LOYENS & LOEFF

JULY 2020
EDITION 134

Quoted

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In this edition

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1. Introduction

The Coalition Agreement authored by the current government entitled 'Confidence in the Future' dating to 2017 already announced the introduction of a statutory cooling-off period for listed companies. This initiative was prompted by PPG's attempt to acquire AkzoNobel and the foreign 'attacks' on Unilever and PostNL. In addition to the bill introducing a statutory cooling-off period, another bill is being prepared that will provide for a Dutch investment test for risks to national security during takeovers and investments. The statutory assessment framework covers takeovers of and investments in providers of vital processes and vital infrastructure as well as companies active in the field of high-grade sensitive technology. These takeovers and investments will only be assessed if the protection of national security warrants it.[1]

The cooling-off period is intended as a legal protection for companies faced with an unsolicited takeover bid or pressure being exerted on the board to change its course. With regard to the relationship between management boards and shareholders on strategic matters, the Corporate Governance Code contains a 'response time'. This response time provides that a shareholder must give the board a reasonable period of no more than 180 days to respond to the intended placement of an item on the agenda that may lead to a change in strategy.[2]

On 18 December 2019, the bill to amend Book 2 of the Dutch Civil Code in connection with the invocation of a cooling-off period by the management board of a listed company was submitted to the House of Representatives (the "bill"). The bill followed a public consultation on its content that ran from 7 July 2018 to 7 February 2019. As a result of this consultation, the bill has been amended on a number of points. Loyens & Loeff participated[3] in the consultation during that period.

The bill adds a new article 114b to Book 2 of the Dutch Civil Code (**DCC**). The purpose of the article is to give the board of a listed company more time and room to weigh the interests of the company and its stakeholders, i.e., to carefully determine its policy. The Ministers involved are of the opinion that, partly in view of the complexity of such issues, management boards need sufficient time and room to identify the possible consequences of actions demanded by shareholders, whether or not in relation to a takeover, and to prepare an appropriate response.

In concrete terms, management boards will be given the opportunity to invoke a cooling-off period of up to 250 days in the event of the imminent removal of management board members or supervisory board members as a result of failure to take up shareholders' ideas with regard to the strategy or in the event of an impending takeover, "if the management board is also of the opinion that such a situation is substantially contrary to the interests of the company and its business". A management board's decision to invoke the cooling-off period is subject to the approval of the supervisory board. In addition, the bill lays down the primacy of the management board with regard to strategy, which was developed first in case law (new article 129(1) of Book 2 DCC).

1 On 2 June 2020, a letter from Minister of Economic Affairs, Mr Wiebes, to the House of Representatives was published announcing that a reference date would be included in this bill. This reference date implies that part of the legal framework for the investment test system will be introduced retroactively as from 2 June 2020. This means that takeovers and investments made between 2 June 2020 and the entry into force of the Act can be reviewed if there is reason to do so in connection with national security risks.

2 Provision 4.1.7.

3 https://www.internetconsultatie.nl/wetsvoorstelbedenktijd/reactie/cb574281-cc51-4b51-bdfe-b12516576e1b.

2. Main outlines of the bill

2.1 Strategy lies in the purview of the board

The board's primacy with regard to strategy is made explicit in the bill. The bill codifies the standard from case law that part of the duties of boards of listed companies or other companies includes, in any case, policy and strategy determination. Article 129(1) of Book 2 DCC will be amended in this respect.[4] The expectation is that this statutory primacy of the board will enable long-term value creation in listed companies to become more central in decision making and create more scope for a broad stakeholder approach. It should be noted that, in principle, for unlisted companies the board is also responsible for policy and strategy.

As an extension of the confirmation of the role of the board, the bill attempts to create scope for the board to fulfil its task in the best possible way. In this context, the Ministers involved note that, as a means of exerting pressure, shareholders can dismiss management board members and supervisory board members at the general meeting by using their rights to put items on the agenda and to call a general meeting. The result is that management boards may be prevented from making a proper assessment of their policy determination.

2.2 Invoking a cooling-off period

The bill provides for the possibility for a listed company to invoke a cooling-off period of up to 250 days if the management board is also of the opinion that one of the circumstances listed below is "substantially contrary to the interests of the company and its business". Article 114b of Book 2 DCC states the following circumstances:

i. a request by one or more shareholders for consideration of a proposal to appoint, suspend or dismiss one or more members of the management board or supervisory board, or
ii. when a public bid has been announced or made for shares in the capital of a listed company without agreement having been reached on the bid with the target company.

In the event of a (hostile) takeover bid, the cooling-off period provides the board with time and room to carefully determine its policy and allows the board of the target company, among other things, to examine alternatives, with or without the assistance of external parties, such as a competitive bid by a 'white knight' or independent survival, with or without a modified strategy.

The Explanatory Memorandum to the bill notes that, in practice, the scope created by the cooling-off period for the listed company may mean that the cooling-off period is not invoked at all or is not used in full. The mere possibility of invoking the cooling-off period may be sufficient to achieve a better result on the whole for the stakeholders. It may result, for example, in the offeror making more provisions to limit any negative effects on the stakeholders of the target company (for example, by proposing to continue or expand certain activities, to respect existing contracts or to agree on a redundancy package).

