SHAREHOLDERS' AND BOARD MEETINGS AND COVID-19: THE NETHERLANDS

This article discusses the impact that the 2019 novel coronavirus disease (COVID-19) pandemic has had on shareholders' and board meetings for Dutch companies.

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With the second wave of 2019 novel coronavirus disease (COVID-19) in sight, it is safe to conclude that the changes to day-to-day life brought by the pandemic may continue for quite some time. Along with crucial matters, such as health care and social welfare, that require immediate attention, the "new normal" also impacts ordinary business, not only from a general economic perspective, with entire sectors shut down or suffering from minimised customer flows, delayed supply chains and so on, but also from a practical perspective.

Guidelines on social distancing and avoiding crowded gatherings that have been adopted around the world are one of the key COVID-19 changes that has had practical consequences on business life. These rules also hinder the convening of mandatory corporate meetings, such as board meetings and general meetings of legal entities. In the Netherlands, the first half of the calendar year is referred to as the "GM-season" since public limited companies (including listed companies) are required to hold their general meetings within six months from year end. This year's GM-season coincided with the first global wave of COVID-19 lockdowns and caused management to act promptly and in a creative manner. For limited liability companies, at least one general meeting per year needs to be convened. Apart from meetings needing to be held due to statutory law requirements, the pandemic has also required, and still requires, crisis-management for many companies, and corporate meetings often provide the best platform for discussing the prompt actions that need to be taken.

This article provides an overview of the impact COVID-19 has had on Dutch corporate meetings for Dutch limited companies, namely the:

- Public limited company (*naamloze vennootschap*), or NV.
- Limited liability company (*besloten vennootschap*), or BV.

Specifically, the Dutch government has implemented a temporary bill of law to facilitate corporate meetings of Dutch legal entities that are facing practical limitations due to the pandemic. In this regard, the Netherlands has followed several other EU members states that have implemented similar laws, such as Germany, France, Luxembourg, Italy and Spain.

ADOPTION OF TEMPORARY ACT COVID-19

Following intense lobbying by Dutch employers' and investors' organisations, the Dutch Senate (*Eerste Kamer*) approved the Temporary Act COVID-19 Justice and Security (*Tijdelijke wet COVID-19 Justitie en Veiligheid*) (Temporary Act) on 21 April 2020. This emergency act was proclaimed with retroactive effect back to 23 March 2020, which means that the Temporary Act also applies to both:

- Meetings that were held before the date the Act was adopted.
- Meetings for which the convocation notices had already been circulated by the date of the Act's adoption.

The Temporary Act was due to expire on 1 September 2020. However, by a Royal Decree of 28 September 2020, the Dutch government extended the Temporary Act's validity until 1 December 2020. Given the current resurgence of COVID-19, it has been extended again until 1 February 2021, and it may be further prolonged. Extensions of the Temporary Act do not require any formal legislative procedure but can be effected unilaterally by the government based on a Royal Decree.

The Temporary Act provides a temporary solution for corporate meetings of BVs and NVs and also for meetings of other Dutch legal entities. In addition, the Temporary Act regulates other legal issues that require prompt attention due to COVID-19, such as provisions for prolonging the statutory period for drafting and adopting the annual accounts, for virtual court hearings and on executing notarial deeds virtually. This article focuses on virtual meetings of the BV and the NV only.

CORPORATE MEETINGS PRE-COVID-19

To understand the impact of the Temporary Act, one must understand what the applicable rules were pre-COVID-19.

Dutch law requires that at least one general meeting of shareholders (general meeting) per year is convened for the BV and the NV. The main purpose of the meeting is to discuss the financial statements of the preceding financial year. The scope of the agenda usually includes the discharge of the management board (and, if installed, the supervisory board), as well as the appointment of the accountant. For the NV, the general meeting must be held during the first six months of a financial year; for the BV, this may be more flexible. Typically, general meetings are preceded by board meetings (both management and, if applicable, supervisory boards).

Since 2007, Dutch corporate law has, to a certain extent, already enabled general meetings to be held electronically (*Book 2, Dutch Civil Code*). That previous change of law allows for the articles of association of the BV or NV to contain provisions which permit shareholders to participate in and vote by electronic means in a general meeting. However, this right is an additional option for shareholders; they are still permitted to attend physically. Therefore, these meetings are considered hybrid meetings; in addition to being able to participate electronically, there is still a physical meeting held at a certain location with board members physically present.

Although Dutch corporate law permits hybrid general meetings where electronic attendance is optional, not all BVs and NVs have amended their articles of association to allow for this. For these companies, partial electronic general meetings are not an option at all.

