a hire-purchase transaction, the recognition of profits may, under certain conditions, be postponed until the instalments received exceed the tax book value of the assets concerned. In another example, if a fixed asset is replaced by an asset with the same

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<sup>970</sup> Vpb art. 12.

<sup>971</sup> Vpb art. 8 (1), IB art. 3.25.

economic function, the gain on the replaced asset may be rolled-over to the newly acquired asset by reducing the tax book value of this new asset. As a basic rule, the valuation of assets and liabilities for corporate income tax purposes must be made on the basis of all facts and circumstances prevailing at the end of the financial year, as known (or as should reasonably be known) at the time of the preparation of the tax return. However, facts and circumstances known at the time of preparing the tax return which occurred after the end of the financial year must be disregarded.

In brief, the following valuation rules apply. Inventory can be valued either (1) at cost, (2) at the lower of cost or market value, or (3) in accordance with the base-stock method, the FIFO, or LIFO method. Valuation based on replacement value is not allowed. In respect of receivables, a provision may be made for bad debts. Fixed assets are valued against acquisition cost and can be depreciated over the useful life of the asset concerned, taking into account the expected residual value.<sup>972</sup> Corporations are free to choose a depreciation method, as long as it is in line with sound business practice. Generally, the straight line method is used. In case law the declining balance method has also been accepted, but only for assets whose economic use steadily declines as they become older. The amortisation of goodwill (generally over a five year period) is allowed only if it has been acquired from a third party. Goodwill included in the acquisition price of shares is generally not tax deductible. Furthermore, accelerated depreciation has been introduced for certain fixed assets, such as environmentally friendly and energy-saving assets.<sup>973</sup>

#### B Special Reserves.

Provided the corporation maintains up-to-date books and records a limited number of reserves may be formed under the CIT Act by making a tax deductible contribution:<sup>974</sup> (1) the cost equalisation or business expense reserve; and (2) the reinvestment reserve.

The cost equalisation reserve enables recurrent expenses which do not lead to annual expenditures (e.g., maintenance expenses), to be spread more

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<sup>972</sup> Vpb art. 8 (1), IB art. 3.30 (1).

<sup>973</sup> Vpb art. 8 (1), IB arts. 3.31, 3.32, 3.33, 3.34.

<sup>974</sup> Vpb art. 8 (1), IB arts. 3.53, 3.54.

equally over time. A reinvestment reserve can be formed if fixed assets (tangible or intangible) are lost, damaged or sold and the damages or consideration received exceed the book value. A condition for forming the reserve is the intention to reinvest the proceeds in one or more new fixed assets. If within three years after the financial year in which the loss, sale or damage took place, no reinvestment took place, the reserve has to be released (with a corresponding increase in the taxable profits in that third year). No release needs to take place if it can be demonstrated that the reinvestment is in process, but delayed due to exceptional circumstances or the nature of a specific reinvestment requires a longer period. It is not required that the reinvestment should have the same economic function as the asset for which the reserve was formed, unless the reinvestment concerns an asset that is generally not depreciated or depreciated over a period of more than 10 years.

**c Participation Exemption**

- i General. A Dutch resident corporation or a non-resident corporation with a permanent establishment in the Netherlands (see infra Chapter 14.2g.ii) is exempt in respect of benefits derived from a qualifying participation.<sup>975</sup> These benefits include capital gains, actual or deemed dividends and certain currency exchange results (see infra). On the other hand, capital losses realised in respect of a qualifying participation are not tax deductible, except, under certain conditions, for losses realised in respect of a liquidation,<sup>976</sup> or a decrease in value during the first five years after the incorporation or acquisition of a subsidiary company.<sup>977</sup>

Both positive and negative currency exchange results realised on loans which were obtained in order to finance the acquisition of, or the capital contribution in a foreign-qualifying participation, are also exempt under the participation exemption. Upon request, the participation exemption will also apply to gains and losses on financial instruments acquired by the company in order to hedge its currency risk with respect to foreign-qualifying participations.<sup>978</sup>

ii Conditions

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<sup>975</sup> Vpb art. 13.  
<sup>976</sup> Vpb art. 13d.  
<sup>977</sup> Vpb art. 13ca.  
<sup>978</sup> Vpb art. 13 (1).

A General.

A qualifying participation in a Dutch resident corporation exists where:<sup>979</sup>

- a the corporation owns five per cent. or more of the nominal paid-up capital of another corporation, with a capital which is wholly or partly divided into shares;<sup>980</sup> and
- b the shares are not held as "inventory".

If shares are owned in a non-resident corporation, the following additional conditions apply:

- c the shares may not be held as a passive portfolio investment; and
- d the corporation in which the shares are held must be subject to tax on profits levied by the central government of the country in which it is domiciled.

B Non-Inventory Test.

The purpose of the non-inventory test is to exclude from the application of the participation exemption profits derived from trading in shares in "cash companies" (i.e., companies which do not carry on a business, but only own cash or other liquid assets). In principle, shares held in a company which carries on an active business are not considered to be "inventory".<sup>981</sup>

C Non-Passive Portfolio Investment Test.

The condition that the shareholding in the foreign subsidiary company may not qualify as a passive portfolio investment is interpreted as follows. This condition is not met if the foreign subsidiary itself is a passive portfolio investment company. However, this condition may still not be met even if the foreign subsidiary is an active operating subsidiary, unless the Dutch corporation performs a "real function" within the group to which it belongs.<sup>982</sup> This real function is considered to be performed, and accordingly the participation exemption may apply, if:

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<sup>979</sup> Vpb art. 13 (2).

