

# Legal Alert

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## Update on Corporate Governance for Dutch listed companies

19 January 2010

### Introduction

This legal alert is a follow-up to our legal alert “Update on Corporate Governance for Dutch listed companies” of 28 January 2009 (the “**2009 Legal Alert**”)<sup>1</sup> and outlines the principal developments in the field of corporate governance of Dutch listed companies in 2009. 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 Area<sup>2</sup>.

This legal alert also provides guidelines on the notice and agenda for the 2010 annual general meeting (the “**2010 AGM**”).

### Overview 2009

#### Decree on Corporate Governance

In line with the Directive amending the EU Directives on annual accounts and consolidated

annual accounts<sup>3</sup>, the statutory requirements on the corporate governance statement of, among others, Dutch listed companies were extended on 1 April 2009 by governmental decree<sup>4</sup> (the “**April 2009 Decree**”). The April 2009 Decree amends the governmental decree of 24 December 2004<sup>5</sup> (the “**2004 Decree**”) and provides that the corporate governance statement of a Dutch listed company also needs to include:

- a statement on the compliance with principles and best practices addressed to the company’s management board or supervisory board of any other code of conduct that the company voluntarily applies and all relevant information on corporate governance practices

<sup>3</sup> Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending the Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings

<sup>4</sup> *Besluit van 20 maart 2009 tot wijziging van het Besluit van 23 december 2004 tot vaststelling van nadere voorschriften omtrent de inhoud van het jaarverslag, ter uitvoering van Richtlijn 2006/46/EG van het Europees Parlement en de Raad van 14 juni 2006, tot wijziging van de Richtlijnen 78/660/EEG, 83/349/EEG, 86/635/EEG en 91/674/EEG betreffende de jaarrekening en de geconsolideerde jaarrekening (PbEU L 224), Stb. 2009, 154*

<sup>5</sup> *Besluit van 23 december 2004 tot vaststelling van nadere voorschriften omtrent de inhoud van het jaarverslag, Stb. 747*

<sup>1</sup> The 2009 Legal Alert can be downloaded from [www.debrauw.com](http://www.debrauw.com).

<sup>2</sup> Please note that this legal alert assumes that an NV does not qualify as an investment institution.

applied other than pursuant to statutory provisions;

- a reference to the place where the text of the Corporate Governance Code and any other code of conduct that the company voluntarily applies is available for the public;
- a statement on the main features of the internal risk management and control systems in relation to the company's financial reporting process and of the group of which the financial data are included in the company's annual accounts;
- the functioning of the general meeting of shareholders and its principal powers as well as the rights of shareholders and how such rights can be exercised, where this is not explicitly provided for by law;
- the composition and functioning of the management board and the supervisory board and their committees; and
- to the extent that the Decree on Article 10 of the Takeover Directive<sup>6</sup> applies to the company; a statement on certain information required pursuant thereto as well as the information on those who, under the articles of association, have a special right of control over the company.

In its audit on the consistency of the annual report with the annual accounts the auditor should take into consideration the statement on the main features of the internal risk management and control systems as well as the statement on certain information required under the Decree on Article 10 of the Takeover Directive and the information on special rights of control over the company. With regard to the other information to be included in the corporate governance statement, the auditor should verify whether such information is indeed included.

The April 2009 Decree furthermore provides that the corporate governance statement, instead of

being incorporated in or attached to the annual report, may also be published electronically provided that the annual report refers to the place of publication, in which case the statement will be deemed to be incorporated in the annual report.

The new requirements apply to financial years started on or after 1 April 2008.

### Rulebook II of Euronext Amsterdam

Book II of the Euronext Rulebook, the General Rules for the Euronext Amsterdam Stock Market ("**Rulebook II of Euronext Amsterdam**") was amended on 1 July 2009. As a result of the amendment, all information that Dutch listed companies with a listing on Euronext Amsterdam are required to disclose to the public under the provisions of chapter A 2-7 of Rulebook II of Euronext Amsterdam as well as the listing agreement of the company concerned, must be published in the manner prescribed by the Financial Markets Supervision Act (*Wet op het financieel toezicht*) (the "**FMSA**")<sup>7</sup>. The obligation to publish notifications in the Dutch Daily Official List (Officiële Prijscourant) and in a Dutch daily newspaper no longer applies.

