

Corporate

Newsletter

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The Netherlands | Laws and regulation

- General discussions in parliament on corporate governance
- Bill submitted to parliament implementing the Monitoring Committee's recommendations of 30 May 2007
- Legislation update

The Netherlands | Other

- Consultation on proposal to extend FMSA disclosure obligations to include economic long positions
- Outcome consultations concerning a market supervisor for takeovers
- Appointment of new Monitoring Committee
- Response DNB and AFM to Maas report
- Netherlands Bankers Association presents Banking Code
- Digital AFM newsletter on Supervision of Financial Reporting
- Eumedion publishes evaluation of 2009 AGM season

The Netherlands | Case Law

- Decision Enterprise Chamber in inquiry procedure Hermes *et al*/ASMI

Europe | Regulation

- Approval for Directive simplifying requirements for legal mergers and divisions
- Publication of proposed directive amending the Prospectus Directive and the Transparency Directive

The Netherlands | Laws and regulation

General discussions in parliament on corporate governance

On 3 September 2009, general discussions on corporate governance took place in the Second Chamber, which were based on a letter from the Minister of Finance dated 27 August 2009.¹ There is a report of the discussions, dated 24 September 2009.²

The Minister's letter – Update on legislative proposals concerning corporate governance

In his letter the Minister elaborates on various legislation initiatives in respect of corporate governance of companies, including listed companies. These are:

¹ Second Chamber 2008-2009, 31 083, no. 32.

² Second Chamber 2009-2010, 31 083, no. 35.

- a Bill implementing the recommendations of the Frijns Committee of 30 May 2007 (lowering the notification threshold, raising the threshold for the right to place items on the agenda and the identification and notification of intentions of shareholders). This Bill was submitted to the Second Chamber on 18 July 2009;³
- a Bill on management and supervision (one tier-board). This Bill is ready for plenary session discussions in the Second Chamber;⁴
- a Bill implementing the EU Directive on rights of shareholders. This Bill is ready for plenary session discussions in the Second Chamber;⁵
- a Bill limiting the amount of compensation paid upon dissolution of employment agreements by the court (cantonal division), where the annual salary exceeds €75,000. This Bill was submitted to the Second Chamber on 13 February 2009;⁶
- a Bill introducing the right for a works council to adopt a formal position with regard to important managing board decisions, the appointment and dismissal of managing directors and the remuneration policy and a right to speak at general meetings. The memorandum responding to the report (of the parliamentary discussion) of the Bill was adopted on 24 September 2009.⁷

A draft order in council designating the updated Corporate Governance Code of 10 December 2008 (Frijns Code) as the code of conduct to be observed was submitted to parliament on 13 July 2009.

A Bill on management and supervision (one tier-board) and a Bill implementing the Directive on shareholders rights are scheduled for joint discussion and plenary completion on 29 October 2009, together with a Bill on partnerships and a Bill to simplify and increase the flexibility of private company law.

³ Second Chamber 2008-2009, 32 014.

⁴ Second Chamber 2008-2009, 31 763.

⁵ Second Chamber 2008-2009, 31 746.

⁶ Second Chamber 2008-2009, 31 862.

⁷ Second Chamber 2008-2009, 31 877, no. 5.

Letter of Minister (in Dutch)

Report of general discussion on 3 September 2009

The matters dealt with during the discussion on corporate governance included the following:

- the Minister of Finance announced that there is going to be a Bill on long-term shareholders and that a public consultation process will start this autumn.
- the Cabinet is not going to incorporate into law the 180-day response time recommended in the updated Frijns Code. The existing statutory period of 60 days to have an item placed on the agenda will remain unchanged. In his letter, the Minister undertakes to submit to the Company Law Commission the issue of whether the 180-day response time is compatible with the Shareholders Rights Directive.
- the Minister undertakes to review, together with the new Monitoring Committee, a proposal to include in the Corporate Governance Code the rule that important management decisions can only be taken by listed companies if the majority of independent supervisory directors agree.

Bill submitted to parliament implementing the Monitoring Committee's recommendations of 30 May 2007

On 18 July 2009, a Bill was introduced amending the Financial Markets Supervision Act, the Securities Giro Transfer Act and the Dutch Civil Code in connection with the recommendations of the Monitoring Committee Corporate Governance Code (Frijns Committee) of 30 May 2007.⁸

The main changes proposed by the Bill are:

Disclosure of substantial shareholdings

In accordance with the Monitoring Committee's recommendations the Bill proposes lowering the threshold for mandatory disclosure by shareholders, from 5% to 3%.

⁸ Second Chamber 2008-2009, 32 014, no's 1-4.

