

Corporate

Newsletter

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Proposed revision of public offer rules

The Ministry of Finance has launched a consultation on amendments to the public offer rules. The proposed amendments arise from an earlier consultation on the desirability of introducing a market supervisor (*marktmeester*) in the offering process. It emerged from this earlier consultation that a market supervisor was unnecessary but that the public offer rules would benefit from some revision, i.e. (i) streamlining the offering process, (ii) increasing the transparency before and during the offering process, (iii) making the rules concerning mandatory offers more specific, and (iv) adjusting the rules on buy-out and consignment. The draft decrees submitted as part of the consultation address a number of these points:

- The *put up or shut up* rule is introduced
- The duty to make information generally available relating to the proposed, announced or launched public offer is more clearly set out
- The requirement that the offer price may be raised only once has been removed; in principle, the number of increases would be unlimited.

The consultation period ends on 26 July 2010.

[Consultation offer rules \(in Dutch\)](#)

Claw back of executive bonuses

Two draft bills have been published providing for revision and claw back of executive remuneration. The draft bills relate to bonuses awarded to executives of public limited liability companies (NVs) and financial enterprises. The new provisions also apply to a large extent to cooperatives, mutual insurance associations and private limited liability companies (BVs) if they can be considered to be financial enterprises.

In practice, the new provisions will enable the supervisory board in many instances to

- revise executive bonuses if payment were to be unacceptable according to standards of reasonableness and fairness. This power would also exist in the case of a public offer (change of control).
- claw back executive bonuses where payment was based on incorrect information or the underlying objectives have not been met.

Both draft bills were submitted to market parties and other interested parties for consultation. The consultation closed at the end of April and the Cabinet gave its approval to the draft bills at the end of May. The relevant links (in Dutch) are:

[News report cabinet](#)

[Consultation on proposed civil law provisions](#)

[Reactions of market parties to consultation on civil law provisions](#)

[Consultation on proposed financial law provisions](#)

Amendments by Second Chamber to company law bills

At the end of December 2009, a number of company law bills were passed by the Second Chamber of parliament:

- Bill on simplification and greater flexibility of private company law
- Bill implementing Directive on shareholders rights
- Bill on management and supervision
- Bill giving works councils a right to speak
- Bill on partnerships

In connection with these developments, De Brauw published a number of Legal Alerts in December 2009 and January 2010:

[Legal Alert Bill on management and supervision](#)
[Legal Alert New Dutch Legislation on Partnerships](#)
[Legal Alert Update Corporate Governance](#)

During the debate in the Second Chamber a number of significant amendments were made to the first three bills mentioned. The key changes are summarised below.

Bill on greater flexibility of private company law

- In the event of a merger or takeover or a public offer, the value of shares held by executives is to be frozen. An obligation has been introduced for executives to repay to the company any related increase in value.
- Managing board approval will be required for dividend payments to shareholders, and board members will be liable for unjustified payments of dividend.

A provision in the draft bill on claw back of executive bonuses gives supervisory directors the power to revise executive pay in the case of a change of control in connection with a public offer. The government intends for that provision to eventually replace the above provision on freezing the value of shares.

Bill implementing Directive on shareholders rights

- The registration deadline has been changed from 21 days to 28 days before the general meeting. The deadline for convening general meetings has been changed to 42 days before the meeting (this was 30 days). Both deadlines apply to annual and to extraordinary general meetings.

Bill on management and supervision

- The legal relationship between a managing director and a listed company can no longer be regarded as an employment contract.
- The number of supervisory positions that a managing director can hold is two. For a supervisory director, this number is five.

The maximum number of supervisory provisions applies only to managing and supervisory directors of "large" companies and foundations, i.e. meeting two of the following three criteria: (i) more than 250 employees, (ii) a net turnover of more than EUR 35

million, and (iii) assets with a value exceeding EUR 17.5 million.

The website of the First Chamber of parliament provides updates (in Dutch) on the various draft bills:

[*Bill on simplification and greater flexibility of private company law*](#)

[*Bill implementing Directive on shareholders rights*](#)

[*Bill on management and supervision*](#)

[*Bill giving works councils a right to speak*](#)

[*Bill on partnerships*](#)

Update on other bills

[*Bill amending preventive supervision of legal entities*](#)

Legislation to remove the preventive supervision and improve and extend the monitoring of legal entities was adopted by the Second Chamber in December 2009. The purpose of the bill is to replace the current system of statements of no objection in respect of new NVs and BVs by a system of continuous monitoring of legal entities.

[*Information on bill \(in Dutch\)*](#)

[*Amending bill in connection with advice of Corporate Governance Code Monitoring Commission of 30 May 2007*](#)

During the reading in the Second Chamber of this amending bill, the Minister discussed legislative options to promote long-term shareholding, such as awarding extra voting rights or dividend to loyal shareholders ("loyalty rights"). Roundtable discussions with managing and supervisory directors seem to suggest that little added value is expected from introducing loyalty rights. The next cabinet will have to decide whether or not to submit a bill on this point.

A memorandum of amendments has been submitted to correct a few omissions in the Corporate Governance Bill.

[*Amending bill \(in Dutch\)*](#)

[*Reading of various bills postponed*](#)

In view of the cabinet's caretaker role, discussions and decisions on a number of (controversial) bills and legislative proposals have been postponed

until a new cabinet has been appointed.

Controversial legislation includes the Financial Markets Amendment Act 2010 and new rules on public offers.

The reading in the First Chamber of various company law bills will proceed as normal, albeit at a slower pace.