<sup>980</sup> In the situation of a shareholding of less than 5 per cent., this condition may still be met provided (i) the shareholding is acquired for the general interest of society, or (ii) the shareholding is not held as a passive portfolio investment (see, inter alia, Judgment of 14 Mar 2001, HR, 2001 BNB No. 210).

<sup>981</sup> See also Judgment of 23 Feb. 2000, HR, 2000 BNB No's 215, 216 and 217.

<sup>982</sup> Judgement of 7 Nov. 1973, HR, 1974 BNB No. 2 and Resolution of 15 Oct. 1974 No. B74/21516.

- a the Dutch corporation acts as a real intermediate holding company by forming a "link" between the business activities of its (ultimate) parent company and its subsidiary; or
- b the Dutch corporation is considered to be a top-holding company which is involved in management, policy making and/or financing activities.

If in doubt, many corporations contact the Dutch tax authorities in order to try to obtain an advance ruling confirming that a foreign participation is not considered to be a passive portfolio investment.

A participation in a foreign group finance company is deemed to be held as a passive portfolio investment, unless the foreign finance company can be considered as actively involved in foreign finance activities.<sup>983</sup>

The portfolio investment test does not apply to a shareholding of 25 per cent. or more of the nominal paid-up capital of an EC corporation domiciled in a Member State,<sup>984</sup> unless (i) the EC corporation is subject to special tax rules or (ii) the assets of the EC corporation consist directly or indirectly mainly of interests in non-EC corporations, that would not qualify for the participation exemption if these interests were held directly.<sup>985</sup>

#### D Subject to Tax Test.

The foreign tax levied from the non-resident subsidiary company should be comparable to Dutch corporate income tax, i.e. it should be based on the profits realised and not be an annual flat amount. It is not necessary that the foreign profits are subject to a tax rate similar to the Dutch corporate income tax rate; a low rate is sufficient. The test is also met in the case where no tax is actually paid due to a tax holiday (a tax exemption which aims to stimulate the foreign economy), or due to loss carry forwards.

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<sup>983</sup> Vpb art. 13 (2).

<sup>984</sup> Vpb art. 13g. This rule is based on the EC parent subsidiary directive (Council Directive No. 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, 33 O.J. EUR. COMM. (No. L 225) 6 (1990)). In certain cases, the paid-up capital requirement may be replaced with a voting power requirement.

<sup>985</sup> Vpb art. 13g. The second exception does not apply if it is demonstrated that the interposition of the EC corporation is not based on tax avoidance or deferral.

#### E Deduction of Losses and Expenses.

Although the participation exemption may be considered a favourable provision of the CIT Act, certain consequences should be considered. The acquisition costs of shares (including goodwill reflected in the purchase price of the shares) can generally not be deducted from the taxable profits. However, under certain conditions a deductible write-down may be possible if the subsidiary company in which the shares are held is liquidated.<sup>986</sup> Moreover, it is possible to take into account a temporary tax deduction in respect of a decrease in value of a participation during the first five years after its acquisition.<sup>987</sup> The amount of this tax deduction equals the difference between the acquisition price of the participation and its reduced fair market value. For subsequent benefits (*i.e.*, increases in value, dividends received and capital gains realised) derived in connection with this shareholding, the participation exemption is not applicable in so far of the tax deductions taken in the previous years. If after the five year period the fair market value of the participation remains below the acquisition price, and to the extent no benefits have been added to the taxable profits, a recapture rule will apply in the five subsequent years. According to this recapture rule, the tax deductions in the past will be added to the taxable profits in five equal instalments. In the case of a sale of the participation within the five year recapture period, the unrecaptured amount will be added to the taxable profit at once.

Expenses incurred by a Dutch corporation in connection with a direct or indirect foreign participation that qualifies for the participation exemption, are generally not tax deductible.<sup>988</sup> The same applies to a direct or indirect participation in a Dutch resident corporation which realises profits through a foreign permanent establishment, if its profits are exempt due to the application of a treaty for the avoidance of double taxation or unilateral rules for double tax relief.<sup>989</sup> Important non-deductible expenses in this respect are interest due on, and currency exchange losses realised in connection with, loans which were obtained in order to finance the acquisition of, or the capital contribution in, such a participation.

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<sup>986</sup> Vpb art. 13d.

<sup>987</sup> Vpb art. 13ca.

<sup>988</sup> Vpb art. 13 (1). The Dutch Supreme Court has requested the European Court of Justice to decide whether the restriction on the deduction of expenses could be viewed as a violation of EC law. Judgement of 11 Apr. 2001, HR, 2001 BNB No. 257.

<sup>989</sup> Judgement of 13 Nov. 1991, HR 1992 BNB No. 58



**d Group Financing Activities**

- i General. Upon request a special reserve can be formed for the specific risks which arise from the financing of activities of a business operating internationally.<sup>990</sup> The rules do not form a special regime; any Dutch resident or non-resident companies which fulfil the conditions can request this treatment, regardless of whether they only carry on financing activities or have other activities as well. Nevertheless, the creation of the reserve may result in a low effective tax burden on the group financing profit realised by such company.<sup>991</sup>

In order to be eligible for the special reserve, a company should truly be involved in financing activities (see *infra* Chapter 14.2.d.ii)) on an international scale. The activities must be spread over at least four different countries or two different continents, thereby satisfying certain tests regarding the minimum amount of financing profits to be derived from each country or continent and the maximum amount of financing profit to be derived from Dutch resident group companies. The tax inspector is allowed to impose conditions when approving a request by a corporation to form the reserve. These conditions can be updated once every 10 years. If a company does not accept these changed conditions, but still fulfils the previous conditions, it is no longer possible to make new contributions to the reserve, but a taxable release of the reserve need not take place.

