

# News Update

## TWO NEW LAWS REINFORCE RIGHTS OF DUTCH COMPANIES' SHAREHOLDERS AND WORKS COUNCILS

### I. Act implementing the Shareholders' Rights Directive

On 29 June 2010, a bill on the implementation of the EC Shareholders' Rights Directive (Directive 2007/36/EC) into Dutch law was passed by the Dutch senate and became law on 1 July 2010. The Act is intended to increase shareholder participation in Dutch public companies (NVs). The amendments increase transparency, proxy voting rights, participation in shareholders' meetings and the exercise of cross-border voting rights. The rules will apply to both annual and extraordinary general meetings of shareholders.

#### Notice requirements and mandatory record date

The statutory period for convening a general meeting of shareholders of an NV whose shares are admitted to trading on a regulated market in the European Economic Area ("**listed NV**") is extended from 15 days to 42 days. This measure is meant to enable shareholders to better prepare for a meeting and provide additional time for discussions with other shareholders and the company.

This extended notice period does not apply to NVs whose securities are listed on a stock exchange outside the European Economic Area, e.g. the New York Stock Exchange.

Listed NVs will be required to post the following information on their websites not later than the 42nd day prior to the meeting:

- the aggregate number of shares outstanding and relating voting rights;
- notice of the meeting;
- the documents and draft resolutions to be submitted to the meeting; and
- if applicable, a proxy form and a form enabling voting via mail.

A listed NV can now make its notice of a general meeting available on its website and will no

longer be required to be published such notice in a Dutch national daily newspaper, unless the articles of association provide otherwise. On 1 July 2009, Euronext Amsterdam had already abolished the requirement to publish the notice in the Official Price List (*Officiële Prijscourant*).

The notice of general meeting of shareholders of an NV (listed or unlisted) will have to include the agenda, the date and time of the meeting, and the procedure to be followed for the appointment of proxy-holders. Furthermore, in case of a listed NV, the notice will have to include the company's website address and, if provided for in the articles of association, the procedure to be followed for participating and voting by electronic means.

Most listed NVs already voluntarily set a "record date", determining who is entitled to vote at a particular general meeting of shareholders. The use of a record date will now become mandatory. For every listed NV the record date will be the 28th day before the general meeting of shareholders. The previously mandatory share-transfer restrictions for those shareholders wishing to attend a general meeting of shareholders of a listed NV will cease to apply as a result of the mandatory record date.

Listed NVs will have to record the voting results for each resolution and post them on the company's website within 15 days of the general meeting of shareholders. This will include:

- the number of shares that were validly voted, as well as the percentage of the issued share capital;
- the total number of votes validly cast; and
- the number of votes cast in favour of the resolution, the number of votes cast against the resolution and the number of abstentions.

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## Electronic voting requirements

Listed NVs will be required to enable shareholders to submit their proxies electronically.

A listed NV will still be allowed to set conditions for the use of electronic means. However, any such conditions will have to be reasonable, based on the NV's articles of association, and necessary for the identification of the shareholder and the reliability and security of communications.

## Agenda rights

If a shareholder of an NV (whether listed or not) requests an item to be placed on the agenda of a general meeting of shareholders, the shareholder will have to provide a rationale with the request. It will no longer be possible for an NV to deny such a request on the grounds that the NV has a serious interest that conflicts with the requested agenda item and which interest should prevail (*zwaarwichtig belang*). There will now be only two possible grounds for refusing a request to place an item on the agenda: "reasonableness and fairness" and "abuse of law". Having said this, the explanatory notes explicitly provide that a request to put an item on the agenda can only be included as a voting item to the extent that the general meeting of shareholders has the authority to pass resolutions on it. This means for instance that any items related to the strategy of a company cannot be included on the agenda as a voting item, as the authority on issues relating to the strategy are vested in the management board and, if available, the supervisory board. However, the item can be put on the agenda as a point for discussion.

A corporate governance bill still pending in the Dutch parliament includes proposed amendments to the rules on who has the right to have items placed on the agenda. If the bill is enacted, the threshold will be increased from shareholders (jointly) owning one per cent of the issued capital to three per cent. The supplementary right granted to listed-NV shareholders representing a value of at least €50 million will be eliminated.

## II. Act strengthening the rights of NV Works Councils

Pursuant to the Act, adopted on 29 June 2010 and entered into force on 1 July 2010, a statutory works council of an NV (whether listed or unlisted) will have the right to submit to the general meeting of shareholders – along with the notice convening the meeting – its views on:

- a resolution relating to a significant change of the company's structure or identity, including any resolutions on major acquisitions or divestments as referred to in Section 2:107a of the Dutch Civil Code;
- a resolution to appoint, suspend or dismiss a member of the management board or supervisory board; and
- a resolution to adopt the NV's remuneration policy or any changes thereto.

The works council must be given sufficient time prior to the date of the notice of the general meeting of shareholders to express its views. This means that for listed NVs the preparations for a general meeting of shareholders with any of the above proposals on the agenda, taking into account the new 42-day notice period for listed NVs, will take significantly longer than was the case to date.

The chairperson of the works council or any other member designated by the chairperson has the right to explain the position of the works council in the general meeting of shareholders. If the works council does not express its position (or its position is adverse), the resolution can nevertheless be validly passed.

If the NV does not have a works council, the rights under this Act may be exercised by the works council of a subsidiary of the NV if 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 rights must be exercised jointly. If a central works council has been formed, the rights will be vested in this central works council.

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These new rules will not apply to a general meeting of shareholders held within 90 days following the Act coming into force.

**FOR FURTHER DETAILS, PLEASE CONTACT:**

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