### 2008 Corporate Governance Code

The governmental decree<sup>8</sup> as referred to in article 391, subsection 5 of Book 2 of the Dutch Civil Code (*Burgerlijk Wetboek*) (the "**DCC**"), entered into force on 1 January 2010. The decree amends the 2004 Decree (as amended by the April 2009 Decree) and designates the Dutch Corporate Governance Code (the "**Corporate Governance Code**") as presented by the Monitoring Committee Corporate Governance Code on 10 December 2008 as code of conduct. The decree applies to financial years that started on or after 1 January 2009. This means that a Dutch listed company that wishes to declare in its 2009 annual report that it is in compliance with the Corporate Governance Code, should have been in compliance in 2009.

<sup>6</sup> *Besluit van 5 april 2006 tot uitvoering van artikel 10 van Richtlijn 2004/25/EG van het Europees Parlement en de Raad van de Europese Unie van 21 april 2004 betreffende het openbaar overnamebod (Besluit artikel 10 overnamerichtlijn)*, Stb. 2006, 191

<sup>7</sup> For a more detailed overview of publication requirements under the FMSA, please see our 2009 Legal Alert.

<sup>8</sup> *Besluit van 10 december 2009 tot wijziging van het Besluit van 23 december 2004 tot vaststelling van nadere voorschriften omtrent de inhoud van het jaarverslag (Stb. 747)*, Stb. 2009, 545

## Update on Corporate Governance for Dutch listed companies

The apply or explain principle is maintained, except for those provisions of the Corporate Governance Code that are a reflection of mandatory Dutch law.

The most significant changes to the Dutch Corporate Governance Code relate to:

- corporate social responsibility;
- risk management;
- the role of the management board and the supervisory board in takeover situations;
- remuneration of the management board;
- the role of the supervisory board and diversity in its composition;
- responsibility of shareholders;
- response period regarding shareholders' requests; and
- provision of information to the general meeting.

For a more detailed overview please see our 2009 Legal Alert or our handbook "Corporate Governance in Nederland" volume 2, a copy of which can be obtained through your contact person at De Brauw Blackstone Westbroek.

### Bill on shareholders' rights

The Bill on shareholders' rights<sup>9</sup> was adopted by the Second Chamber of the Dutch Parliament on 8 December 2009 and was sent to the First Chamber of the Dutch Parliament for further debate. This bill will implement the EU Directive on Shareholders' Rights<sup>10</sup> which should have been implemented by 3 August 2009.

As to the general meeting, the bill provides, among other things, for:

- a request of a shareholder to place an item on the agenda for a general meeting to be substantiated;

<sup>9</sup> *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)*

<sup>10</sup> 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

- a publication of the notice for a general meeting of a Dutch listed company on the company's website as general rule (i.e., no longer an announcement in a Dutch daily newspaper as statutory requirement, unless the articles of association provide for this). This applies to both Dutch listed companies with registered shares as well as Dutch listed companies with bearer shares;
- the notice for a general meeting to be published not later than the 42<sup>nd</sup> day prior to the day of the meeting<sup>11</sup>;
- the notice for a general meeting of Dutch listed companies to include (i) the agenda, (ii) the 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 for Dutch listed companies to enable shareholders to submit proxies electronically;
- a mandatory record date for Dutch listed companies fixed at the 28<sup>th</sup> day prior to the day of the general meeting<sup>12</sup>; and
- the requirement for Dutch listed companies to record the voting results for each resolution adopted at the general 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 abstentions). These results must be posted on the company's website not later than the 15<sup>th</sup> day following the day of the general meeting and should be available on the company's website for at least one year.

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

<sup>11</sup> The Directive of Shareholders' Rights is less strict and refers to the 21<sup>st</sup> day.

<sup>12</sup> The Directive of Shareholders' Rights is less strict and provides that the period between the notice of the meeting and the record date should be at least 8 days.

- the notice for the meeting;
- the aggregate number of shares and voting rights as per the date of the notice for the meeting. If on the record date the aggregate number of shares and voting rights is different, 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 (the FMSA will be amended accordingly);
- 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 general 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 general meeting by post.

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

### **Bill on management and supervision**

The Bill on management and supervision<sup>13</sup> was adopted by the Second Chamber of the Dutch Parliament on 8 December 2009 and was sent to the First Chamber of the Dutch Parliament for further debate.

#### ***One-tier board***

This bill introduces statutory provisions on the one-tier board structure (i.e. a single board comprising both executive and non-executive directors) as an alternative to the two-tier board structure (i.e. a management board and a separate supervisory board). The one-tier board structure will also be available for companies that are subject to the structure regime.