[*Overview of controversial issues \(in Dutch\)*](#)

The Netherlands | Case law

Mismanagement of PCM in connection with accession of private equity investor

The Enterprise Chamber has ruled that there was mismanagement on PCM's part during a leveraged buy-out involving the accession of private equity investor APAX. The mismanagement related to:

- the leveraged buy-out (LBO). In view of the considerable financial burden placed on the target company, an LBO requires special attention of the managing board and the supervisory board, as well as of the acceding party.
- The management participation scheme introduced as part of APAX's accession. In particular, the supervisory board should have taken into account – and should have put to APAX and the managing board – that such a participation scheme in a newspaper company would unavoidably lead to considerable tension and damage to reputation. The managing board should also have advised against its introduction.
- the corporate governance policy conducted after the LBO took place. Elements of this policy were unsatisfactory.

On the basis of these findings the Enterprise Chamber reversed the shareholders resolutions discharging the managing directors and the supervisory board in the period 2004 -2007.

[*Ruling of 27 May 2010 \(in Dutch\)*](#)

Management responsible for strategy; mediating role of supervisory directors is limited (corporate inquiry ASMI)

The managing board determines a company's strategy. It is undesirable for the supervisory board

to have a compulsory role as mediator according to the opinion of the Advocate General in corporate inquiry proceedings against ASM International currently pending before the Dutch Supreme Court. In the Advocate General's view, the responsibility for strategy remains with the company's managing board, even if a different strategy is advocated by a large number of shareholders.

With regard to corporate governance, the Advocate General argues that each company is free to set up its (corporate) organisation as it sees fit. Where a company has applied the *comply or explain* principle to its deviations from the corporate governance code, the courts will exercise restraint in assessing the governance arrangements.

The Advocate General considers it undesirable under the current circumstances to give a mandatory mediation role to the supervisory board. However, the Advocate General does note that mediation could be appropriate in special situations, such as in cases of prolonged difference of opinion on an important issue between management and a major shareholder.

[Opinion Advocate General \(in Dutch\)](#)

Corporate governance and public offer (Océ takeover)

On 3 March 2010, the Enterprise Chamber gave its ruling in corporate inquiry proceedings arising in connection with Canon's public offer for the shares in Océ.

Following Canon's offer, Hermes and a number of minority shareholders had indicated that Canon's offer was too low and that they did not accept the proposed changes to Océ's corporate governance structure. As part of the public offer four of the six supervisory directors of Océ were to be replaced by supervisory directors affiliated with Canon. The changes to the corporate governance structure were passed in the extraordinary meeting of shareholders of Océ subject to the condition that Canon's offer would become unconditional. Hermes et al submitted a request to the Enterprise Chamber for a corporate inquiry into Océ and for immediate injunctive relief, including the reversal of the corporate governance changes. The

Enterprise Chamber denied the request for immediate injunctive relief and refused to order a corporate inquiry. According to the Enterprise Chamber, the chosen structure is not automatically in violation of good corporate governance. The four supervisory directors affiliated with Canon have a duty to be guided in their conduct by the company's interests. Moreover, two members of the "old" supervisory board will remain in office and can be regarded as sufficiently independent.

[Enterprise Chamber 3 March 2010](#)

The Netherlands | News

New Banking Code Monitoring Committee

This newly created monitoring committee will conduct an annual review of compliance with the Banking Code, which came into force on 1 January 2010. The members of the committee are: Antony Burgmans (chairman), Prof. Henriëtte Prast, Prof. dr Geert Raaijmakers, Prof. Kees Koedijk, and Willem Bröcker. The maximum term of appointment for committee members is three years. The monitoring committee will evaluate compliance on the basis of the *comply or explain* principle and report annually to the Minister of Finance and the Dutch Banking Association.

[Press release 24 March 2010 \(in Dutch\)](#)

AFM publishes brochure on disclosure obligations of investment firms

The AFM's brochure on disclosure obligations sets out information on current regulation. It also explains to investment firms the practical aspects of disclosing a suspicion of market abuse. If there is a reasonable suspicion that trading has taken place using inside information or that market manipulation has occurred, this should be disclosed to the AFM without delay.

[AFM brochure disclosure obligations February 2010 \(in Dutch\)](#)

AFM interpretation of public offer rules

The AFM has published a number of new interpretations with regard to various aspects of public offer rules. The interpretations concern:

- increasing the offer price

- continuing an offer as a mandatory offer
- the prohibition on potestative conditions

[AFM interpretations January 2010](#)

Europe | News

EU consultation on corporate governance and remuneration policy in financial institutions

The European Commission has launched a public consultation on ways to improve corporate governance in financial institutions, with a special focus on:

- improving the functioning and composition of the board to enhance their supervision of senior management;
- developing risk awareness at all levels in the institution, in order to ensure that long-term interests are taken into account;
- enhancing the involvement of shareholders, financial supervisors and external auditors in corporate governance matters;
- introducing remuneration policies to discourage excessive risk-taking.

The Commission's recommendations are set out in a green paper. The consultation period ends on 1 September 2010.

[Green paper 2 June 2010](#)

[Site European Commission](#)

Proposal for a shareholders duty to notify in connection with *empty voting*

The European Corporate Governance Forum has issued a statement with regard to empty voting and transparency of shareholders positions. The Forum proposes that shareholders who have voting rights but have ceded their financial interest in the underlying shares disclose their positions above a certain threshold. The Forum has considered whether votes cast by shareholders without an economic interest in the shares should be declared null and void, but it does not recommend this at present. Instead, it prefers disclosure as a way to create an insight into these types of positions.

The European Corporate Governance Forum advises the European Commission on corporate governance matters.

[Statement ECGF 20 February 2010](#)

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