

The Netherlands: Works council's right to express an opinion on certain proposed shareholder resolutions

On 9 December 2009, the lower chamber of the Dutch Parliament adopted a bill granting the works council of a public limited liability company (*naamloze vennootschap*, an "NV") the right to express an opinion on certain proposed resolutions of the NV's general meeting of shareholders, both before or at the meeting at which the relevant resolution will be discussed. The right will apply with respect to resolutions:

1. to approve a management decision regarding an important change in the identity or character of the NV or its business within the meaning of Article 2:107a (1) of the Netherlands Civil Code (new Article 2:107a (3));
2. to adopt the remuneration policy for management board members (new Article 2:135 (2) of the Netherlands Civil Code);
3. to appoint, suspend or remove a management board member or supervisory board member in the NV provided it is not subject to the "structure regime" (new Article 2:134a and 2:144a of the Netherlands Civil Code, respectively); and
4. to appoint or nominate supervisory board members if the NV is subject to the "structure regime" (new Article 2:158 (4) of the Netherlands Civil Code).

The bill applies to all NVs, both listed and unlisted. The works council (represented by its chairperson or a member he/she has designated) will be entitled to have its opinion on the relevant proposed resolution included with the notice convening the meeting at which the resolution will be handled. At the meeting itself, the works council will be entitled to take the floor for the purpose of explaining its opinion.

Under the bill, the company's management board must inform the works council of the proposed shareholder resolution in good time before the date on which the notices convening the relevant meeting will be sent. According to the explanatory memorandum to the bill, this generally means at least 30 days before that date. The minimum notice period for convening a

general meeting of shareholders of listed companies is now 15 days but, under a bill expected to enter into effect at the same time as the works council bill, will become 42 days. This means that any proposed resolutions must be ready at least 72 days before the date of the meeting. The 30-day period is relatively long; in practice the works council is usually given less time to render its advice when it is consulted pursuant to Article 25 of the Works Councils Act (*Wet op de ondernemingsraden*).

The works council will not be obliged to exercise its right to express an opinion, either in full or at all. For example, it can also choose to refrain from submitting an opinion in writing and limit itself to speaking at the meeting. However, as the explanatory memorandum to the bill points out, since many shareholders vote by proxy in advance of the meeting, a works council that waits to express its opinion until at the meeting will severely limit its influence on the decision-making.

The bill applies only to works councils that have been established pursuant to a statutory obligation. Under the bill, the term "works council" includes the works council of a (direct or indirect) subsidiary of the NV in question, provided that a majority of all the employees of the companies in the group, taken together, work in the Netherlands. This means, strictly speaking, that in a group which includes more than one NV, a works council can have the right to express an opinion at different levels, depending upon which companies in the group have established a works council.

According to Mr Kalma of left-wing political party PvdA, in practice the new rules will only apply to a few works councils. In this context he refers to a survey carried out by *Stichting Multinationale Ondernemingsradenoverleg*, an organisation whose members include the works councils of 43 Dutch multinationals, which showed that the new rules will only apply to 9 of those 43 multinationals.

The bill also provides that the failure by the works council to express an opinion on a proposed shareholder resolution will not affect its validity. Various legal and other commentators have criticised the bill as a "harmless monster" and questioned whether it really adds anything to the works council's existing consultation right under the Works Councils Act. Nevertheless, some commentators contend that a shareholder resolution could be voidable, on the grounds of the principles of reasonableness

and fairness, if the works council has been unable to exercise its right to express an opinion on the resolution.

A consequence of the current bill is - as stated in the explanatory memorandum - that for NVs subject to the "structure regime", the works council's right to express an opinion on certain proposed shareholder resolutions will not apply to a resolution to suspend or remove supervisory board members (because this is subject to a special procedure in which the works council's position does not need to be strengthened). Moreover, the right will not apply to the appointment, suspension or removal of management board members (because these are not effected through a resolution by the general meeting of shareholders). If a company is, however, subject to a "mitigated structure regime", the latter decisions will, however, require a shareholder resolution, and therefore the works council's right to express an opinion will apply.

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