The supervisory boards of large Dutch companies

by Frank Wooldridge

A summary of reforms relating to the appointment and function of supervisory boards in large private and public companies, and amendments to Dutch law governing employee participation.

PRELIMINARY REMARKS

The rules relating to the appointment and to a lesser extent the functions of such boards have undergone significant reforms as a result of the Law of 1 October 2004 that made a number of amendments to Articles 268 and 158 of book 2 of the Netherlands Civil Code (*Burgerlijke Wetbook*), which are applicable to large (or "structure") private and public companies (NVs and BVs) respectively, as well as certain alterations to other relevant provisions of Dutch law governing employee participation.

"Structure" companies are defined in Articles 263(2) and 153(2) of Book 2 in an identical manner. A company is a large or structure company if: (i) its issued share capital together with its reserves according to the balance sheet amounts to at least €16 million; (ii) the company, or a dependent company, is legally bound to set up a works council; and (iii) the company generally employs at least 100 persons in the Netherlands. The amount of €16 million is subject to periodic revision. The obligation to appoint a works council is generally imposed on companies employing more than 50 persons.

Such companies are required to set up supervisory boards which are invested with particular functions. Other companies may set them up and thus use a dual board system on a voluntary basis. The appointment of the supervisory board in large or structure companies used to be based upon a system of cooptation, according to which it appointed its own members. Those representing the employees were recommended by the works council, but their appointment could be prevented by the general meeting. Disputes about such appointments could be referred by the supervisory board to the Enterprise Chamber of the Amsterdam Court of Appeals. The system of co-optation has been replaced by a new method of appointing the supervisory boards of large companies, which is described below, where the dismissal of such members and their functions are also considered. The Dutch rules of law applicable to large companies only apply in a weakened form to large Dutch companies which belong to an international group of companies. The applicable rules of law governing the appointment of the members of the supervisory board of a large Dutch company are principally contained in Articles 265 and 155 of Book 2 of the Dutch Civil Code. Other provisions, however, are of significant relevance.

APPOINTMENT OF MEMBERS OF THE SUPERVISORY BOARD

The new provisions governing the appointment of members of the supervisory board of a large company owe their existence to a proposal of the Netherlands Economic and Social Council in 2001, which considered matters relating to corporate governance. The new provisions contained in the Law of 1 October 2004 give the principal role in appointing members of the supervisory board to the general meeting, acting on a proposal which must be made by that board. The board is given an enhanced right (the Dutch term is *bindende*) of nominating up to one third of the members of the supervisory board, who are recommended by the works council unless it objects to such recommendation. Article 270 of Book 2, and Article 160 thereof, which may be intended to prevent the formation of factions, provides that trade union officials who are active within the enterprise or one dependent on it, are ineligible for appointment to the supervisory board is persons having a service contract with the company or one dependent on it.

By Articles 268(9) and 158(9) of Book 2 of the Civil Code, the general meeting may reject a proposal for the appointment of a member of the board by itself or by the supervisory board, or by the works council by means of a resolution passed by an enhanced majority of the passing of votes of at least one third of the holders of the issued capital represented. The new provisions governing the appointment of the members of the supervisory board seem to have weakened the position of that board regarding such appointment. These provisions seem to have been influenced by considerations relating to satisfactory corporate governance.

Period of office

A member of the supervisory board of a large company holds office for a period of four years from his appointment according to Articles 271(2) and 161(2) of Book 2, which apply respectively to private and public companies. If the large company is listed, it will be subject to the Netherlands Corporate Governance Code, according to which the period of office for a member of the supervisory board is four years, which may be renewed for a maximum period of four years each.

Dismissal from office

The period of office of a member of the supervisory board may be terminated involuntarily as the result of a decision of the Enterprise Chamber of the Court of Appeals of Amsterdam. The relevant rules of law are set out in Articles 271(2) and 161(2) of Book 2 of the Civil Code, which apply respectively to Dutch private and public companies. A decision to dismiss a member of the supervisory board may be requested by the board itself, the works council, or by the shareholders in general meeting, or the shareholders committee. It may only be taken by the Enterprise Chamber in the event of breaches of duties, other important reasons, or in the event of any significant changes in circumstances, for instance the merger of the company with another, which made it unreasonable for the relevant person to continue as a member.

Articles 272a and 161a of Book 2, which apply respectively to private and public companies, gave a significant power of dismissal to the general meeting. When it has lost confidence in the supervisory board as a whole, it may take proceedings to dismiss it without the intervention of the Enterprise Chamber. It has to act by an enhanced majority and at least one third of holders of the issued capital must be represented at the meeting. Furthermore, the proposed resolution must be submitted to the works council at least 30 days before the relevant meeting. The directors of the large company must request the Enterprise Chamber of the Court of Appeals of Amsterdam to appoint one or more directors on a temporary basis such that a new supervisory board may be constituted. The articles of a company may not depart from this procedure. However, the new supervisory board members remain competent to make nominations for the appointment of members thereof by the general meeting. It would seem that the new procedure would only be used in serious cases, but its existence may be thought to weaken the position of the supervisory board.

TASKS OF THE SUPERVISORY BOARD

The supervisory board has the normal tasks of any supervisory board of exercising supervision and tendering advice set out in Articles 250 and 140 of Book 2 of the Dutch Commercial Code, applicable respectively to Dutch private and public companies. It also has significant additional tasks, including the appointment and dismissal of the directors in accordance with Articles 272 and 162 of Book 2 and by Articles 274 and 164, the approval of the passing of certain resolutions of private and public companies, for example resolutions governing the issue of shares and bonds by such companies. The supervisory board is no longer entrusted with the adoption of the annual accounts. It cannot dismiss the directors until the general meeting has considered the matter. If it purports to do so, it act is void.

CONCLUDING REMARKS

The Dutch system governing large companies results in some degree of employee participation, and is designed to be one which, as far as possible, does not lead to confrontation. The role of the supervisory board has been significantly weakened since the reforms made in 2004, whilst there has been a considerable strengthening in the position of the general meeting. Whatever its merits may be, it does not seem one which will be adopted by a significant number of other countries. This is because of its balanced compromise character which is hardly likely to appeal to both parties to industrial relations. The very detailed character of certain of the provisions may not make them very acceptable models for legal transplants. This is especially true of those governing total and partial exemptions from the regime.

Dr Frank Wooldridge