NEW LEGISLATION IMPLEMENTING REVISED SHAREHOLDERS' RIGHTS DIRECTIVE IN THE NETHERLANDS

On 5 November 2019, a law implementing the revised shareholders' rights directive was adopted by the Upper House of the Dutch Parliament. Key changes relate to the remuneration policy and disclosure thereof (regarding both managing and supervisory directors) and related party transactions. Further, it introduces certain transparency obligations for institutional investors and rules to facilitate shareholder identification. The law will take effect no later than 1 January 2020. The law mainly applies to companies incorporated under Dutch law (NVs and BVs) whose shares are admitted to trading on a regulated market in the European Union.

Below, the most important topics of the law and key changes to current legislation and market practice are explained.

REMUNERATION POLICY

In relation to listed companies, the law provides, in line with the revised shareholders' rights directive, that the shareholders meeting should have a binding vote on the company's remuneration policy in respect of its directors. Dutch law already contained such a rule, but a number of important changes are introduced:

- the remuneration policy shall be adopted by the shareholders meeting at least once in four years, and not only in the event of significant changes as is currently the case;
- for the shareholders meeting's decision to adopt the remuneration policy a three-fourths majority vote is at least required, unless the articles of association provide for a lower majority;
- the works council of a listed company will have a right to advise on the proposal for the remuneration policy, to be considered by the corporate body deciding on the proposal. The works council's advice will be presented to the shareholders meeting simultaneously with the proposed remuneration policy. If the works council's advice is not reflected in the relevant proposal, a written explanation for the non-adherence to the

advice will be added to the documentation sent to the shareholders meeting. As a result, listed companies will need to involve the works council with regard to the proposal for the remuneration policy at an earlier stage than public companies that are not listed;

- the rules on remuneration policy (and the rules on the remuneration report as set out in detail below) apply not only to members of a management board, but to the members of the supervisory board as well (and, similarly, to non-executive directors in a one-tier board structure); and
- a company will be permitted to temporarily deviate from the adopted remuneration policy, even though only in limited circumstances. A company is only allowed to do so until a new remuneration policy has been adopted and may only deviate insofar as required to serve the long-term interests and sustainability of the company as a whole or to safeguard its continuity.

If no remuneration policy is adopted, the company is allowed to remunerate directors in conformity with the existing policy or existing practice until a remuneration policy in accordance with the new rules is adopted by the shareholders meeting. This provision of the law, which applies to both listed and non-listed public companies (NVs), ensures that a remuneration granted in the absence of a remuneration policy, is not deemed invalid. According to the explanatory notes to the law, if a company needs to revise its remuneration policy based on the new rules, it will need to do so in the first annual general meeting following the implementation of the law which is ultimately in the 2020 annual general meeting.

The law also provides that the remuneration policy of listed companies should be clear and understandable and include details on, amongst other things:

- an explanation of the way in which the remuneration policy, in particular any variable and share-based remuneration, contributes to the company's strategy, long term interests and sustainability;
- an explanation of the way in which the remuneration and employment terms of the company's employees are taken into account;
- an explanation on the manner in which the remuneration policy takes account of:
    - the identity, mission and values of the company and its related undertaking
    - the internal remuneration ratios (*bezoldigingsverhoudingen*) within the company and its related undertaking
    - the level of support in society
- a detailed description of the various components of the fixed and variable remuneration;
- in case of share-related remuneration: description of the vesting period and the retention period of the shares;
- a description of the duration of the agreements with directors (i.e. members of both the management board and the supervisory board, or, as the case may be, of all members of a one-tier board), including

pension agreements, early termination agreements and the terms and conditions for payments in case of termination;

- a description of the decision-making process for the adoption, revision and execution of the remuneration policy; and
- in case of revision of the remuneration policy, an explanation of the most important changes and of the way in which the views of the shareholders and voting results at the general meeting were taken into account.

REMUNERATION REPORT

A listed company must draw up a remuneration report every year, containing an overview of all remuneration paid or due to individual directors (i.e. members of both the management board and of the supervisory board, or, as the case may be, of all members of a one-tier board) in the previous financial year. The remuneration report must be provided to the shareholders meeting for a (non-binding) "advisory vote". The law does not provide for an exemption to this requirement for smaller listed companies as is available under the Directive.

The remuneration report should be clear and understandable and include details on, amongst other things:

- the total amount of remuneration per component part and the ratio between fixed and variable remuneration;
- the way in which the total amount of the remuneration complies with the remuneration policy and contributes to the company's long term financial objectives;
- the annual changes in the remuneration over the past five financial years, the development of the company's financial achievements and the average remuneration of the company's employees;
- any claw back of bonuses; and
- any deviations from the remuneration policy.

