

Legal Alert

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Bills on shareholders' and works council's rights become law

1 July 2010

Introduction

1. This Legal Alert outlines the principal consequences of the Bill on shareholders' rights¹ and the Bill on a works council's right to present its opinion to the shareholders' meeting², as adopted by the First Chamber of the Dutch Parliament on 29 June 2010. The bills are in force as of 1 July 2010.

2. An Annex to this Legal Alert provides a comprehensive overview and a timeline outlining all relevant matters for a shareholders' meeting.

3. In this Legal Alert, the term "Dutch listed companies" refers to Dutch public companies with limited liability ("NVs") whose (depository receipts

for) shares are admitted to trading on a regulated market in the European Economic Area³.

Bill on shareholders' rights

4. The Bill on shareholders' rights implements the EU Directive on shareholders' rights⁴ which should have been implemented by 3 August 2009.

5. The most important amendments of the bill relate to an extension of the notice period and the record date. The notice for a shareholders' meeting of a Dutch listed company needs to be published not later than the 42nd day (currently 15th day) prior to the day of the meeting. This extended notice period is not yet recognised in the rules regarding a public offer on a listed company where a shareholders' meeting must be convened to discuss the offer and hence timing issues may come up. The bill sets a mandatory (participation and voting) record date for Dutch listed companies fixed at the 28th day prior to the day of the shareholders' meeting (currently flexible with a maximum of 30 days). These new dates will need to be reflected on a company's (financial) calendar on its website for 2011 and subsequent years.

¹ *Wijziging van boek 2 van het Burgerlijk Wetboek en de Wet op het financieel toezicht ter uitvoering van richtlijn nr. 2007/36/EG van het Europees Parlement en de Raad van de Europese Unie van 11 juli 2007 betreffende de uitoefening van bepaalde rechten van aandeelhouders in beursgenoteerde vennootschappen (PbEU L 184) (31 746)*

² *Wijziging van Boek 2 van het Burgerlijk Wetboek in verband met de invoering van een recht voor de ondernemingsraad van naamloze vennootschappen om een standpunt kenbaar te maken ten aanzien van belangrijke bestuursbesluiten en besluiten tot benoeming, schorsing en ontslag van bestuurders en commissarissen alsmede ten aanzien van het bezoldigingsbeleid (31 877)*

³ This Legal Alert assumes that an NV does not qualify as an investment institution.

⁴ Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

6. The bill provides that the notice for a shareholders' meeting of a Dutch listed company can be made via the company's website. Unless the company's articles of association provide otherwise, an announcement of the meeting no longer needs to be published in a Dutch daily newspaper.

7. Dutch listed companies will also need to take into account:

- the notice for a shareholders' meeting to include (i) the agenda, (ii) the place, date and time of the meeting, (iii) the procedure for proxies, (iv) if applicable, the procedure for participation in the meeting and exercise of voting rights by electronic means of communication, and (v) the company's website;
- the obligation to enable shareholders to submit proxies for a shareholders' meeting electronically;
- the requirement to record the voting results for each resolution adopted at a shareholders' meeting (i.e. record of shares that have been validly voted on, both as a number and as a percentage of the issued share capital, the total number of votes validly cast and the number of votes cast in favour and against the resolution as well as the abstentions). These results must be posted on the company's website not later than the 15th day following the day of the shareholders' meeting and should be available on the website for at least one year.

8. Furthermore, the bill requires Dutch listed companies to post the following information on their website not later than the 42nd day prior to the day of the general meeting:

- the notice for the meeting, stating the place, date and time of the meeting, the agenda and the right to attend the meeting;
- the aggregate number of shares and voting rights as per the date of the notice for the meeting. On the first business day following the record date Dutch listed companies should also publish the aggregate number of shares and voting rights as per the record date on

their website, if on the record date the aggregate number of shares and voting rights is different;

- documents to be presented to the general meeting, if any;
- draft resolutions presented to the general meeting, or if no draft resolutions are presented, an explanation by the management board with regard to each item to be considered at the shareholders' meeting;
- if applicable, draft resolutions submitted by shareholders with regard to items submitted by them that have been included in the agenda; and
- if applicable, a proxy form and a form regarding the voting prior to the shareholders' meeting by regular post.

The information should be available on the company's website for at least one year.

9. Finally, the bill provides some new rules with respect to the right of a shareholder to request a matter to be included on the agenda of a shareholders' meeting of an NV. The bill specifies that such a request needs to be substantiated. Under current law, a company may deny such a request on the ground of an overriding interest (*zwaarwichtig belang*). This possibility will be deleted, although the principles of reasonableness and fairness that govern corporate relations may allow the management board and the supervisory board to refuse to include a matter on the agenda under specific circumstances.

10. The explanatory notes to the bill specify that the request to include a matter on the agenda of a shareholders' meeting can only be included as a voting item to the extent that the general meeting has the authority to resolve on such matter. As an example, the authority to decide on the strategy lies with the management board and, if instituted, the supervisory board. Hence a request with respect to strategy should be requested and included only as a matter for discussion and not as a voting item.

Bill on a works council's right to present its opinion to the shareholders' meeting

11. The Bill on a works council's right to present its opinion to the shareholders' meeting provides for the right for the statutory works council of an NV (listed or non-listed) to be given sufficient time prior to the date of the notice for a shareholders' meeting to define its position on proposals to the general meeting, inter alia, to adopt:

- a resolution with regard to a significant change of the company's structure or identity as well as major acquisitions or divestments as referred to in section 2:107a Dutch Civil Code;
- a resolution to appoint, suspend or dismiss a member of the management board or supervisory board; and
- a (revised) remuneration policy for members of the management board.

The absence of a position of the works council on a proposal does not constitute a ground for nullification of the resolution.