Intentions of shareholders

In line with the Monitoring Committee's initial recommendations the Bill provides for an obligation for shareholders holding a stake of 3% or more to state their intentions, *i.e.* their views on the company's strategy. When it presented the amended Code Corporate Governance on 10 December 2008, the Committee reconsidered this recommendation and expressed doubts as to whether disclosure of intentions could be effective. The Cabinet, however, continues to support disclosure, arguing that it will promote dialogue between the various parties involved in the company.

Under the proposed arrangements shareholders with a 3% interest will have to make a "yes" or "no" notification.

A "no" notification means that the shareholder has no objections to the company's strategy. He/she must make the same notification if his/her position is neutral or if he/she has not yet formed a view. If the shareholder does object to the strategy, a "yes" notification must be made. This applies to shareholders who intend to actively express that view, either now or in the future, and who wish to exercise their shareholders rights to change the strategy.

A shareholder must notify the company immediately if he/she changes their view.

It is important for the exercise of these provisions that the shareholders are aware of the company's strategy. Accordingly, the Bill contains an obligation for the company to publish details of its strategy on the company's website.

Non-compliance by a shareholder or the company will be subject to an administrative fine or a penalty.

Identification of investors

As recommended by the Committee, the Bill introduces a system enabling the company to establish the identity of its shareholders. Irrespective of the interest held by the "investor" (this is the term used in the Bill) the issuing institution may, prior to a general or extraordinary

meeting, make an identification request to Euroclear Nederland, associated institutions (such as banks), brokers, institutions abroad and management companies of investment institutions. The cost of supplying the information is to be reimbursed by the company.

A shareholder representing, either individually or with others, at least 1% of the issued capital may provide information to other investors via the issuing institution. There are some limits that apply to the company providing the information. It may not send out information which:

- a. is manifestly incorrect, unclear or misleading;
- b. is aimed at circulating advertisements;
- c. has no connection with the policy or affairs of the company;
- d. is of such a nature that the company cannot reasonably be expected to send it.

Right to have items placed on agenda

In line with the Committee's recommendations, the Bill proposes raising the threshold for shareholders for placing items on the agenda of a general meeting, from 1% to 3%. In addition, the Bill completely removes the existing alternative for shareholders with shares representing a market value of at least € 50 million to propose agenda items.

Bill implementing recommendations of Monitoring Committee (in Dutch)

Legislation update

Bill amending supervision of legal entities

In May 2009, a Bill was submitted to parliament abolishing preventive supervision and improving and extending the monitoring of legal entities.⁹

The Bill proposes that the preventive supervision of legal entities by the Ministry of Justice be abolished. This means that a "statement of no objection" will no longer be required for the incorporation of an NV or BV, the conversion of a legal entity into an NV or BV, the amendment of articles of association or a legal merger or division of an NV or BV. Preventive supervision will be replaced by a system of continuous monitoring of

⁹ Second Chamber 2008-2009, 31 948, no's 1-5.

legal entities aimed at preventing and combating misuse of legal entities and facilitating the detection and prosecution of criminal acts which have been or may be committed through legal entities.

The system of continuous monitoring will apply to:

- legal entities with their registered office in the Netherlands (NV, BV, foundation, association with full legal capacity, cooperative, mutual insurance association, European NV, European cooperative company, European economic interest grouping)
- undertakings held by a foreign legal entity having its principal office or branch offices in the Netherlands.

A public company obtaining legal personality after the legislative proposals on partnerships take effect will not be subject to monitoring (the joint and several liability of the partners in the company will continue to exist).

Draft Financial Markets Amendment Act 2010

On 26 August 2009 a Bill was submitted to parliament amending the Financial Markets Supervision Act (FMSA) and other legislation.¹⁰ A number of amendments included in the Bill relate to problem areas flagged by supervisory authorities and market parties. The main amendments of the FMSA are:

- development and expansion of the mandatory exemption notice (the “*wild west sign*”). Parties offering financial products that are not subject to supervision have to state in information material that there is no supervision of the products. This obligation is extended to some offers of securities, for example concerning investments of at least € 50,000 or offers to fewer than a hundred persons.
- introduction of a voluntary supervisory regime for investment firms. If investment firms only offer their participation rights to qualified investors, a licence is not required. Some foreign institutional investors may only be allowed to invest in investment firms that are under supervision. The new regime will make it possible for investment firms to be supervised

voluntarily, which will make them open to these foreign institutional investors.

Draft Financial Markets Amendment Act (in Dutch)

The Netherlands | Other

Consultation on proposal to extend FMSA disclosure obligations to include economic long positions

On 1 September 2009, the Ministry of Finance began consultations with market parties, branch organisations and other relevant parties on a draft Bill amending the FMSA to extend the disclosure requirements for controlling and capital interests to include economic long positions.¹¹ The proposed amendment extends the disclosure requirements in the FMSA to include cash-settled financial instruments. These are financial instruments offering the holder an economic value which is dependent on the price increase of shares in a listed company (long positions), without the holder being able to make a legal claim on the (underlying) shares. In a takeover battle, in particular, substantial economic positions in listed companies may be secretly accumulated by using these instruments. Both the British and French supervisory authorities have taken action to include these instruments in the disclosure thresholds. This is also being discussed in Germany.