WORKS COUNCIL REPRESENTATION IN REMUNERATION COMMITTEES

The law provides that if in a listed or non-listed NV which is subject to the large company rules, the supervisory board (or non-executive directors in a one-tier board structure) determines the remuneration of the (executive) directors and the supervisory board has established a (remuneration) committee to this end, the supervisory board member(s) appointed pursuant to the works council's enhanced right of recommendation should form part of this (remuneration) committee.

RELATED PARTY TRANSACTIONS

The law also provides for rules on the approval and disclosure of certain transactions entered into by a company with a related party. These rules apply to listed companies (NVs and BVs) and are largely consistent with, and codify

certain of, the best practices as set out in the Dutch Corporate Governance Code. Under the law, the company is obliged to make a public announcement in case of a material transaction with a related party if and when such transaction is not entered into in the normal course of business or under normal market terms and conditions.

To ensure consistency with a company's financial reporting, the law refers to the definition of “related party” as used in IAS 24.9 of the International Accounting Standards Boards.

The law qualifies the following persons as related parties: (i) a company's management board members, (ii) a company's supervisory board members and (iii) a person or persons who hold more than 10% of the company's shares. Other examples under IAS 24.9 are a person or persons who have (joint) control or significant influence over the company or who belong to the company's key management personnel.

A transaction qualifies as "material" (i) if information on the transaction qualifies as inside information (which by itself also triggers a disclosure obligation, subject to certain limited exemptions available under applicable market abuse rules), and (ii) if it is concluded between the company and a related party.

Material transactions with related parties are subject to approval by the supervisory board or, if applicable, the one-tier board. If the company does not have a supervisory board or a one-tier board, the transactions are subject to approval of the shareholders meeting. A member of the management board or supervisory board, or a shareholder, does not participate in the decision making if he is involved in the related party transaction.

The public announcement must be made at the moment when the transaction is concluded and has to contain information about the nature of the relationship and the name of the related party as well as the date and the value of the transaction.

The rules on related party transactions do not apply to transactions between the company and a subsidiary and transactions which are offered under the same conditions to all shareholders if their equal treatment and the interest of the company are safeguarded.

TRANSPARENCY OBLIGATIONS WITH RESPECT TO THE LONG-TERM ENGAGEMENT POLICY OF INSTITUTIONAL INVESTORS, ASSET MANAGERS AND PROXY ADVISORS

The law introduces rules aimed at improving the quality of shareholder engagement through stronger transparency requirements for institutional investors and asset managers. The law also introduces, mostly on a "comply or explain" basis, rules on the preparation, contents and disclosure of their policies regarding shareholder engagement and investment strategy. Similar rules are introduced for proxy advisers in relation to their operations, procedures and compliance with applicable codes.

SHAREHOLDER IDENTIFICATION, TRANSMISSION OF INFORMATION AND FACILITATION OF THE EXERCISE OF SHAREHOLDERS RIGHTS

Finally, the law introduces rules that are aimed at further harmonising the transmission of information through cross-border chains of custodians holding the shares of listed companies on behalf of the ultimate beneficiaries (shareholders). The rules provide, amongst other things, that a listed company incorporated in the Netherlands has the right to request foreign custodians in the chain to provide information on the identity of the shareholders holding 0.5% or more in the company's share capital (whereby the mirroring legislation in the other relevant Member States will oblige such custodians to acknowledge and respond to such request). Currently, under Dutch law, custodians in the chain (only) have the obligation to provide information on the identity of the next party in the chain. The current rules will continue to apply next to the new rules applicable pursuant to the law. The law also introduces the obligation for parties in the chain of custodians to provide shareholders timely with all information necessary to exercise their voting rights and other shareholders rights. EC Regulation 2018/1212 dated 3 September 2018 contains formats for the transmission of such information.

CONTACTS

Floris van de Bult
Partner
T + 31 20 711 9158
E floris.vandebult
@cliffordchance.com

Han Teerink
Counsel
T + 31 20 711 9132
E han.teerink
@cliffordchance.com

Sara Schermerhorn
Senior Advisor
T + 31 20 711 9332
E sara.schermerhorn
@cliffordchance.com

Hans Beerlage
Partner
T + 31 20 711 9198
E hans.beerlage
@cliffordchance.com

Richard Nowak
Senior Advisor
T + 31 20 711 9109
E richard.nowak
@cliffordchance.com

Mark Jan Arends
Partner
T +31 20 711 9212
E markjan.arends
@cliffordchance.com