The tasks of the executive and non-executive directors may be allocated under or pursuant to the articles of association, provided that the task to supervise the performance by the directors of their duties cannot be taken away from non-executive directors. Furthermore, an executive director may not be allocated the tasks of (i) chairman of the board, (ii) fixing the remuneration of executive directors or (iii) recommending directors for appointment. Nor may an executive director participate in the adoption of resolutions (including deliberations in respect of these) with regard to the remuneration of executive directors. Tasks that have not been allocated fall within the power of the board as a whole.

In view of potential liability of directors, especially non-executive directors as regard the day-to-day management, it is imperative that the tasks within the one-tier board are allocated precisely.

#### ***Binding nomination***

It is proposed that the requirement that a binding nomination for the appointment of a member of the management board or supervisory board consists of at least two persons for each vacancy be abolished.

#### ***Conflict of interest***

The bill will amend the statutory provisions on conflicts of interest of members of the management board. Whereas current law provides for a restriction of the power of members of the management board to represent the company externally, the bill departs from the external effect and proceeds on the principle that conflicts of interests have to be dealt with internally. It provides that a member of the management board may not participate in the adoption of a resolution (including deliberation in respect of these) if he/she has a direct or indirect personal conflict of interest with the company. If all members of the management board have a conflict of interest, the resolution concerned will be adopted by the supervisory board. Failing a supervisory board, the resolution will be adopted by the general meeting, unless the articles of association provide

<sup>13</sup> *Wijziging van Boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen (31 763)*

otherwise. A similar provision applies to members of the supervisory board.

The proposed provisions on conflicts of interest are in line with the provisions on conflicts of interest included in the Dutch Corporate Governance Code.

### *Limitation of managing/supervisory director positions*

The bill puts limitations on the number of managing/supervisory director positions that a managing director or a supervisory director of an NV, BV or foundation that qualifies as a large company (“**Large Company**”) may hold. An NV, BV or foundation qualifies as a large company if it meets at least two of the following criteria:

- a. the value of the assets according to the balance sheet with explanation is, on the basis of purchase and production price, more than EUR 17.5 mln;
- b. the net turnover is more than EUR 35 mln;
- c. the average number of employees is 250 or more.

The bill provides that a person may not be managing director of a Large Company if he/she holds more than two supervisory positions with Large Companies or if he/she acts as chairman of the supervisory board, or in the case of a one-tier board, the management board of a Large Company.

Furthermore, the bill provides that a person may not hold a supervisory position with a Large Company if he/she holds five or more supervisory positions with Large Companies. Acting as chairman in a supervisory position will count twice. Having a supervisory position in a group company of a legal entity will not be counted when addressing the question of whether someone may be appointed as managing director or supervisory director of that legal entity.

A transitional regime will be provided for. A person may continue in his/her position who, at the time of the act entering into force, holds more positions

than is allowed. The new rule will apply, however, to re-appointments or new appointments.

### *No employment agreement*

Under current law, usually a double legal relationship exists between a managing director and a Dutch listed company; a company law relationship and an employment agreement with the Dutch listed company. According to the bill, the legal relationship between a managing director and the Dutch listed company will no longer be considered as an employment agreement. This does not mean that there will be no agreement between a managing director and a Dutch listed company. What the nature of such agreement will be, however, does not follow from the bill or the explanation thereto. There are various scenarios imaginable, one of which is an agreement “sui generis”, or an agreement of assignment. The new rules will apply to new situations only; existing employment agreements will be grandfathered.

### *Gender diversity*

The bill includes provisions on a well-balanced participation of men and women in the managing boards and supervisory boards of NVs and BVs that qualify as Large Companies. The bill provides that at least 30% of the seats should be held by men and at least 30% of the seats should be held by women, insofar as the seats are allocated to natural persons.

If a Large Company does not comply with the rules on gender diversity, it is required to set out in its annual report (i) why the seats are not allocated in a well-balanced manner, (ii) how the company has attempted to achieve a well-balanced allocation and (iii) how the company aims to achieve a well-balanced allocation in the future.

If an NV or BV acts as managing director (“**Managing Director Legal Entity**”) of an NV or BV that qualifies as a Large Company, the above also applies to the Managing Director Legal Entity as well as to each NV and BV that acts as managing director of such Managing Director Legal Entity.

