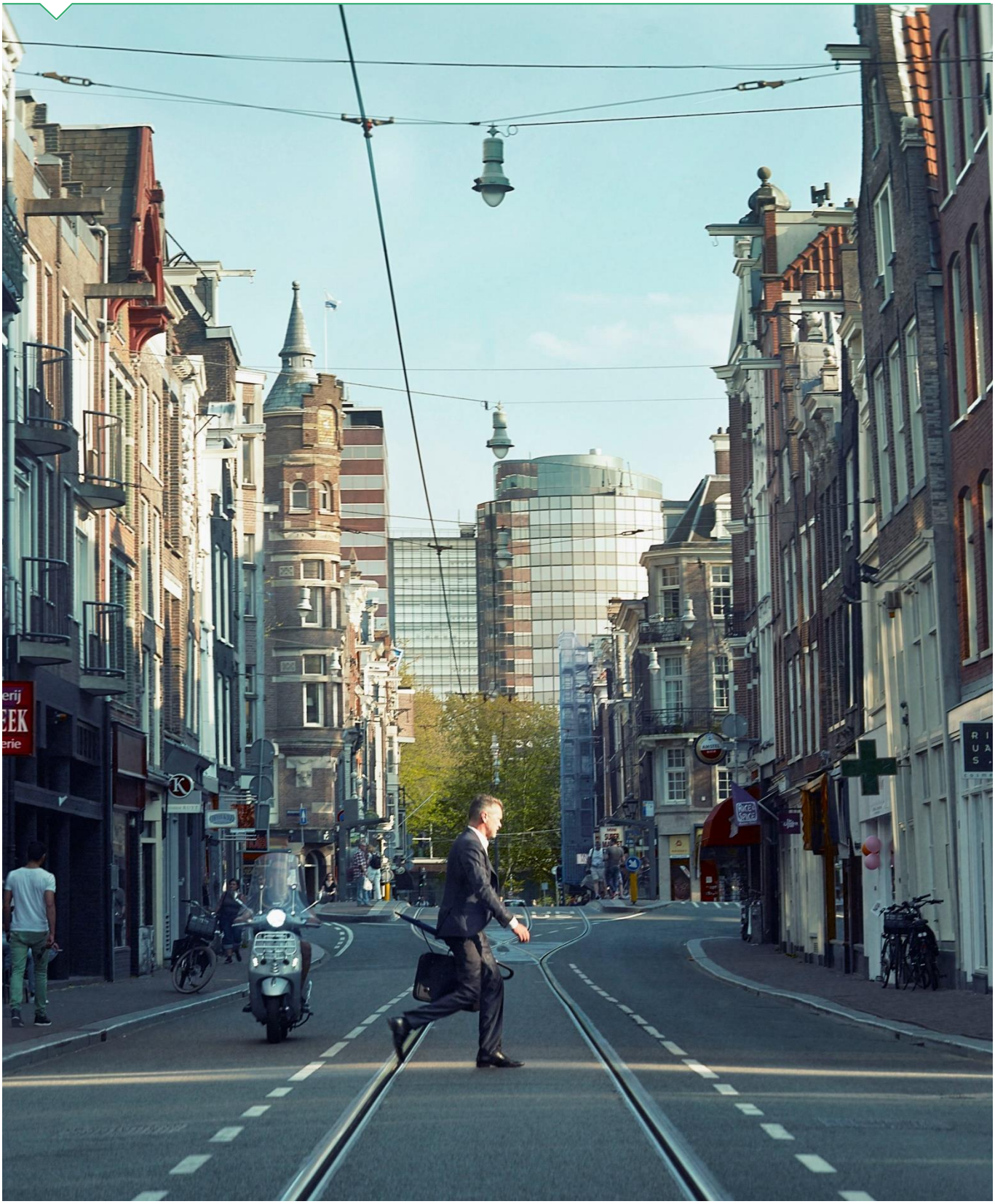
Stibbe | Corporate Update | February 2021



16 February 2021

Recent developments: Dutch corporate law

This is our biannual newsletter about certain main developments in Dutch corporate law. In this Corporate Update we provide an overview of the implementation of the Dutch UBO Register, we mention the entry into force of the WHOA and we discuss current developments regarding (foreign) investment control and the bill concerning gender diversity at the top.

Implementation of the Dutch UBO register

The Act to implement the Dutch Ultimate Beneficial Owner ("UBO") register (the "UBO register") took effect (in part) from 8 July 2020. This concerns:

1. the obligation for legal entities to internally collect and maintain information about their UBOs;
2. the obligation of the UBO to cooperate with a request for information from such a legal entity; and
3. the obligation for foundations to maintain a register in which the names and addresses are registered of all persons to whom payments have been made that represent 25% or less of the sum that may be distributed in a particular fiscal year.