- ii Financing Activities. The international group financing activities include providing loans to group companies, the financing of participations, the financing of business assets used within the group and of business activities of the group, financial and operational leasing, licensing of intellectual property and financial administrative services. In principle, these activities should take place within the group, but they may, to a limited extent, have effect outside the group as well. For example, if a loan is provided to a group company which uses the proceeds to grant consumer credit to its customers, this is seen as a relevant group financing

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<sup>990</sup> Vpb art. 15b.

<sup>991</sup> In a letter of 11 July 2001 the Commission of the European Union has stated that the Dutch group financing regime may qualify as state aid and that it has started a procedure against the Netherlands in accordance with EC Treaty art. 88(2) (see Vakstudie Nieuws, V-N 2001/44.15). Accordingly, the question can be raised whether the group financing regime in its present form will have a long life and whether companies that have benefited from this regime in the past, may have to pay back any benefits. In addition, the Dutch group financing regime may not be allowed in future as a result of the Code of Conduct discussion within the EC.

activity.

- iii Special Reserve. Each financial year in which the conditions are met, the company can contribute to the special reserve, and accordingly exclude from the taxable profits, up to 80 per cent. of its relevant group financing profit and of the proceeds derived from short-term funds available for new acquisitions (the so-called "war-chest").

The group financing profit consists of the profit from the qualifying financing activities conducted by the company itself and of Dutch taxable profits realised by other group companies to the extent these latter profits relate to a taxable release of the reserve by the company in earlier years.

- iv Release of the Reserve. The reserve can be released, either tax-free, or subject to taxation, depending on the circumstances.

#### A Taxable Release.

The release is taxable if it compensates a loss relating to a risk for which the reserve was formed, to the extent such loss is deducted in the Netherlands by either the company itself or a group company. For example, this may concern a write-down of a loan granted to a group company, or the liquidation of a subsidiary.

It is possible to release the reserve voluntarily in five equal annual instalments. The annual release to the taxable profits is then taxed at a special rate of 10 per cent.

A mandatory release takes place if the company does not longer realise taxable profits in the Netherlands,<sup>992</sup> if it no longer meets the test of being involved in international group financing activities, or if it no longer fulfils the conditions imposed by the tax inspector. The release is then subject to taxation at the ordinary rate of 34.5 per cent.

#### B Tax-Free Release.

Under certain conditions, the reserve can be released tax-free if shares are acquired in, or a capital contribution takes place into, a subsidiary company.

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<sup>992</sup> (For example, by transferring the place of residence abroad, or as a result of a liquidation or merger).

The tax-free release of the reserve equals 50 per cent. of the investment made. The investment must lead to a real broadening of the participations within the group. The participation thus acquired should be held for at least five years, unless sound business reasons call for a different course of action. The tax-free release of the reserve may even equal 100 per cent. of the investment made if (1) it relates to a subsidiary company whose activities or location (political, economical, climatological) are, in the judgement of the Ministry of Finance, so extreme that exceptional risks are run, or (2) it relates to a capital contribution into a subsidiary company which has been held liable for an event leading to damages which the subsidiary company cannot bear itself. In calculating a possible tax deductible loss upon the liquidation of a subsidiary company, the "acquisition costs" of the shares in this subsidiary company will be reduced by tax-free release of the reserve.

**e Fiscal Unity**

- i General.<sup>993</sup> Under certain conditions, Dutch corporations belonging to the same group can form a fiscal unity (*fiscale eenheid*) for CIT purposes.<sup>994</sup> Under the fiscal unity rules, the parent company and its subsidiary companies may opt to file a consolidated tax return. One favourable consequence of the fiscal unity rules is that losses of one fiscal unity member can be offset against the profits of another member. Another favourable consequence of the fiscal unity rules is that it is possible to carry out intra-group transactions (such as sales of goods and services, and also reorganisations) without triggering CIT liability on unrealised gains.

In order to apply for the fiscal unity treatment, the parent company must own 99 per cent. or more of the shares in the subsidiary company as from the start of the financial year. The corporations concerned must be Dutch corporations or foreign corporations domiciled in the Netherlands which have the same legal

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The Second Chamber of Dutch parliament has approved a draft statute that will substantially revise the current rules of the fiscal unity (draft statute No. 26854). The new fiscal unity rules should apply to the fiscal years that start on or after 1 Jan. 2003. Certain transitional rules may be applicable. The most important changes are the following: (1) the 99 per cent. shareholding threshold is reduced to 95 per cent., (2) the fiscal unity can start from the date the conditions are met and will terminate when one or more of the conditions are no longer met (i.e., no retroactive effect to the beginning of the financial year), (3) on the termination of the fiscal unity it would be possible to allocate the losses for future compensation purposes to the company that realised those losses, (4) the taxable revaluation under the anti-abuse rule of the 16th standard condition will be restricted to the transferred asset with the hidden reserve.

