



COVID-19: impact on corporate governance matters

The Coronavirus (COVID-19) is rapidly spreading and also impacts Dutch corporate governance matters of many companies and businesses in the Netherlands. Directors are questioning what their tasks and responsibilities are in times like these, and companies are struggling how to organise board- and shareholder meetings.

1 Directors' tasks and responsibilities

The primary powers of the statutory directors of Dutch companies lie in the management of the company's day-to-day affairs, the administration of its assets and liabilities and the operation of its business. When performing their tasks, all directors must act in the interest of the company and its business, which implies that the board of directors should take into account, the interests of all stakeholders (shareholders, creditors, employees etc.). In principle, all directors are jointly and severally liable to the company for shortcomings in the performance of their tasks. In case of 'improper management' (*onbehoorlijk bestuur*) a director can be held liable by the company. Improper should be read as 'clearly negligent and insufficient'. However, a director can only be held liable if serious blame (*ernstig verwijt*) can be attributed to him or her. Serious blame may occur if a director has acted with willful intent or gross negligence. The liability of a director is determined based on all facts and circumstances at hand.

In view of COVID-19, the board of directors should consider to take precautionary measures which are in the (best) interest of the company and will ensure the continuity of the day-to-day affairs. Amongst other actions, the board of directors could proactively assess the potential impact of COVID-19 on the business, carry out adequate risk assessments, update contingency plans and prepare adequate responses to questions from shareholders relating to COVID-19 in anticipation of an upcoming general meeting.

It is important to keep proper and detailed accounts of all decisions, minutes, correspondence as well as all actions taken in relation to COVID-19. Detailed records could make it easier for the board of directors to prove that it 'properly' fulfilled its tasks and duties, by showing that the board anything in its power to reasonably minimize the potential impact of COVID-19 on the business. This is particularly important if, for some reason, any disputes and/or claims arise.

2 Board Meeting

As the outbreak of the COVID-19 caused office closures, travel restrictions and bans on large gatherings, the board of directors can face some difficulties regarding the question whether they are obliged and/or able to hold their board meetings in accordance with – for example – the requirements set forth in articles of association and/or board regulations.

In principle, there is no general requirement under Dutch corporate law for the board of directors to meet at specific dates, which means that the board meeting can be postponed or canceled due to the COVID-19 outbreak.

In addition, a number of arrangements can be made to minimize the (negative) effects of the COVID-19 related safety measures with regard to their decision making. Please note that the arrangements described below, are subject to the company's articles of association and/or internal board regulations, which may provide limitations or set out additional requirements for the application of these arrangements. We furthermore note that the tax residency of a company may impact the flexibility to make alternative arrangements as well.

- ▶ In case a director is not able to attend a board meeting due to – for example – travel restrictions, or is not willing to attend the meeting for safety reasons, the relevant director could grant a proxy to another director to represent him or her at the board meeting. If desired, this arrangement could also be useful to limit the number of participants.
- ▶ The board meeting could be held entirely by electronic means, without holding a corresponding physical meeting. In this regard, it is required that all (participating) directors can properly communicate with each other.
- ▶ Subject to certain conditions, the board of directors may validly adopt resolutions in writing, i.e. outside a meeting.

3 General meeting

In view of the abovementioned Dutch measures and recommendations relating to COVID-19, another issue that requires the attention of companies is how COVID-19 impacts their upcoming (annual) general meeting.

In principle, the board of directors of a Dutch company is authorized to convene a general meeting of shareholders. At least one general meeting must be held per financial year.

Pursuant to Dutch law, a general meeting must – in principle – be held physically. A entire virtual general meeting is not (yet) permitted. However, subject to certain conditions, such as the provisions of the articles of association of the company, it is possible to enable shareholders to participate in and vote at the general

meeting by means of electronic communication. For this purpose, it is required that the shareholders can be identified by means of an electronic medium, that they are able to obtain direct knowledge of the proceedings at the meeting and are able to exercise their voting rights.

In this regard, and again subject to certain conditions, other arrangements that could be considered by the board of directors in order to limit the number of people attending the (annual) general meeting are:

- ▶ Expressly requesting the shareholders to grant a proxy with voting instructions to a member of the board of directors or a third party.
- ▶ Enabling shareholders to cast their votes prior to the (annual) general meeting by means of electronic communication.

The above-mentioned arrangements are not limited and are proposed in view of an upcoming (annual) general meeting, which – for example - cannot be postponed. These arrangements must be distinguished from the (potential) possibility of the general meeting to validly adopt resolutions in writing, i.e. outside a meeting. Also, shareholders cannot be obliged to use the above-mentioned arrangements.

In addition, please note that based on the principles of reasonableness and fairness, it can be argued that a Dutch company may, in exceptional circumstances, deviate from the requirements set forth in the articles of association and/or pursuant to Dutch law. In this regard, the board of directors should consider to reach out to shareholders, to avoid that a shareholder was not aware of the deviation and may use argumentation that the circumstances were used to prevent him/her from voting.

Emergency legislative proposal

Finally, we note that since Friday April 3, 2020, an 'emergency' legislative proposal is pending, which should temporarily allow the board of directors to hold the general meeting entirely by electronic means. In this respect, the shareholders must be given the opportunity to follow the meeting through a livestream and to submit questions prior to and during the meeting. Furthermore, the board of directors may decide to extend the term for preparing the annual accounts and to postpone the annual general meeting.

The legislative proposal will be sent to the Council of State for advice, and subsequently to the House of Representatives, upon which receipt the proposal will become public. The expected timeframe is yet unknown.

What HVG Law can do for you:

- ▶ Advice on corporate governance issues and director's liability
- ▶ Arrange meetings by electronic means of communication
- ▶ Act as secretary during board and/or shareholders' meetings

For more information:



Caspar van der Winden
Senior Manager | Lawyer

E: caspar.van.der.winden@hvglaw.nl
T: +31 (0)6 21 25 24 22



Robin Doesema
Senior Consultant | Lawyer

E: robin.doesema@hvglaw.nl
T: +31 (0)6 29 08 38 44

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