The obligation for legal persons to register the UBO information in the Dutch UBO register and the related obligations entered into force on 27 September 2020.

UBO or pseudo-UBO

A UBO is a natural person who ultimately owns or controls the entity. There can be more than one UBO for a single entity. A Governmental Decree (*Uitvoeringsbesluit Wwft 2018*) defines which individuals must in any event be considered a UBO in various scenarios.

If the UBO cannot be determined under these rules and there are no anti money laundering suspicions or if there is uncertainty regarding the identity of the UBO, the senior management will be considered UBOs (so-called "pseudo-UBOs"). Under Dutch law the natural person(s) who are managing director(s) will be regarded as senior management.

Public UBO register

Certain information on UBOs will become publicly available: the UBO's name, month and year of birth, country of residence, nationality and the nature and size of the interest held. Other information (address, date, place and country of birth, Dutch BSN, fiscal tax number and a copy of the filed UBO documentation) is not public and can only be accessed by certain competent authorities and the Financial Intelligence Unit.

In individual and exceptional situations, the Trade Register can be requested to restrict the publicly accessible information; however, the list of exceptions is very strict and limited.

Timing

There is a transition period of 18 months to submit the relevant UBO information to the Trade Register. Existing legal entities are therefore obliged to submit a UBO declaration before 27 March 2022. However, Dutch companies to be newly incorporated must register their UBO information prior to the first registration of the new company with the Trade Register. The Trade Register uses this transition period for administrative purposes; this includes sending of a letter to all existing entities. In this letter, the Trade Register will explain the UBO registration in more detail.

What happens if the UBO information is not provided?

Not complying with these rules may result in an administrative or criminal sanction for the legal entity and the UBO.

For more information, please see our **newsletter** of 23 June 2020.

WHOA entered into force on 1 January 2021

On 1 January 2021, legislation entered into force in the Netherlands introducing a framework allowing debtors to restructure their debts outside formal insolvency proceedings: the Act on Confirmation of Private Restructuring Plans (*Wet homologatie onderhands akkoord - "WHOA"*)). This highly anticipated Act incorporates features of the US Chapter 11 regime and the English Scheme of Arrangement and is, as such, sometimes referred to as the "Dutch Scheme". The Dutch Scheme provides businesses with the opportunity to arrange financial restructuring outside formal insolvency proceedings by means of a court-approved restructuring plan.

For more information, please see our **previous blogs** on the Dutch Scheme. In these blogs we have summarised the key aspects, in which situations the Dutch Scheme can be used, who can make use of it and what action is required and the high degree of of flexibility that is offered by the Dutch Scheme. Our latest blog on the Dutch Scheme discusses how classes are created in the process of voting.

Developments regarding (foreign) investment control

There have been various developments regarding (foreign) investment control.

Telecommunications Sector Undesirable Control Act entered into force

On 1 October 2020, the Telecommunications Sector Undesirable Control Act entered into force.

The purpose of this act is to prevent parts of the vital Dutch telecom sector ending up with foreign parties acting on the basis of geopolitical motives. To this end, an obligation to notify the Dutch Minister of Economic Affairs and Climate (*Minister van Economische Zaken en Klimaat - "EZK*") has been introduced for parties wishing to take over a Dutch telecommunications company and who could exercise relevant influence in the telecommunications sector after the takeover. If EZK is of the opinion that predominant control by a certain party may lead to a threat to the public interest, EZK imposes a prohibition on holding or acquiring such control, with or without suspensory conditions.

Foreign Direct Investments screening

The **Regulation** establishing a framework for the screening of foreign direct investments into the Union (Regulation 2019/452 – "FDI Regulation") is applicable as of 11 October 2020.

The FDI Regulation creates a cooperation mechanism between Member States and the European Commission ("EC") to facilitate the exchange of certain information on acquisitions or investments from third countries that form a risk to the public order of a Member State. This information includes the ownership structure, the value of the investment and the financing and source of the investment. Furthermore, the FDI Regulation confirms that Member States ultimately decide if a particular acquisition or investment is permitted in their territory.

On 4 December 2020, the Dutch Act that establishes the necessary legal measures to implement the FDI Regulation entered into force. The act stipulates that EZK is the contact point in the Netherlands, determines which ministers are responsible for taking decisions under the cooperation mechanism and stipulates how the responsible ministers can obtain the information described in the FDI Regulation in order to fulfill the requirements following from the Regulation and take the necessary decisions.

Screening of takeovers and investments for economy and national security

Another proposal through which the Dutch legislator intends to introduce a screening mechanism as referred to in the FDI Regulation is the draft bill economic and national security screening (*Wet toetsing economie en nationale veiligheid*).

This draft bill introduces a screening mechanism, with the aim to control risks to national security arising from certain economic activities (such as investments and takeovers) involving vital processes and critical infrastructure or companies that are active in the field of high-quality sensitive technology.