<sup>994</sup>

Vpb art. 15.

characteristics as Dutch B.V.s and N.V.s.<sup>995</sup> The corporations must have the same financial year. Newly incorporated subsidiaries can become members as from the date of their incorporation. Subsidiary companies owned by a fiscal unity member which meet the requirements above can also become members of the fiscal unity. If the conditions are met, an application must be made prior to the end of the financial year in which the fiscal unity will start. The fiscal unity will terminate as from the start of the financial year during which one of the requirements above is no longer met. Loss carry forwards present with the fiscal unity prior to the termination of the fiscal unity will stay with the parent company even if these losses are actually realised by the subsidiary company. The corporate income tax due on the profits of the fiscal unity will be levied on the parent company. However, each member of the fiscal unity is jointly and severally liable for the corporate income tax due in respect of the profits of the fiscal unity.<sup>996</sup>

- ii Anti-Abuse Rule. Certain complicated conditions have been imposed by the Dutch tax authorities for approving the application for fiscal unity treatment. One important condition could lead to the adverse tax result that prior to the end of the preceding financial year, as a result of the sale of shares in a fiscal unity member in a subsequent year, the assets and liabilities of that subsidiary must be revalued at fair market value.<sup>997</sup> This taxable revaluation must take place if: (1) assets or liabilities were transferred between the subsidiary and another fiscal unity member such that hidden reserves were transferred between fiscal unity members, and (2) the sale of the subsidiary leads to a realisation of all or part of these hidden reserves. No revaluation is required once a period of six financial years has lapsed between the date the assets or liabilities were transferred and the date the subsidiary's shares were sold.<sup>998</sup> The purpose of this condition (generally referred to as the "16th standard condition") is to prevent abusive schemes under which assets with a tax basis below fair market value would effectively be sold without taxation. Under such schemes the assets would first be transferred to a subsidiary within the fiscal unity following which the shares in that subsidiary would be sold in a subsequent year. The first transfer within the fiscal unity would not result in

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<sup>995</sup> Judgment of 16 Mar. 1994, HR, 1994 BNB No. 191 and Resolution No. DB 94/1842m (10 Aug. 1994).

<sup>996</sup> Invorderingswet [Inv.] (Tax Collection Act), 1990 S. 221, as amended, art. 39.

<sup>997</sup> In anticipation of the new law dealing with the fiscal unity (see supra footnote No. 50), it may already be possible to restrict the revaluation to the assets transferred, Statement of Practice, 15 Feb. 2002, No. CPP 2001/3589 (see Vakstudie Nieuws, V-N 2002/11.20).

<sup>998</sup> Under certain conditions a three-year period may apply.

taxation of the hidden reserve, while the subsequent sale of the shares would be tax-exempt under the participation exemption (see supra Chapter 14.2.c).

- iii Acquisition Holding. Before 1997, the fiscal unity has been an important factor in structuring acquisitions of Dutch corporations. By establishing a special purpose Dutch acquisition holding company which would form a fiscal unity with the Dutch target company, the interest expenses due by the holding company on the acquisition debt could be offset against the profits of the Dutch target.<sup>999</sup> Under the current rules, the interest deduction has been restricted to the acquisition holding company's "own profits", if the interest is directly or indirectly due to an affiliated company and this company did not obtain a third party loan in respect of the financing of the acquisition.<sup>1000</sup> This restriction applies for an eight-year period. During this eight-year period, the non-deductible interest can be carried forward to off-set future "own profits" of the acquisition holding company. After this eight-year period any amount of "interest carry forward" still available can be used to offset the future profits of the Dutch acquired company, although certain limitations still apply during the next four years. The same restrictions will apply if the acquisition holding company and the acquired company are merged by means of a statutory merger (see supra Chapter 11.3) or if the acquisition debt and the assets and liabilities of the acquired company are united as a result of a statutory split-up.<sup>1001</sup>

**f Mergers and Reorganisations.** The CIT Act contains certain provisions which may exempt and/or defer the recognition of the gain realised on the transfer of a business enterprise or on the transfer of shares to another corporation.

- i Tax-Free "Business-Merger". A corporation can transfer all or an independent part of its business enterprise tax-free to another corporation if the transfer qualifies as a "business-merger". Principally, the following conditions apply in order to qualify as a business-merger.<sup>1002</sup>
  - a The transferee is, or will become subject to CIT in the Netherlands.
  - b The transferee will acquire all or an independent part of the business

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<sup>999</sup> Judgment of 27 Sept. 1995, HR, BNB No. 6.

<sup>1000</sup> Under certain conditions the restriction on interest deduction does not apply in the case of an acquisition where an individual is involved who is or will be employed by the acquired company.

<sup>1001</sup> Vpb arts. 14b (6) and 14a (8).

<sup>1002</sup> Vpb art. 14.



acquires shares in a corporation domiciled outside the EC, resulting in a voting interest of more than 90 per cent.

An amount not exceeding 10 per cent. of the nominal value of the shares issued may represent consideration other than in shares, which will be subject to tax.

If the transfer of shares takes place as a result of a statutory merger or statutory split-up, this statutory merger or statutory split-up must be between Dutch resident corporations or qualifying non-Dutch EC corporations.

The tax basis of the new shares received under a qualifying share-merger, statutory merger or statutory split-up, is the same as the basis of the shares transferred. A non-recognition will only be possible if the share-merger, statutory merger or statutory split-up is not predominantly aimed at avoiding or deferring the levying of taxes.

