



Coronavirus – COVID-19 Justice and Security (Interim Measures) Act

On 21 April 2020 the Senate (*Eerste Kamer*) passed the COVID-19 Justice and Security (Interim Measures) Act (*Tijdelijke wet COVID-19 Justitie en Veiligheid*). This Act contains a range of temporary measures concerning meetings and the reporting obligations of legal entities. It is expected that the Act will come into force very soon.

What is the purpose of the COVID-19 (Interim Measures) Act?

The purpose of the Act is – amongst other things – to permit temporary deviations from statutory provisions and provisions under articles of association concerning the holding of physical meetings, and the associated deadlines and sanctions.

All associations (*verenigingen*), cooperatives (*coöperaties*), mutual insurance associations (*onderlinge waarborgmaatschappijen*), public and private limited companies (*naamloze en besloten vennootschappen met beperkte aansprakelijkheid*) are required to hold a general meeting each year. The annual general meeting is held within six months of the end of the financial year. At this general meeting, usually the financial statements are adopted, the executive and supervisory directors are discharged from liability for their management and supervision, the dividend, if any, shall be determined and executive or supervisory directors can be appointed. The obligations to hold a general meeting are laid down in Book 2 of the Dutch Civil Code. In order to limit the spread of COVID-19, the physical gathering of members or shareholders for a general meeting can be undesirable under the present circumstances.

What amendments does the COVID-19 (Interim Measures) Act contain?

We will set out below the main aspects of this statutory scheme:

1. Deviations from statutory provisions concerning the holding of general meetings.

The management board of the legal entity may - even without currently being provided for in the articles of association - determine that shareholders/members (and other persons entitled to attend meetings) will not have physical access to the general meeting, and that a general meeting will be held that is only accessible by electronic means for the shareholders or members, if this is stated in the notice convening the meeting and the following conditions are met:

- (i) the general meeting can be followed electronically by shareholders/members. This can be done, for example, via a livestream (audio or video) of the meeting;
- (ii) the shareholders/members are given the opportunity up to 72 hours prior to the meeting to ask questions, in writing or electronically, about the subjects stated in the notice convening the meeting. If the notice has already been sent out and the management board has decided within five days prior to the date of the meeting to change the manner of holding the meeting to one that is only accessible electronically, the shareholders/members will then have the opportunity, up to 36 hours prior to the meeting, to ask questions in writing or electronically about the subjects stated in the notice convening the meeting;
- (iii) the shareholders'/members' questions will be responded to during the meeting (the questions may also be responded to earlier), by theme or otherwise, and will be posted on the legal entity's website or communicated electronically to the shareholders/members. If desirable and feasible, the management board of the legal entity may combine all the questions (and the responses to them) that have been received for the meeting and circulate them in a single email to all shareholders/members. In this way the shareholders/members can take note of the questions of other shareholders/members; and
- (iv) the management board will ensure (in the case of a public limited company) or make every effort to ensure (in the case of a private limited company, association, cooperative or mutual insurance association) that further questions can be asked during the meeting, electronically or otherwise, unless this cannot reasonably be demanded in the light of circumstances at that time.

Deviations from the provisions regarding the responses to the shareholders'/members' questions (referred to under (iii) and (iv)), (because the connection drops out, for example) do not have any consequences for the legal validity of the resolutions adopted in the meeting.

If a notice convening a general meeting has already been sent out, the management board has until 48 hours before the time of the general meeting to change the manner of holding the meeting to one that is accessible only electronically, or to change the venue of the meeting (changing the venue is only possible in the case of a public limited company). This will be notified to the shareholders/members in the same manner as prescribed for convening a general meeting.

The chairman of the meeting shall ensure that the order of the meeting is maintained. This includes that the meeting proceeds in an orderly and efficient manner, with the chairman opening the meeting with the rules of the meeting, such as who may submit questions, in what way and when the questions will be answered.

Generally, the chairman of a meeting determines whether a resolution has been adopted or rejected. Unless the articles of association provide otherwise, the ruling pronounced by the chairman at a meeting in respect of the outcome of a vote or the content of the resolution shall be decisive.

Voting by shareholders also takes place electronically. The management board may even stipulate in the notice of the meeting that votes are valid if they are cast electronically up to 30 days before the meeting.

2. Extending the deadline for holding a general meeting and preparing the financial statements.

The management board may extend the deadline for holding a general meeting by no more than four months. The annual general meeting can be postponed in this manner, should it be more convenient for the legal entity and the parties involved than holding a general meeting electronically. In addition, the management board may extend the deadline for preparing the financial statements by no more than four months (in the case of associations, cooperatives and mutual insurance association) or five months (in the case of public and private limited companies). In this case, the general meeting cannot be postponed. This regulation also applies to foundations.

3. Restriction of evidentiary presumption if the adopted financial statements are not published in time.

If the management board has not published the financial statements in time, under current legislation this leads (in the event of insolvency) to the irrefutable presumption that the management board has performed its duties manifestly improperly. This improper performance of its duties is suspected to be a major cause of insolvency. The COVID-19 (Interim Measures) Act lays down that if the financial statements are not filed in time and the management board can demonstrate that this is due to the COVID-19 virus, this failure to file in time does not qualify as manifestly improper performance of duties. The burden of proof therefore rests with the management board.

Retrospective effect and period of validity

The COVID-19 (Interim Measures) Act has partial retrospective effect to 23 March 2020 and will be in effect until 1 September 2020 (except if the continuation of restrictions make it necessary to extend the period of validity of these provisions). If legal entities want it to be possible for voting rights to be exercised at a general meeting after 31 August too by an electronic means of communication, this must be explicitly laid down in the articles of association. An amendment to the articles of association will be required, if this has not already been done.

Adopting resolutions without holding a meeting

We would like to point out, perhaps superfluously, that for associations, cooperatives, mutual insurance associations and private limited companies (and for public limited companies if the articles of association provide for this) there are also possibilities to adopt resolutions without holding a meeting, in writing or electronically, subject to the approval of all persons with meeting rights.

Conclusion

If you have any questions about holding general or other meetings electronically or amending the articles of association of your company, please do not hesitate to contact your contact person at Loyens & Loeff N.V. We will be pleased to assist and explain matters further.

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