The consultation document contains a short questionnaire on whether it is desirable to create legislation providing that holders of substantial controlling and capital interests or economic long positions should also simultaneously disclose their (gross) short positions.

The consultation period has ended on 15 October 2009.

Consultation on Proposal to extend FMSA notification requirements to include economic long positions (in Dutch)

¹⁰ Second Chamber 2008-2009, 32 036.

¹¹ Second Chamber 2009-2010, 31 083, no. 34.

Outcome of consultations concerning a market supervisor for takeovers

In September last year, the Minister of Finance published a consultation document on the desirability of a market supervisor (*marktmeester*) in the Netherlands.

In his letter of 2 September 2009, the Minister informed parliament of the outcome of the consultations.¹²

Market supervisor

- the introduction of a market supervisor is unnecessary. The existing system with the Financial Markets Authority (AFM) and the Enterprise Chamber is adequate.
- There is a need for specific rules for hostile or competing bids which should not be developed through self-regulation but be laid down in statutory provisions.

Offer rules

The Minister considers certain further amendments of the offer rules desirable. His focus is on amendments which:

- concern streamlining of the bidding process by measures such as a “put up or shut up” provision;
- create more transparency before and during the bidding process;
- give more specific rules for the mandatory bid;
- lead to revision of the Securities Giro Transfer Act in connection with an orderly completion of the takeover process in situations involving buy-out or consignment.

The Minister anticipates publication of new draft rules in the first half of 2010.

Outcome consultation market supervisor (in Dutch)

Appointment of new Monitoring Committee

As of 1 September 2009, Mr Streppel took over from Mr Frijns as chair of the Monitoring Committee Corporate Governance Code. The Minister of Finance, also on behalf of the Ministers of Economic Affairs and Justice, has appointed a new Monitoring Committee Corporate Governance

Code for a period of four years starting on 1 September 2009. The new Committee will be comprised of: J.B.M. Streppel, H.C.J. van den Burg, J.H. Lemstra, J.A. van Manen, H.M. Prast, H.M. Vletter-van Dort and P. Wakkie.

Response Dutch Central Bank (DNB) and AFM to Maas report

Supervisors DNB and AFM have issued their advice on the report by the Maas Committee, “Restoring Trust”, of 7 April 2009. Both DNB and AFM welcome the report and have endorsed it subject to some comments.

DNB

The points mentioned by DNB include:

- recommendations in the report with regard to the expertise of managing and supervisory directors correspond with DNB’s own standards for assessing expertise, which are expected to be ready this year.
- a remuneration policy should be created for staff other than managing directors and this should be in line with the principles set by the supervisory authorities. Later this year, DNB will issue a detailed version of its principles for controlled remuneration policy.

AFM

The comments made by the AFM include:

- it endorses giving the client’s interests a central position but feels that this has not been developed. The AFM’s suggestions include setting up and implementing integral improvement programmes, focussing on client-orientated product development, distribution and advice.
- The relationships between shareholders, supervisory board and the company deserve more analysis; it should be ensured that the recommendations are in line with the Dutch Corporate Governance Code.

The Minister considers it necessary to take a closer look at client interests, in consultation with AFM and the financial sector. He expects to inform parliament on this in the first half of 2010.

Response DNB en AFM to Maas report (in Dutch)

¹² Second Chamber 2008-2009, 31 083, no. 33.

Netherlands Bankers Association presents Banking Code

The Netherlands Bankers Association adopted the Banking Code on 9 September 2009. The Code was drawn up in response to the report of the Maas Committee of 7 April 2009 ("Restoring Trust"). The recommendations set out in chapters 1 and 2 of the report have been incorporated into the Code.

Important elements of the Code are:

- a moral-ethical statement for bankers.
- principles with regard to expertise and permanent education (e.g. a banker's exam) whereby the duty of care for the customer forms an important element of the expertise requirements.
- principles for a careful, controlled and sustainable remuneration policy – in line with the Gentlemen's Agreement made on 30 March 2009 between the Minister of Finance and the majority of the financial sector – with special attention paid to non-financial performance criteria. Members of the managing board will be subject to the principle that variable remuneration will be limited to 100% of fixed income. Variable remuneration which has been wrongly paid out can be claimed back.

The *comply or explain* principle applies to the Banking Code. The Code applies to all banks with a banking licence granted pursuant to the FMSA. No distinction is made between activities taking place in the Netherlands or in another Member State or whether the activities are performed by a branch office. The Code contains principles which follow from the Dutch Corporate Governance Code.