If as a result of the share-merger, the statutory merger or statutory split-up, the newly acquired shares qualify for the application of the participation exemption; a future gain on the disposal of these shares will only be exempt to the extent this gain exceeds the previous non-recognised gain.<sup>1006</sup>

## **g      Taxation of Non-Resident Companies**

i      General. Under the CIT Act a non-resident company is subject to Dutch corporate income tax if it realises profits from certain specifically mentioned Dutch sources.<sup>1007</sup>

These Dutch sources include: (1) profits derived from a Dutch business enterprise, i.e., business profits realised through a permanent establishment in the Netherlands;<sup>1008</sup> (2) capital gains realised on the sale of shares in and dividends derived from a Dutch resident corporation in which the taxpayer has a "substantial interest" which does not belong to the assets of a business enterprise.<sup>1009</sup>

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<sup>1006</sup>                      Vpb art. 13h.

<sup>1007</sup>                      Vpb art. 17.

<sup>1008</sup>                      Dutch real property and receivables on a Dutch resident corporation in which the taxpayer has a "substantial interest" (see next footnote) and which receivable do not belong to the assets of a business enterprise are deemed to belong to a Dutch business enterprise.

<sup>1009</sup>                      Generally, a "substantial interest" exists if the taxpayer owns directly or indirectly five per cent. or more of the share capital of a corporation.

- ii Dutch Permanent Establishment. Another important Dutch source of taxable income is profit derived from an enterprise which is wholly or partly conducted through a permanent establishment situated in the Netherlands or a permanent representative in the Netherlands.

The CIT Act does not contain general definitions of the terms "permanent establishment" and "permanent representative". The law only contains a fiction that a permanent establishment is deemed to be present if, during an uninterrupted period of at least 30 days, activities are conducted on the Dutch part of the continental shelf.<sup>1010</sup> Due to the absence of a definition in the law, the meaning of the terms "permanent establishment" and "permanent representative" under the application of the CIT Act must for the greater part be derived from case law. This case law shows that the following criteria are relevant for the interpretation of the term "permanent establishment":

- a there must be physical premises situated in the Netherlands;
- b these premises must be available to the non-resident taxpayer;
- c the premises must in some degree be available on a permanent basis; and
- d the premises must be fitted for the business activities to be conducted.

The following criteria can be derived from case law when interpreting the term "permanent representative":

- a the representative must be authorised on a permanent basis to conclude contracts on behalf of the non-resident taxpayer;
- b the representative must to a certain extent be dependant on the non-resident taxpayer which it represents; and
- c the proxy must be habitually exercised.

The question of whether the non-resident company is a resident of a country which has concluded a tax treaty with the Netherlands could be of importance. The meaning of the terms "permanent establishment" and "permanent representative" under the CIT Act is not always equal to the meaning under the application of tax treaties concluded by the Netherlands. For example, a non-resident company located in a non-treaty country may be taxed with respect to its profits derived in connection with supporting activities conducted through a Dutch permanent establishment, while such an activity would not qualify as a permanent

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<sup>1010</sup>

Vpb arts. 17a (e), 17a (f).



establishment under a treaty.

If it has been established that under Netherlands' domestic law a permanent establishment exists, and a tax treaty does not preclude the Dutch authorities to exercise their rights in this respect, the amount of profits to be attributed to this permanent establishment has to be determined. The direct method is generally viewed as the appropriate method to determine the taxable profits. Under this direct method, the permanent establishment is treated as if it is a separate independent enterprise which should deal on an arm's length basis with the enterprise to which it belongs. However, case law indicates that an exception to the construction of "the independent enterprise" applies in respect of certain internal payments between head office and the permanent establishment, such as interest and royalties. These payments will only be taken into account if they are due to, or received from, a third party and relate to assets and liabilities attributable to the business activities conducted through the permanent establishment.<sup>1011</sup>

**h Compensation of Losses.** If the "taxable profit" is in fact a loss, it can be offset against the taxable profits of the three preceding years (carry back). Any remaining amount not carried back can be carried forward indefinitely.<sup>1012</sup> Losses are offset in the order in which they were incurred. If the (ultimate) interest in the company has changed by 30 per cent. or more, restrictions apply to the possibility to carry back or carry forward losses realised.<sup>1013</sup> These restrictions apply where the activities of the company concerned for the greater part consist of passive portfolio investment activities or where the size of the activities of the company has been substantially reduced.<sup>1014</sup>

**i Foreign Source Income.**

**i General.** Dutch resident corporations receiving income from foreign sources may under certain conditions be entitled to relief in order to avoid a tax claim in both the Netherlands and the foreign source country on the same income.<sup>1015</sup> This double tax relief is based on tax treaties for the avoidance of double taxation or on

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<sup>1011</sup> Judgments of 7 May 1997, HR, 1997 BNB no. 263 and no. 264.

<sup>1012</sup> Vpb art. 20 (2).

<sup>1013</sup> Vpb art. 20a.

<sup>1014</sup> In respect of a loss carry forward: to a size below 30 per cent. of the size of the activities at the start of the year in which the earliest loss was realised; in respect of a loss carry back: if the activities are terminated or almost entirely terminated.

<sup>1015</sup> A restriction applies to the possibility to credit foreign withholding tax levied on royalties and interest received if the Dutch company merely acts as a conduit company (Vpb art. 8c).

