

DUTCH LOWER HOUSE ADOPTS BILL ON COOLING-OFF PERIOD AGAINST HOSTILE TAKEOVER BIDS AND BOARD DISMISSAL REQUESTS

On 8 September 2020, the Bill on a cooling-off period (*bedenktijd*) for Dutch listed companies was adopted by the Lower House of the Dutch Parliament. In the coming months, the Bill will be discussed in the Upper House and will enter into force when adopted by the Upper House. The Bill has been broadly criticised as being unnecessary and unuseful.

SCOPE OF THE BILL

The Bill applies to companies incorporated under the laws of the Netherlands whose shares are admitted to trading on a regulated market or multilateral trade facility in a member state of the European Union or a similar system in a non-member state ("listed companies"). The Bill does not apply to listed companies which have provided in their articles of association that they shall not have or use any protective devices (*no frustration rule*).

GROUNDINGS FOR INVOKING A COOLING-OFF PERIOD

The Bill provides that the (management) board of a listed company may invoke a cooling-off period of at most 250 days on the following grounds:

- (i) if one or more shareholders entitled to put items on the agenda of the shareholders meeting pursuant to the law or the company's articles of association, request that the appointment, suspension or dismissal of a managing or supervisory director (or a proposal to amend the articles of association in respect of the foregoing) be tabled as a voting item on the agenda of the company's forthcoming general meeting; or
- (ii) if a public bid on the company's shares has been announced or made without an agreement with the company having been reached;

but only if the management board considers the shareholder request or the public bid materially contrary to the interests of the company, including its continuity and independence.

The ground for invoking a cooling-off period in one of the situations mentioned above, is without prejudice to the possibility to invoke a cooling-off period on another ground.

In case the company has a two-tier board, the management board's resolution to invoke the cooling-off period is subject to approval by the supervisory board.

EFFECT OF INVOKING COOLING-OFF PERIOD

The effect of invoking a cooling-off period is that it suspends shareholder requests to table a voting on appointment, suspension and dismissal of a managing or supervisory director (or a proposal to amend the articles of association in respect of the foregoing).

The explanatory memorandum to the Bill clarifies that this means that the board is not obliged to table the requested item as a voting item, but can confine itself to tabling the item as discussion item (without voting taking place).

COMMENCEMENT OF COOLING-OFF PERIOD

In case of a shareholder request, the 250 days term commences the day following the ultimate day on which shareholder requests have to be received by the company pursuant to the law or pursuant to the company's articles of association. When one or more shareholders holding at least 10% of the issued share capital request the court to order the company to convene a shareholders meeting, the 250 days term commences on the day the court grants the request. If the board invokes the cooling-off period at a later moment, the 250 days-term is shortened accordingly.

In case of a public bid, the board may invoke the cooling-off period as of the announcement of the public bid until a reasonable time after the public bid has been launched. The 250 days-term commences at the moment the bid is launched or, if the board invokes the cooling-off period earlier, at that moment.

A cooling-off period may only be invoked once per event and may not be extended during that event. The management board may (with the approval of the supervisory board) terminate the cooling-off period before the expiry of the 250 days-term.

APPEAL TO ENTERPRISE COURT

One or more shareholders entitled to request items to be put on the agenda pursuant to the law or pursuant to the company's articles of association, may request the Enterprise Court to terminate the cooling-off period. The Enterprise Court has to grant the request if the board (i) could not have reasonably come to its decision (based on the circumstances at the moment of invoking the cooling-off period), (ii) cannot reasonably consider that the continuation of the cooling-off period may contribute to a careful determination of the company's policy, or (iii) has not terminated or suspended, upon the request of these shareholders, any other active protective measures similar in purpose and effect.

CONSULTATION OBLIGATIONS OF BOARD DURING COOLING-OFF PERIOD

During the cooling-off period, the (management) board has to consult with all interested parties, in particular with shareholders holding at least 3% of the company's share capital and the works council. Opinions expressed by a party have to be published by the board on the company's website, subject to that party's consent.

TERMINATION OF COOLING-OFF PERIOD

The cooling-off period ends:

- after expiry of the 250 days term;
- in case of a public bid: when the bid has become unconditional; or
- upon earlier termination by the board or by the Enterprise Court.

CUMULATION WITH OTHER PROTECTIVE MEASURES

The explanatory memorandum states that the government does not consider it desirable that the cooling-off period cumulates with other protective measures, such as the issue of protective preference shares or the invoking of the so-called response time (entailing that the board may invoke a cooling-off period of at most 180 days in case a shareholder requests the board to table an agenda item relating to the company's strategy). In such cases, shareholders may refer the matter to the court and the court may set-off the duration of each of the protective measures invoked.

REPORT ON POLICY DURING COOLING-OFF PERIOD AND REVIVAL OF REQUESTED VOTING ITEM

Within one week after the cooling-off period, the company shall publish a report on its actions and policy during the cooling-off period on its website. The report will be discussed in the first (annual or extraordinary) shareholders meeting following the end of the cooling-off period. After that, voting may take place on the requested appointment, suspension or dismissal of the director. The explanatory memorandum states that it would seem logical that first the report will be discussed and thereafter the voting will take place, so that the report can be taken into account when casting a vote.

EVALUATION

The minister shall send a report evaluating the law to Parliament within five years after the law has entered into force.

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