

Special litigation committees in the Netherlands

Trends and developments in Dutch corporate governance

The use of (*ad hoc*) special committees has seen a significant shift over recent years. While traditionally such committees have been used primarily to supervise and steer M&A and restructuring transactions, we see an increased use of special litigation committees in high-stakes (often bet-the-company) litigation involving Dutch companies. In this trend report, we share our views on the current use of special litigation committees in the Netherlands and expected developments.

The rise of special committees in the Netherlands

US corporate governance practices have significantly influenced the use of special committees in the Netherlands. Traditionally, this has especially been the case in Dutch M&A practice. In US practice, the establishment of special committees of disinterested and independent directors emerged to address (potential) conflicts of interests and satisfy director fiduciary duties in M&A transactions. Dutch special committees are typically established to address similar concerns and evaluate the relevant offer, support executive decision making and oversee and steer the transaction process. Empirical research by Loyens & Loeff senior associate Philippe Hezer shows that (at least) 27 such Dutch target companies of public bids established special committees between 2010 and 2017.

While focus has mostly been on special committees in an M&A context, over the past few years, we have also seen a rise in Dutch companies establishing special litigation committees. In the US, special litigation committees comprised of disinterested and independent directors are used in derivative actions. In sum, such committees are established to investigate and determine whether the prosecution of a given derivative claim brought by a shareholder is in the best interests of the company. Delaware law provides that establishing such a committee allows the board – as opposed to the relevant shareholder attempting to bring the claim – to retain control over that derivative claim. This statutory framework, along with precedent case law, provides clear guidance on the role and composition of special litigation committees.

This is different from the use of special litigation committees in Dutch practice to date. Absent derivative action mechanics, or any other relevant statutory framework, Dutch companies typically establish special

litigation committees to (i) oversee and steer pending or threatened high-stakes (often bet-the-company) litigation and (ii) address potential conflict of interest concerns, but also to (iii) provide relevant stakeholders with a forum where they can share their views and voice concerns.

Use cases and considerations for Dutch special litigation committees

Dutch law does not provide for a statutory framework nor is precedent case law available to give guidance on the use of special litigation committees. As a result, there is significant flexibility but no clear set of tried and tested rules. We believe that there are valid governance-related reasons for Dutch companies to consider establishing special litigation committees when faced with (the threat of) high-stakes litigation. Complex high-profile litigation will often require high-stakes strategic decisions and diligent case management, taking up significant management time. A special litigation committee could take up such tasks to reduce the burden on a larger part of (senior) management.

More importantly, however, special litigation committees can be used to (i) address concerns on conflicts of interests, particularly at board level; and/or (ii) coordinate the involvement of relevant stakeholders. In such cases in particular, establishing a special litigation committee may constitute good governance. We have identified the following illustrative scenarios where establishing a special litigation committee may constitute good governance:

1. *Internal investigations*

Establishing a 'clean team' special committee to oversee and steer internal investigations into irregularities helps ensure independent fact-finding and prevents that such investigations are adversely affected by individuals involved in the irregularities under investigation, especially when it remains unclear at the start of the investigation who is potentially involved.

2. *Actions concerning director misconduct*

Actions may be brought against the company concerning alleged misconduct of one or more directors, for instance alleging involvement of those directors in a fraudulent scheme. Depending on the nature of such a claim, a special litigation committee may be used to 'shield' the company from the directors (potentially) involved in that conduct and emphasise

the independence of the company in relation to the relevant directors.

3. *Stakeholder engagement*

Certain litigation may require close stakeholder engagement. Such engagement may be considered if, for instance, the relevant stakeholders' interests are subject to significant exposure depending on the outcome of the litigation. In those cases, a special litigation committee may provide a forum for such engagement and could, in part, even be comprised of representatives of the relevant stakeholders (e.g., financiers or parties that have entered into a standstill).

If the decision is made to establish a special litigation committee, due consideration should be given to its task and composition. Relevant considerations include:

- Will the committee have a supervisory or executive role? In case of the latter, will the committee be involved in preparing resolutions or have a more prominent role in the decision making process?
- Will the committee be comprised of both executive and supervisory directors? What about (senior) management and/or outside counsel and other advisors? Are there any requirements in terms of expertise and independence?
- Are there circumstances requiring involvement of outside parties, such as external stakeholders and/or parties to a standstill? How will that involvement be structured?
- How will the committee's access to information be structured, both from a legal and technical perspective? Are there any specific confidentiality or security concerns that need to be addressed?
- Will the committee have its own counsel and/or other advisors and, if so, how will they be funded and engaged?

Expectations for the future

Our expectation is that the use of special litigation committees in the Netherlands will increase, especially in the context of internal investigations and complex bet-the-company litigation. The more well-established these committees become, the more likely this is to impact Dutch corporate governance standards. This would likely also lead to more concrete guidance on the role and composition of Dutch special litigation committees.

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