Dutch unilateral rules for double tax relief. If no tax treaties or unilateral rules can be applied, the amount of foreign tax paid can generally be recognised as a deductible expense.<sup>1016</sup> In the case where a tax credit would normally be applied the corporation may also opt for non-recognition of the tax credit and deduct the amount of foreign tax paid as an expense.

- ii Unilateral Rules for Double Tax Relief. The Decree for the avoidance of double taxation (BVDB) includes the most important unilateral rules for double tax relief.<sup>1017</sup> Under the BVDB, Dutch resident taxpayers can claim an exemption or a credit in respect of certain items of foreign source income. These unilateral rules can only be used if no tax treaty for the avoidance of double taxation (see infra Chapter 14.2.i.iii) is applicable.<sup>1018</sup> An "exemption" (see infra Chapter 14.2.i.iv) can, inter alia, be claimed in respect of profits realised through a permanent establishment present in another country, provided the profits are subject to tax levied by that other country.<sup>1019</sup> Foreign income taxes paid by a Dutch resident taxpayer in respect of interest, dividends and royalties received from certain developing countries may, under certain conditions, be credited against the Dutch tax due on these items of income.<sup>1020</sup> The so-called "participation exemption" (see supra Chapter 14.2.c) is also considered a unilateral rule for the avoidance of double taxation. This participation exemption excludes dividends received by the Dutch corporation, including foreign dividends, from corporate income tax. If the participation exemption applies, no credit or deduction of foreign withholding tax levied will be given.<sup>1021</sup>
- iii Tax Treaties for the Avoidance of Double Taxation. The Netherlands has concluded many tax treaties for the avoidance of double taxation. Generally, these tax treaties require the Netherlands, inter alia, (1) to "exempt" (see infra Chapter 14.2.i.iv) profits realised by a Dutch resident person through a permanent establishment in the other treaty country, and (2) to credit the Dutch tax liability for the amount of withholding tax levied by the other treaty country on interest, dividends and royalties paid to the Dutch resident recipient. In addition, these tax

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<sup>1016</sup> Vpb art. 10 (1) (e).

<sup>1017</sup> Besluit voorkoming dubbele belasting [BVDB] (Decree for the avoidance of double taxation), 2001 S. 642.

<sup>1018</sup> BVDB art. 1 (2).

<sup>1019</sup> BVDB art. 32 (1).

<sup>1020</sup> BVDB art. 36.

<sup>1021</sup> See infra Chapter 14.3 for the possibility of crediting the amount of foreign dividend withholding tax paid against the amount of Dutch dividend withholding tax.

treaties provide for a reduction of withholding taxes which may be levied by the source country on dividends, interest and royalties.

- iv Exemption for Foreign Branch Income. Under the unilateral rules and tax treaties for the avoidance of double taxation, the Netherlands "exempts" the income attributable to a foreign branch ("permanent establishment"; see supra Chapter 14.2.i.ii and Chapter 14.2.i.iii). This "exemption" does not imply that the foreign branch income is actually excluded from the Dutch taxable base. The foreign branch income is included in the world-wide taxable income, while the relief for double taxation is calculated by means of a reduction of the Dutch tax due on that world-wide income. This reduction equals the average rate of Dutch tax due on the foreign branch income (so-called "exemption with progression").<sup>1022</sup> For corporations, this method of double tax relief is generally equal to an exemption. It should be noted that this method of double tax relief allows for the deduction of foreign branch losses from other Dutch source taxable income. A recapture rule applies if the branch becomes profitable in subsequent years.<sup>1023</sup>

## j **Administrative Aspects**

- i Filing Tax Returns. CIT is levied on a corporation through an assessment raised by the competent tax inspector.<sup>1024</sup> This assessment is based on the tax return which should be filed every year.<sup>1025</sup> This tax return shows the taxable amount realised during the tax year concerned. The tax inspector sends a tax return to the corporation if he believes that it may be subject to CIT.<sup>1026</sup> If the corporation is subject to CIT, but has not received a tax return, it must request the tax inspector for a tax return within six months, and two weeks after the end of the tax year.<sup>1027</sup> The tax return must be completed and filed by the corporation within the period indicated by the tax inspector, which is generally within six months after the tax year. If requested by the corporation, the tax inspector may grant an extension of filing of the tax return.<sup>1028</sup>

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<sup>1022</sup> The "exemption" as applicable under the unilateral rules is replaced by a credit method if the foreign branch is mainly engaged in passive financing activities (BVDB arts. 32 (5) and 39).

<sup>1023</sup> BVDB art. 35. This article provides for the "per country method".

<sup>1024</sup> Vpb art. 24.

<sup>1025</sup> AWR art. 6.

<sup>1026</sup> AWR art. 6.

<sup>1027</sup> Uitvoeringsregeling Algemene Wet inzake Rijksbelastingen 1994 [UAWR] (Implementing Decree on General Act on Taxation) art. 2, 1994 S. 114, as amended.

<sup>1028</sup> AWR art. 9 (2).

- ii Assessments. During and after the tax year concerned, the tax inspector may already impose one or more provisional assessments based on information to be provided by the corporation.<sup>1029</sup> These provisional assessments will be offset with the final assessment.<sup>1030</sup>

The tax inspector must impose the final assessment within three years after the tax year concerned.<sup>1031</sup> This three-year period is extended by the period for which the tax inspector granted the corporation an extension of filing of the tax return.