Since the pandemic's arrival, a problem may now arise where a shareholder is not allowed access to a physical meeting because, for example, the meeting location has been closed due to a lockdown. The shareholder could object to an electronic meeting being held without a physical meeting option. A Dutch court might determine the electronic resolutions passed at the meeting to be voidable.

However, the Dutch corporate law principle of "reasonableness and fairness" (*Article 2:8, Dutch Civil Code*) may help here. Based on this principle, a restriction of a shareholder's right might be considered as reasonable and fair and the electronic resolutions valid in the given circumstances (for example, where no meeting location is available). However, most companies would of course prefer instant legal certainty and not to depend on litigation and case law.

Furthermore, Dutch corporate law does not provide specific provisions on management and supervisory board meetings and whether these can be held via electronic means, in a manner similar to general meetings. Where the articles of association or the specific board regulations (if in place, they are rules which govern practical management issues) do not permit virtual board meetings, the leading opinion is that these would only be allowed if all board members agree to them. However, it is not standard practice for board regulations or articles of association to contain clauses which require meetings to be held only physically, so this leaves room for electronic alternatives. The issue of being limited to physical meetings only is therefore mostly an issue for general meetings.

IMPACT OF THE TEMPORARY ACT ON CORPORATE MEETINGS

The Temporary Act facilitates, on a temporary basis, virtual meetings of management boards and supervisory boards and virtual general meetings for all BVs and NVs, regardless of what their articles of association or internal board regulations may have in place. Other corporate meetings are not covered by the Temporary Act, such as meetings of depositary receipt holders or holders of specific shares. In these instances, management boards may need to continue to be creative, applying as necessary the abovementioned principle of reasonableness and fairness.

The Temporary Act imposes conditions on establishing the validity of virtual meetings and specifically permits deviations from existing statutory law. Within the scope of these changes, the Dutch legislator has made a distinction between one-way electronic communication (such as email, website, and audio stream) and two-way communication (such as video conference calls).

Virtual general meetings

General meetings can be held virtually only, without the granting of any physical access to shareholders, and can conclude in the passing of legally valid shareholders' resolutions, if the following conditions are met:

- If a company chooses to have a virtual general meeting (which is optional and not mandatory for the company because it is permitted to convene a physical meeting), this must be explicitly indicated in the notice of general meeting.
- After a notice of general meeting has been issued, the management board can circulate an amended notice for a virtual meeting if it gives shareholders at least 48 hours' advance notice. This may, for instance, be applicable if the (physical) location of the intended general meeting has been cancelled at the last minute due to a lockdown. The amended notice of general meeting must be sent in the same form as the original notice of general meeting (for example, it cannot be sent by email if the original notice was sent by post).
- Shareholders must be enabled to join (in person or by proxy) the general meeting via electronic means (which can be either one-way or two-way), for instance via livestream.
- Shareholders must be permitted to raise questions on agenda-items before the meeting, either in writing or electronically. Questions can be sent up to 72 hours before the meeting. In case of a last-minute change to the manner the meeting will be held (second bullet point above), questions may be filed up to at least 36 hours before the start of the meeting. Questions not related to agenda items cannot be filed based on the Temporary Act. The management board, when receiving such out-of-scope questions, may choose to refuse to reply to such questions based only on the Temporary Act or based also on reasonableness and fairness.
- The questions raised must be responded to during the meeting (whether or not thematically), and the responses must be published on the company's website or made accessible to all shareholders via other electronic means. An alternative would be for the management board to circulate before the meeting its responses to the questions raised. In any event, shareholders must be able to consider the responses before voting.
- The company must allow for questions to be posed during the meeting, for instance electronically (one-way or two-way, for example, via chat), unless this would be unreasonably burdensome (for instance, if there are too

many shareholders). The Temporary Act differentiates here between the NV and the BV. For NVs, there seems to be an obligation to enable raising questions, but for BVs the Temporary Act requires the management board to use its best efforts. However, both are subject to dispensation if it proves to be "unreasonably burdensome". This differentiation might raise questions, especially since NVs can have large numbers of shareholders (especially listed companies), which could complicate IT logistics even more. For both the NV and the BV, the Temporary Act requires that only shareholders who sent questions before the meeting are allowed to pose questions (either pre-submitted or different questions) during the meeting.

The chairman of the meeting (typically the president of the management board) is, as with "normal" general meetings, responsible for procuring an orderly and efficient meeting and for procuring a certain dialogue. For virtual meetings, this may imply that the chairman is authorised to manage the exchange of questions and to end discussions which would, in practice, for instance, imply closing of a chat portal.