The provisions on gender diversity will apply for a limited period only; they will cease to be effective as per 1 January 2016.

### Q&As

For a list of Q&As on the topics “Limitation of managing/supervisory director positions” and “No employment agreement”, please see our legal alert “Bill on management and supervision” of 21 December 2009<sup>14</sup>.

### Bill on simplification and flexibilisation of the law applicable to private companies with limited liability

The Second Chamber of the Dutch Parliament adopted the Bill on simplification and flexibilisation of BV-law<sup>15</sup> on 15 December 2009. The bill was sent to the First Chamber of the Dutch Parliament for further debate. Since the general purpose of the bill concerns a simpler and more legal framework for private companies with limited liability, discussion of the bill falls outside the scope of this legal alert. One topic, however, applies to Dutch listed companies and is therefore addressed below.

#### *Freezing of the value of shares and option rights held by managing directors*

The Bill on simplification and flexibilisation of BV-law provides that if (i) a Dutch listed company announces that it has adopted a resolution with regard to a significant change of the company’s character or identity as referred to in article 107a, subsection 1 sub a, b or c of Book 2 DCC or (ii) a public offer is announced for a Dutch listed company, the value of the shares and option rights with regard to the Dutch listed company concerned held by its managing directors, will be fixed by the supervisory board four weeks (by close of the stock exchange) prior to such event. Four weeks following the resolution, or in the case of a public offer, four weeks following the termination of the public offer, the value of the shares and option

rights of the managing directors will once again be fixed by the supervisory board. If the value has increased compared to the first fixing of the value of the shares and option rights, the managing directors concerned must pay the difference to the Dutch listed company. When and how repayment is to take place is at the company’s discretion, which can make arrangements with the managing director(s) concerned in that respect.

The new rule was adopted by the Second Chamber of the Dutch Parliament as a supplement to the new rules on conflicts of interest as included in the Bill on management and supervision. The Second Chamber of the Dutch Parliament takes the view that managing directors of a Dutch listed company holding shares or option rights in such company should not be tempted to take their own financial interest into consideration when assessing transactions as referred to above.

The proposed text of the new rule appears to have been drafted in a rather over-simplified fashion. In light of the above and the fact that the proposed rule is rather controversial, it is uncertain whether and if so, in what form the new rule will be enacted.

#### **Bill on a works council’s right to speak**

The Bill on a works council’s right to speak<sup>16</sup> was adopted by the Second Chamber of the Dutch Parliament on 8 December 2009 and was sent to the First Chamber of the Dutch Parliament for further debate.

The bill provides for the right for the statutory works council of an NV to be given sufficient time prior to the date of the notice for the general meeting, to define its position on proposals to the general meeting, among other things, to adopt:

<sup>14</sup> This legal alert can be downloaded from [www.debrauw.com](http://www.debrauw.com).

<sup>15</sup> *Wijziging van Boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van de regeling voor besloten vennootschappen met beperkte aansprakelijkheid (Wet vereenvoudiging en flexibilisering bv-recht) (31 058)*

<sup>16</sup> *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)*

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- a resolution with regard to a significant change of the company's character or identity as referred to in article 107a DCC;
- 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 position of the works council must be presented to the general meeting together with the proposal concerned. This means that upon entry into force of this bill and the Bill on shareholders' rights, providing for a notice period of 42 days, Dutch listed companies should begin in good time with the preparation of general meetings with one of the topics referred to above on the agenda.

At the general meeting the chairperson of the works council, or another member of the works council designated by the chairperson, can explain the position of the works council.

The bill includes a definition of works council and extends the rights referred to above to works councils of subsidiaries, provided that the majority of the employees of the NV and its group companies are employed in the Netherlands. 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.

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

### Bill on corporate governance

The bill implementing the recommendations of the Monitoring Committee of 30 May 2007<sup>17</sup> (the "**Bill on corporate governance**") is currently under

consideration by the Second Chamber of the Dutch Parliament.