12. The position of the works council must be presented to the general meeting together with the proposal concerned. In combination with the new notice period of at least 42 days for Dutch listed companies, the preparation of a shareholders' meeting with one of the topics referred to above on the agenda should start early.

13. At the shareholders' meeting the chair of the works council, or another member of the works council designated by him, is entitled to address the general meeting and explain the position of the works council.

14. When the NV itself does not have a works council, it may nevertheless be subject to the new rules. The bill extends the rights referred to above to works councils of subsidiaries, provided that the majority of the employees of the holding NV and its group companies are employed in the Netherlands.

15. If there is more than one works council, the works councils will collectively exercise their rights and if a central works council has been

established, the rights referred to above will vest in the central works council.

16. The bill includes a transitional provision; the new rules do not apply to shareholders' meetings to be held within 90 days following the entry into force of the new rules.

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Contact information

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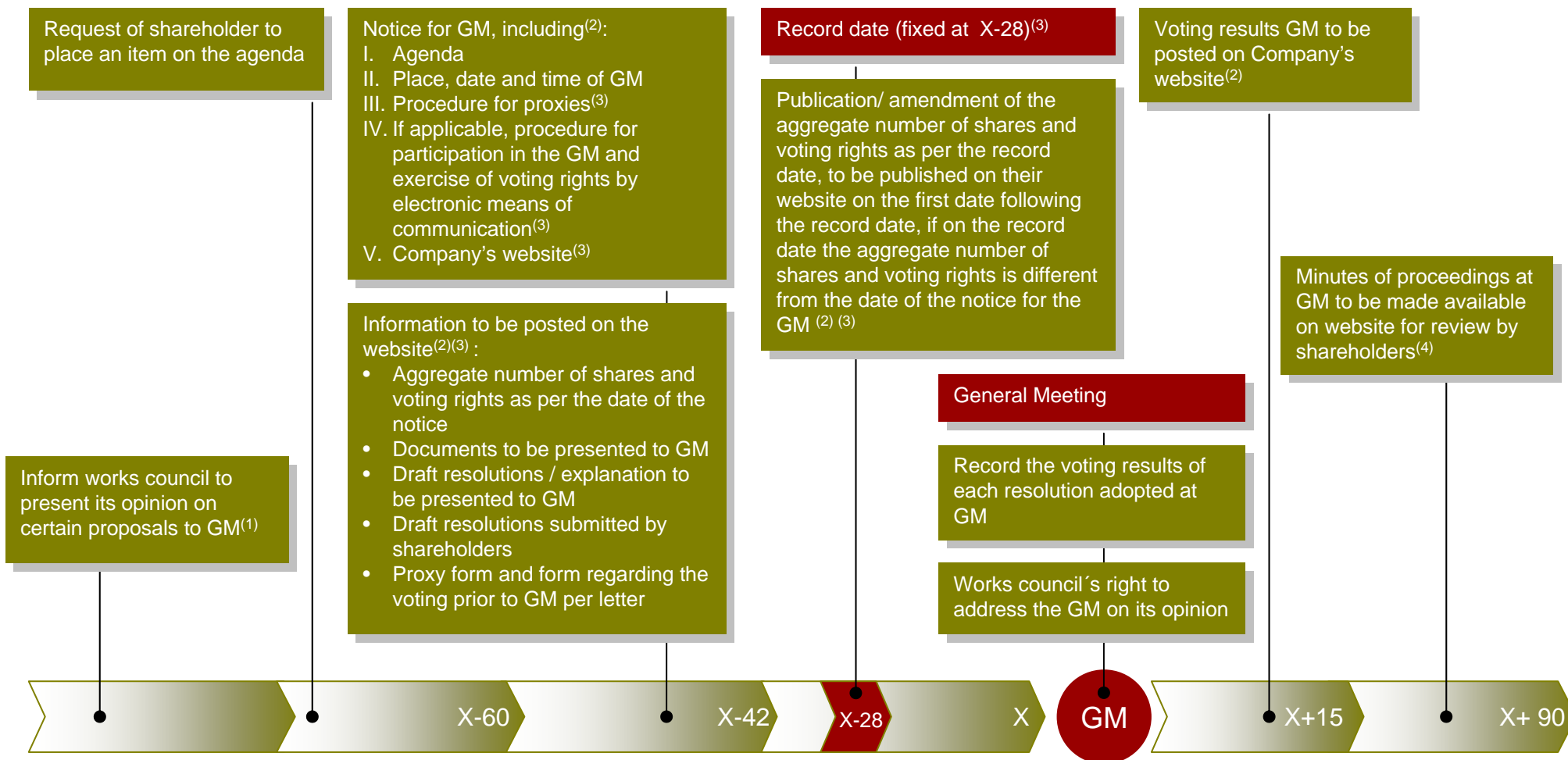
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Timeline General Meeting of Shareholders ("GM") (in days)



⁽¹⁾ The Bill on a works council's right to present its opinion to the GM provides for the right for the statutory works council to be given sufficient time to define its position on proposals to the GM prior to the date of the notice for the GM (X- 42), inter alia with regard to significant change of the company's character or identity (2:107a Dutch Civil Code), appointment, suspension or dismissal of managing and supervisory directors and resolutions with regard to the remuneration policy of management directors. Its position must be presented to GM together with the proposal concerned.

⁽²⁾ Information should remain to be available on the website for at least 1 year

⁽³⁾ Mandatory for Dutch listed companies

⁽⁴⁾ Shareholders shall have the opportunity to comment on the report in the 3 months following publication of report. Report to be adopted in the manner provided for in the articles of association and posted on the company's website (Best practice provision IV.3.10 Corporate Governance Code).