Under certain conditions the tax inspector may impose an additional assessment if he believes that the final assessment was too low.<sup>1032</sup> Generally, this additional assessment can only be imposed within five years after the tax year concerned and the additional assessment is based on facts and circumstances not known to the tax inspector at the time of the final assessment. Latter condition does not apply if the taxpayer acted in bad faith. The five year period may be extended to a 12 year period if the additional assessment relates to foreign source income.<sup>1033</sup>

- iii Appeal. The provisional, final and additional assessments can be challenged by the corporation in a pre-proceeding by sending a notice of objection (bezwaarschrift) to the tax inspector within six weeks after the date of the assessment.<sup>1034</sup> The tax inspector must decide on the objection within one year.<sup>1035</sup> The decision of the tax inspector can be appealed against before the Tax Court,<sup>1036</sup> with a further right of appeal to the Supreme Court on questions of law only.<sup>1037</sup>

### 14.3 Dividend Withholding Tax (DWT)

Profit distributions made by Dutch resident companies whose capital is divided into shares are subject to DWT at a rate of 25 per cent.<sup>1038</sup> The tax must be withheld by the

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<sup>1029</sup> AWR art. 13.

<sup>1030</sup> AWR art. 15.

<sup>1031</sup> AWR art. 11 (3).

<sup>1032</sup> AWR art. 16.

<sup>1033</sup> AWR art. 16 (4).

<sup>1034</sup> AWR art. 22j and art. 23, Algemene Wet Bestuursrecht [AWB] (General Administrative Law Act) art. 6:7, 1994 S. 1, as amended.

<sup>1035</sup> AWR art. 25, the one-year period may be extended by one additional year.

<sup>1036</sup> AWR art. 26.

<sup>1037</sup> AWR art. 28.

<sup>1038</sup> DIV arts. 1, 5. Certain "excessive" profit distributions may be subject to a 20 per cent. surtax. See supra Chapter 14.2.b.ii.

distributing company.<sup>1039</sup> If the dividend is received by a Dutch resident taxpayer, the DWT can be credited against the Individual Income Tax or CIT due.<sup>1040</sup> If the dividend is paid to a non-resident taxpayer, the withholding tax is generally a final levy. However, the DWT can under certain circumstances be reduced, for example, due to the application of tax treaties or domestic provisions implementing the EC parent-subsidiary directive.<sup>1041</sup> Under the latter mentioned domestic provisions, generally no Dutch withholding tax is due if the dividend-receiving EC corporation owns 25 per cent. or more of the share capital in the Dutch corporation.<sup>1042</sup> If the shares are held by a corporation and qualify for the application of the participation exemption (see supra Chapter 14.2.c), no DWT needs to be withheld on distributions to the recipient.<sup>1043</sup>

Profit distributions subject to DWT include disguised dividends and liquidation proceeds paid to the shareholders to the extent these payments exceed the paid-up capital recognised for tax purposes.<sup>1044</sup> A repurchase by the corporation of its of own shares is also subject to DWT to the extent that the purchase price of the shares exceeds the recognised paid-up capital of these shares. Under certain conditions no DWT is due in connection with the repurchase by the corporation of its of own shares that are listed on a recognised stock exchange.<sup>1045</sup>

A repayment of capital is generally not subject to DWT. In the case of a share-for-share exchange, the new paid-up capital which equals the fair market value of the contributed shares, may not be fully recognised for Dutch tax purposes.<sup>1046</sup> Only the recognised amount of capital paid on the contributed shares will be recognised as capital payment to the newly-issued shares. The excess amount (the "tainted" part) will be subject to DWT. This rule counters potential tax avoidance. For example, in the absence of this provision, a shareholder in a corporation with a substantial amount of retained earnings could transfer his shares under a tax-free share-for-share exchange to another corporation and

<sup>1039</sup> DIV art. 7.

<sup>1040</sup> AWR art. 15; IB art. 9.2 (1) (b) and Vpb art. 25. A draft statute (No. 27896) introduces measures to counteract dividend stripping.

<sup>1041</sup> Council Directive No. 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, 33 O.J. EUR. COMM. (No. L 225) 6 (1990); DIV arts. 4a, 4b.

<sup>1042</sup> Under certain conditions the "capital requirement" can be replaced by a "voting rights requirement" and the 25 per cent. threshold by a 10 per cent. threshold; DIV arts. 4a (2) and (3).

<sup>1043</sup> DIV art. 4.

<sup>1044</sup> DIV art. 3.

<sup>1045</sup> DIV art. 4c.

<sup>1046</sup> DIV art. 3a (1). An exception applies to the contribution of shares in a non-resident corporation (Resolution No. DB 89/4235 (1989)).

have the retained earnings distributed tax-free to that other corporation. Thereafter, the latter corporation could repay the capital created under the share-for-share exchange without DWT. However, the rule above subjects the tainted part of the capital to DWT.