The bill applies to, among others, Dutch listed companies and provides, among other things, for:

- a change in the disclosure obligations for shareholders regarding their voting and capital interest (i.e. decrease of the first threshold from 5 to 3 percent);
- the obligation to post a company's strategy on its website;
- the obligation for shareholders holding 3 percent or more voting or capital interest to inform the public whether or not they object to the company's strategy;
- the possibility and, if requested by one or more shareholders holding at least 10 percent of the shares, the obligation for Dutch listed companies with a listing on Euronext Amsterdam to discover the identity of their shareholders;
- a system for communication between (the company and its) shareholders with respect to Dutch listed companies with a listing on Euronext Amsterdam; and
- an increase in the threshold for shareholders to place items on the agenda for the general meeting (i.e., increase from 1 to 3 percent and abolishment of the supplementary right to put items on the agenda for holders of shares representing a value of at least EUR 50 mln).

### 2010 AGM

#### Notice of meeting

Most Dutch listed companies already apply a record date for general meetings. Upon enactment of the Bill on shareholders' rights, a record date will be mandatory. It could be considered applying a record date for the 2010 AGM which, in line with the Bill on shareholders' rights, is set at the 28<sup>th</sup> day prior to the day of the meeting. However, if the articles of association still refer to a record date to be set no earlier than at the 7<sup>th</sup> day prior to the day of the meeting, the company concerned should comply with this 7<sup>th</sup> day requirement.

<sup>17</sup> *Wijziging van de Wet op het financieel toezicht, de Wet giraal effectenverkeer en het Burgerlijk Wetboek naar aanleiding van het advies van de Monitoring Commissie Corporate Governance Code van 30 mei 2007 (32 014)*

If the general meeting has not authorised the management board to set a record date and the articles of association do not provide for such authorisation, a record date may not be set.

Furthermore, Dutch listed companies could consider complying with the Bill on shareholders' rights and include the information referred to in that bill in the notice of the meeting.

### **Agenda**

#### *General*

Pursuant to the Corporate Governance Code, Dutch listed companies should:

- specify in the agenda for the general meeting which items are for discussion and which items are to be put to a vote;
- present material changes to the articles of association as separate voting items;
- present proposals to appoint members of the management board or supervisory board as separate voting items; and
- publish the main elements of the employment contract of a member of the management board not later than when convening the general meeting in which he/she is nominated for appointment.

In order to comply with the Corporate Governance Code, Dutch listed companies should draw up their agenda for the 2010 AGM in line with these requirements and publish the main elements of the employment contract of any candidate member of the management board on their website.

#### *Items to be placed on the 2010 AGM agenda*

Besides the regular items that Dutch listed companies put on their agenda for the annual general meeting, please find below an overview of additional items regarding the agenda for the 2010 AGM.

In the preamble to the Corporate Governance Code, Dutch listed companies are recommended to put the corporate governance chapter regarding the main features of their corporate structure and their compliance with the Corporate Governance

Code included in the annual report on the agenda for the 2010 AGM as a separate discussion item.

As described above in this legal alert, the Corporate Governance Code includes revised best practice provisions regarding the remuneration of members of the management board. Dutch listed companies should assess whether their remuneration policy complies with such best practice provisions and if not, consider presenting a revised remuneration policy for adoption at the 2010 AGM.

Dutch listed companies should assess whether their articles of association are still up to date. We have identified possible amendments to the articles of association of Dutch listed companies reflecting the developments addressed in this legal alert and would be pleased to provide further advice in this respect.

#### **Information at the 2010 AGM / Information to be posted on a company's website**

Pursuant to the FMSA, Dutch listed companies must inform their shareholders of the aggregate number of outstanding shares and voting rights. Such information should be made public not later than at the opening of the 2010 AGM. The Bill on shareholders' rights includes the obligation to publish the aggregate number of shares and voting rights as per the date of the notice for the meeting on the company's website not later than by the 42<sup>nd</sup> day prior to the day of the meeting (the future latest day on which to send out the notice for the meeting) and if on the record date the aggregate number of shares and voting rights is different, also on the 27<sup>th</sup> day prior to the day of the meeting (the day following the future mandatory record date). We advise to publish such information on the company's website as per the day of the notice of the 2010 AGM, and if on the record date the aggregate number of shares and voting rights is different, also on the day following the record date. We also advise to orally inform the general meeting at the beginning of the 2010 AGM of the number of shares and voting rights represented at the meeting.

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As referred to above, the Bill on shareholders' rights also provides that certain information regarding the general meeting and the voting results must be published on the website of Dutch listed companies. In anticipation of the Bill on shareholders' rights being enacted, Dutch listed companies could consider complying with these requirements.

### Contact information

Should you have any questions concerning the subject of this legal alert, please contact your contact person at De Brauw Blackstone Westbroek or any of the following individuals.

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