Validity of virtual resolutions

Voting at a virtual meeting can either be done in advance (for instance, by email) or during the meeting (such as via chat or raising hands via Zoom). The manner of voting must be stated in the notice convening the meeting. A company may opt to limit voting to only voting before the meeting. According to the legislator, enabling electronic voting during a meeting (especially in the case of multiple shareholders or listed companies) can be regarded as too burdensome for a company. Votes that are cast in advance shall be deemed votes cast at the meeting.

Although a virtual general meeting has similar legal validity as a "normal" physical or hybrid meeting, technical connection malfunctions may occur (such as with the internet or telephone) and have a different disruptive impact on a virtual meeting than on a physical or hybrid meeting. However, even if a malfunction implies that one or more shareholders have not been able to participate properly in the meeting, the Temporary Act states that this does not affect the validity of the resolutions passed at the meeting. Similar rules apply in case not all questions raised have been properly answered, for instance because the chairman closed the chat portal. The organisation of a virtual meeting can be regarded as a "best effort" undertaking of the management board and has to be seen against the background of the (temporary) crisis-character of the Temporary Act. However, this flexibility of the Temporary Act should not be regarded as a carte blanche to management to limit or exclude shareholders from participation by simply stating that the IT did not function properly. Indeed, this would be regarded as contrary to (among others) the abovementioned principle of reasonableness and fairness. Shareholders continue to have the (statutory) right to meet and to vote during the Covid-19 pandemic.

In addition, resolutions adopted in a virtual meeting are deemed valid, regardless of whether the articles of association permit this type of meeting. Not all articles of association of Dutch BVs and NVs allow for (partial) electronic meetings yet (see *Corporate meetings pre-COVID-19*). The possibility of convening virtual meetings therefore clearly sets aside applicable law and articles of association.

However, the above does not provide absolute certainty for the validity of all resolutions. For example, if, when the Temporary Act entered into force, an invitee to the general meeting had already invoked the nullity of resolutions because these were not adopted in a physical meeting which was pre-Temporary Act mandatory, those resolutions would not suddenly become valid resolutions because of the Temporary Act.

VIRTUAL BOARD MEETINGS AND RESOLUTIONS

The temporary changes to general meetings have been brought about mainly by the Temporary Act. However, meetings of the management or supervisory board have been granted less attention by the Dutch legislator. For these meetings, the Temporary Act simply states that, should there be any obstructions in the articles of association which would prevent virtual meetings, these may be set aside based on the Temporary Act. The reason for this brief attention is due to the fact that board meetings are only briefly addressed in Dutch corporate law, which leaves quite some flexibility for a company in terms of how these meetings are organised. This contrasts with the more detailed regulations applicable to the organisation of general meetings.

The Temporary Act is more far-reaching regarding board resolutions. Articles of association commonly contain provisions which prescribe that resolutions of the management board require the prior approval of another

statutory body, such as the supervisory board or general meeting. This may especially be the case with joint-ventures or companies with minority shareholders. Under the Temporary Act, a BV and NV may disregard such limitations in its articles of association. The legislator's reasoning is that, in times of crisis, management should be able to act swiftly and not be hindered by internal hurdles.

FUTURE OUTLOOK FOR VIRTUAL CORPORATE MEETINGS

Since the Temporary Act is intended to solve a (hopefully) short term crisis situation only, one may question what the long-term outlook for corporate meetings is.

Most listed companies are already experienced in voting electronically and organising general meetings via live stream. They will likely proceed with these and will even fine-tune their virtual meetings further.

For smaller companies, the matter of virtual meetings may be less of an issue because:

- Physical meetings do not pose any significant health, safety or IT issues. For example, if there are just one or two shareholders, keeping a social distance is not likely an issue, and the organisation of a virtual meeting may also be more straightforward.
- Smaller companies already mostly resolve matters by means of circular (written) resolutions.

However, for BVs and NVs with multiple shareholders and less experience in organising virtual meetings, this new normal may cause some practical issues, especially from an IT perspective. Matters like IT security, GDPR and so on will suddenly become issues to be dealt with as a part of corporate matters.

However, some companies had already, even before the Temporary Act had been adopted, organised hybrid meetings in accordance with their articles of association and were urgently requesting their shareholders to opt for electronic voting, given the circumstances. Time will tell if shareholders will indeed adopt the new normal, or if they will prefer to be physically present when that is again possible. Much will depend on whether companies can successfully adapt technology to enable a robust debate to take place virtually as if shareholders were attending a physical meeting.

To date, what is clear is that a further postponement of general meetings until life returns to normal is no longer an option. With the further spread of COVID-19 and possible upcoming lockdowns, companies that have not done so already will need to resolve to hold their meetings. One specific point of action, if it has not been done already, is to amend the articles of association to enable (at least) hybrid meetings, including for their provision post-COVID-19.