2.3 Safeguards

The bill contains various safeguards in order to prevent improper use of the cooling-off period,. Firstly, as indicated above, in the opinion of the management board, the request for appointment, suspension or removal or the public bid must be substantially contrary to the interests of the company and its business. Secondly, the decision to invoke the cooling-off period is subject to the approval of the supervisory board.

In addition, a special legal procedure will be introduced at the Enterprise Chamber. Such a procedure will only relate to the question of whether the statutory cooling-off period "could reasonably be invoked", or whether the "continuation of the cooling-off period could reasonably contribute to a careful policy determination". The review by the Enterprise Chamber will be marginal, since the board has a certain amount of discretion in invoking the cooling-off period.

Incidentally, article 107a of Book 2 DCC remains fully applicable. In short, this article stipulates that resolutions of the management board regarding important changes to the identity or character of a public limited company and its business are subject to the approval of the general meeting.

4 By virtue of article 187 of Book 2 DCC, this also applies to a private limited company with a stock exchange listing.

2.4 Duration

As already mentioned, the cooling-off period lasts a maximum of 250 days. The cooling off period starts to run on the day the request is made by one or more shareholders[5] for the appointment, suspension or removal of one or more members of the management board or supervisory board or the day after the day on which a public bid has been made. The time that elapses between the aforementioned request made by one or more shareholders or the launching of the bid and the invocation of the cooling-off period by the board will be deducted from the maximum duration of the cooling-off period. After all, the 250-day period starts to run the day after a bid has been launched. According to the Explanatory Memorandum, in the event of a hostile bid, the board can invoke the cooling-off period as of the day the bid is announced. The board may decide at any time to terminate the cooling-off period before its expiry if it is of the opinion that it has sufficient insight into the effects on the stakeholders and has made an assessment of the interests. Even in the event of early termination, the supervisory board must give its consent. The cooling-off period always ends the day after a public bid has been declared unconditional.

In addition, the cooling-off period, as referred to under point 2.3 above, may be terminated early by order of the Enterprise Chamber, after a request to that effect has been made by shareholders, who alone or together represent 3% of the issued capital. The Enterprise Chamber will grant such a request if, at the time the cooling-off period is invoked, the management board has not been able to reasonably determine that the circumstances referred to in article 114b of Book 2 DCC are substantially contrary to the interests of the company and its business, or if the management board can no longer reasonably assess that the continuation of the cooling-off period can contribute to a careful policy determination.

The 250-day period is longer than the response time provided for in the Corporate Governance Code, which is 180 days. The idea behind this is that a maximum period of 250 days is necessary to give the board sufficient time and room to carefully determine policy.

2.5 Legal consequences

The invocation of the cooling-off period will have the effect of suspending certain of the powers of the general meeting to appoint, suspend or dismiss members of the management board and supervisory board. At the same time, if the cooling-off period is invoked, the powers of the general meeting to amend the articles of association will be suspended, to the extent that the amendment of the articles of association relates to the appointment, suspension or removal of members of the management board or supervisory board.

The board should use the cooling-off period to obtain the necessary information for careful policy-making. A dialogue with direct stakeholders is central in this respect and the management board must, in any event, consult the shareholders who represent at least 3% of the issued capital when invoking the cooling-off period, in addition to the works council. The company may also approach other stakeholders. The position of the shareholder(s) who have been approached and that of the works council must be announced on the company's website after the parties consulted have given their consent.

The company must then report on the policy that it has chosen to pursue and the course of affairs since the cooling-off period was invoked. The company must make the report available for inspection and place the report on the company's website no later than one week after the end of the cooling-off period. In addition, this report should be discussed at the next general meeting after the end of the cooling-off period.

2.6 Concurrence with temporary or permanent protective measures

The Explanatory Memorandum shows that the government does not consider a complete accumulation of the cooling-off period with other protective measures to be desirable. It should be noted that, in this context, the court has the power to block the invocation of protective measures where appropriate. This applies, for example, to an accumulation of the cooling-off period with existing protective measures (under the articles of association).

5 For the purposes of article 114b Book 2 DCC, depositary receipts for shares and holders of depositary receipts for shares are considered to be equivalent to shares and shareholders, respectively, to the extent that these have been issued with the cooperation of the company.

The most common forms of such protective measures are the issuance of preference shares, priority shares and depositary receipts for shares. It is also conceivable that the court may terminate the cooling-off period early if protective measures are invoked after the cooling-off period has been invoked. Similarly, invoking the cooling-off period again consecutively for the same case is considered undesirable.

3. Entry into force

The plenary hearing of the bill in the House of Representatives has yet to be scheduled. The bill will enter into force at a time to be determined by Royal Decree. Transitional law is not considered necessary.

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Quoted is a periodical newsletter for contacts of Loyens & Loeff N.V. Quoted has been published since October 2001.

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