The Banking Code will enter into force on 1 January 2010. Compliance with the Code will be monitored annually by an independent monitoring committee to be appointed by the Bankers Association in consultation with the Minister of Finance. Consultations will take place with the banking sector about the manner in which the Code is to be incorporated into the law.

[Banking Code](#)

Digital newsletter AFM on Supervision of Financial Reporting

The AFM issues a digital newsletter a few times a year summarizing developments in connection with its supervision of financial reporting. The newsletter of 13 July 2009 is almost entirely dedicated to the publication of six-monthly financial reporting and interim statements. Issues which are discussed include the manner in which statements can be made available and filed within the requisite time and the way in which statements have to be filed with the AFM, plus some items for consideration.

[Newsletter AFM \(in Dutch\)](#)

Eumedion publishes evaluation of 2009 AGM season

On 8 July 2009, Eumedion published its findings on the "Annual reports and shareholders meetings season 2009". Points mentioned in the evaluation are:

- institutional investors are increasingly critical about the structure of the remuneration policy for directors of listed companies;
- the number of votes cast at shareholders meetings of AEX companies is barely growing and institutional investors doubt if there is still any point in physically attending all shareholders meetings;
- the "discharge" agenda item is increasingly "used" by shareholders to express their dissatisfaction about the management's policy or the supervision conducted by the supervisory board.

[Eumedion evaluation \(in Dutch\)](#)

The Netherlands | Case law

Decision Enterprise Chamber in inquiry proceedings *Hermes et al/ASMI*

On 5 August 2009, the Enterprise Chamber rendered its second decision in the inquiry proceedings initiated by shareholders Hermes and Fursa against ASM International N.V. (ASMI). After the earlier decision of the Enterprise Chamber of

13 May 2009 the parties failed to reach agreement.¹³ Hermes *et al* maintained its earlier request to order an inquiry into the policy and affairs of ASMI.

The following aspects of this latest decision are noteworthy:

ASMI

In the view of the Enterprise Chamber, the following can be concluded about the state of affairs at ASMI:

- a picture emerged of a listed company which consistently failed to address its problems at a business strategy level or consistently tried to deal with these problems within the limited circle of its own executives (in particular, the CEO and supervisory directors) and major shareholders;
- in doing so, ASMI took a defensive and closed stance towards its other shareholders, which was supported by its outdated governance.

The Enterprise Chamber deemed such approach undesirable in view of the principles of proper management as these should be understood according to generally accepted practice.

Supervisory Board (SB)

According to the Enterprise Chamber, the SB:

- failed to fulfil its responsibilities with regard to creating transparency towards other shareholders.
- failed to adequately check whether expectations were raised with other shareholders that ASMI could not or would not fulfil.

In addition, the Enterprise Chamber is of the view that the SB culpably failed to fulfil its duty to mediate in conflicts between the managing board and the other shareholders (the conflict has continued for more than three and a half years without a satisfactory solution for the parties in question).

Stichting Continuïteit

The Enterprise Chamber ruled with regard to the affairs surrounding the anti-takeover preference shares of Stichting Continuïteit that in this case it is possible that Stichting Continuïteit shielded the current managing board and the current supervisory board in order to facilitate, within the limited circle of its own executives and major shareholders, a resolution of the problems that ASMI was experiencing at a business strategy and corporate governance level.

In its decision, the Enterprise Chamber orders an inquiry into the policy and affairs of ASMI.

Decision (in Dutch)

Europe | Regulation

Directive approved simplifying requirements for legal mergers and divisions

On 16 September 2009, Directive 2009/109/EC as regards reporting and documentation requirements in the case of mergers and divisions was adopted by the European Council and the European Parliament. The directive provides for amendments to existing rules in the European Union with a view to reducing the administrative burden on companies. The directive amends:

- the Second Company Law Directive (77/91/EEC) by reducing situations in which an independent expert report is required.
- the Third Company Law Directive (78/855/EEC regarding mergers of public companies) and the Sixth Company Law Directive (82/891/EEC regarding divisions of public limited liability companies) and the Directive on cross-border mergers (2005/56/EC), by excluding public limited liability companies from publication obligations under those directives where the draft terms of the merger or division are available (at no cost) on the website of the company.

The deadline for implementation into national law is 30 June 2011.

Directive

¹³ See Newsletter Corporate April & May 2009 for the Enterprise Chamber's decision of 13 May 2009.

**Proposal published for a directive amending
the Prospectus Directive and the Transparency
Directive**

On 23 September 2009, the European Commission published a proposal for a directive amending the Prospectus Directive (2003/71/EC) and the Transparency Directive (2004/109/EC). The amendments form part of an action programme to reduce the administrative burden imposed by existing rules in the European Union.

[Proposal for directive](#)

[Summary](#)

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