A notification obligation to EZK arises for certain activities referred to in the draft bill. After notification, EZK will assess, based on the circumstances included in the draft bill, whether the activity leads to the realisation of one or more risks to national security.

Part of the legal framework for screening will be introduced with retroactive effect as of 2 June 2020. This means that activities that fall under the scope of the draft bill that have taken place between 2 June 2020 and the moment of entry into force of the final act will have to be notified if EZK has a suspicion, based on reasonable grounds, that the activity in question could pose a risk to national security. These activities will not have to be notified of their own accord. Those under an obligation to report on their own initiative must report in-scope activities that take place after entry into force of the final act.

EZK will take a decision based on this investment test and various measures may be taken, including prohibiting the reported activity or imposing certain requirements for the activity.

The bill is currently under preparation and not yet submitted to the House of Representatives. The Council of Ministers agreed to the bill on 18 December 2020, after which the bill was sent to the Council of State (*Raad van State – "RvS*") for advice. This advice will be published together with the bill.

Amendment of Book 2 of the Dutch Civil Code in connection with the invocation of a cooling-off period by the board of a listed company

The bill to amend Book 2 of the Dutch Civil Code in connection with the invocation of a cooling-off period by the board of a listed company is under review by the Upper House.

Because of this legislative amendment, the management board of a listed company may invoke, under certain conditions mentioned in the bill, a statutory cooling-off period of a maximum of 250 days in two situations, which the board deems substantially contrary to the interests of the company and its business. These two situations are:

a. a request by shareholders for consideration of a proposal for the appointment, suspension or discharge of one or more directors or supervisory directors or a proposal for the amendment of one or more provisions in the articles of association relating thereto, or
b. an announced or launched public offer for shares in the capital of the company without agreement having been reached with the company about the offer (a hostile offer).

Invoking the cooling-off period has the effect of suspending the power of the general meeting to appoint, suspend or discharge executive and supervisory directors and to amend the articles of association in this respect.

The board must use the cooling-off period to obtain all necessary information for careful policy determination.

It is still unclear when the law will enter into force.

Bill concerning gender diversity at the top published

On 11 February 2021, the bill for balancing the male/female ratio in the top of large companies was adopted by the House of Representatives.

Firstly, the bill introduces a statutory diversity quota of at least one-third male and one-third female for supervisory boards of Dutch listed companies listed on Euronext Amsterdam. As long as the supervisory board is not composed of at least one-third men and at least one-third women, an appointment that does not make the division more balanced shall be null and void.

In addition, large NVs and BVs[1] must set ambitious and appropriate goals in the form of a target to promote gender diversity on the management board, supervisory board and for employees in managerial positions (e.g. the executive committee or senior management positions) to be determined by the company[2]. The company should draw up a plan to achieve the set targets.

Third, the large company must report annually within ten months of the end of the financial year, in a defined format to the Social and Economic Council (*Sociaal Economische Raad – "SER"*) on the number of men and women on the board, the supervisory board and senior management positions at the end of the financial year. Furthermore, reports with certain information regarding the objectives in the form of a target are made. The Decree on the content of the management report (*Besluit inhoud bestuursverslag*) will include an obligation to include this information in the management report.

The proposed regulation replaces the Dutch statutory target scheme that was abolished on 1 January 2020.

[1] An NV or BV qualifies as a large company if its financial statements meet at least two of the following tests for two consecutive years: a balance sheet total greater than 20 million euros, net sales greater than 40 million euros and more than 250 employees.

[2] Large listed companies set appropriate targets in the form of a target for the board and senior management because of the diversity quota for the supervisory board.

Progress of the bill

The RvS advised on the bill and concluded that the introduction of a diversity quota for supervisory boards of listed companies is inconsistent with the prevailing case law of the Court of Justice of the European Union ("ECJ"). In any case, the RvS recommended contacting the EC on this issue. A note on the report published on 18 January 2021 provides that the government does not intend to enter into contact with the EC, because according to the government, this is a matter for the member states and the final say on the interpretation of EU law lies with the Court of Justice and not with the EC. The government maintains that there is room for a diversity quota as proposed by the bill. The bill is therefore not considered to be in conflict with European law.

The bill is now pending in the Upper House. It is unclear when the law will enter into force.

'Corporate governance and directors' duties in the Netherlands: overview

Heleen Kersten and Sandra Rietveld contributed to Thomson Reuters' Practical Law with an article about corporate governance and directors' duties in the Netherlands'. Click **here** to read the article.

The article provides a high level overview of board composition, the comply or explain approach, management rules and authority, directors' duties and liabilities, transactions with directors and conflicts, company meetings, internal controls, accounts and audit, institutional investors and reform proposals.

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