In respect of foreign dividends received by a Dutch corporation, which are exempt under the application of the participation exemption (see supra Chapter 14.2.c), it may be possible to obtain relief in the Netherlands from foreign withholding tax levied on these dividends. This relief can be effected by means of a reduction of the Dutch dividend withholding tax, provided the foreign dividends received are redistributed by the Dutch corporation within two years and certain other conditions are met.<sup>1047</sup>

#### **14.4 Capital Contributions Tax (CCT)**

**a General.** Capital contributions to Dutch resident companies with capital divided into shares are subject to a 0.55 per cent. CCT.<sup>1048</sup> These contributions not only include the amount equal to the paid-up nominal value of the shares, but also share premium (agio) paid in excess of the nominal value, and deemed capital contributions. If the capital contribution is paid in kind, the CCT is calculated on the fair market value of the contributed property.<sup>1049</sup> The CCT is due by the capital receiving company and deductible for CIT purposes.<sup>1050</sup>

An exemption can be claimed in the case of a merger, a statutory split-up or an internal reorganisation, qualified for CCT purposes.<sup>1051</sup>

#### **b Exemptions**

**i Merger.** A merger for CCT purposes exists if:

- a** A Dutch resident corporation acquires 75 per cent. or more of the shares (or increases its interest to 75 per cent. or more) in another corporation residing within the EC, in exchange for newly-issued shares in the Dutch acquiror ("share-merger"), or
- b** A Dutch resident corporation acquires all of the assets and liabilities or the entire business enterprise or an independent part of another EC resident corporation in exchange for newly-issued shares in the Dutch acquiror

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<sup>1047</sup> DIV art. 11.  
<sup>1048</sup> BRV arts. 32, 36.  
<sup>1049</sup> BRV art. 35.  
<sup>1050</sup> BRV art. 38.  
<sup>1051</sup> BRV art. 37.

("business-merger").

If an exemption is claimed under a share-merger, the shares acquired may not be transferred and the interest may not be reduced below the 75 per cent. within a five-year period following the exempt transaction; otherwise, the tax saved under the exemption will still be due (a so-called "recapture claim"). The recapture claim does not apply if the new transfer qualifies under the merger, statutory split-up or under the internal reorganisation exemption, or if the acquiror is to be liquidated.<sup>1052</sup>

A 100 per cent. shareholding may qualify as an independent part of a business enterprise under the business-merger exemption.<sup>1053</sup> Claiming this exemption could be an alternative to the share-merger if it concerns a shareholding in a non-EC resident corporation (not qualifying for the share-merger) or if the intention is to avoid the recapture claim under the share-merger.

The Dutch Supreme Court considers the restriction that the contributing corporations should be residents within the EC, to be a violation of the non-discrimination article as included in certain treaties for the avoidance of double taxation.<sup>1054</sup>

With regard to a statutory merger, an exemption can be claimed based on published tax policies.<sup>1055</sup>

- ii Statutory Split-Up. The issue of shares as a result of a statutory split-up is exempt for CCT purposes, unless the split-up is predominantly aimed at avoiding or deferring of the levying of taxes.<sup>1056</sup>
- iii Internal Reorganisation. For CCT purposes, an internal reorganisation is deemed to exist if a Dutch resident corporation acquires all of the assets of the same kind from other group companies residing in the EC in exchange for newly issued shares in the Dutch acquiror.

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<sup>1052</sup> Uitvoeringsbesluit belastingen van rechtsverkeer [UBBRV] (Implementing Decree on Tax Act Legal Transaction) art. 14, 1971 S. 393, as amended.

<sup>1053</sup> Judgment of 27 Apr. 1994, HR, 1994 BNB No. 207.

<sup>1054</sup> Judgment of 27 Apr. 1994, HR, 1994 BNB Nos. 207, 209 and 210.

<sup>1055</sup> Resolution No. 285-13707 (1985) and Explanatory Notes to draft statutes No. 21031 and No. 25709.

<sup>1056</sup> BRV art. 37 (2) (d).

Under the merger exemption, the statutory split-up exemption and the internal reorganisation exemption the Dutch resident corporation is allowed to make a payment other than in shares to the extent not exceeding 10 per cent. of the nominal value of the shares issued in connection with the transaction.

#### 14.5 Other Taxes

**a Real Property Transfer Tax (RPTT).** The acquisition of Dutch real property is generally subject to a six per cent. RPTT on the fair market value of the transferred property.<sup>1057</sup> The RPTT is due by the acquiror.<sup>1058</sup> A taxable transfer includes not only the transfer of the legal title to the real property, but also the transfer of the economic interest in the real property. Dutch real property includes shares in real property corporations (i.e., corporations mainly engaged in investing in Dutch real property).<sup>1059</sup> The transfer of shares in such a corporation will be subject to RPTT if the purchaser acquires or increases a substantial shareholding (in general an interest of one-third or more).

Under certain conditions, an acquisition of real property is exempt from RPTT if the transfer is connected with a qualifying merger, split-up or internal reorganisation.<sup>1060</sup>

**b Value Added Tax (VAT).** VAT is levied in respect of the delivery of goods and the rendering of services by "entrepreneurs".<sup>1061</sup> The tax is based on the consideration charged<sup>1062</sup> and to a large extent is based on EC Directives. In principle, VAT is borne by the final consumers of the goods and services. In practice, the various entrepreneurs performing taxable transactions act as collectors on behalf of the Dutch tax authorities. The amount of VAT to be paid by an entrepreneur is generally the VAT due on its own turnover reduced by the VAT paid to other entrepreneurs. As a consequence, VAT is not a cumulative levy. The general VAT rate is 19 per cent. Necessity goods and services (e.g., food and medicines) may be subject to the lower rate of six per cent., while exports are generally subject to a zero rate.

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<sup>1057</sup> BRV arts. 2, 14.

<sup>1058</sup> BRV art. 16.

<sup>1059</sup> BRV art. 4.

<sup>1060</sup> BRV art. 15 (1) (h) and UBBRV- arts. 5a, 5b, 5c.

<sup>1061</sup> OB art. 1.

<sup>1062</sup> OB arts. 8, 9.



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