Modernization of Dutch Company Law

1. In 2020 the Dutch Minister of Justice & Security established the Expert Group on modernization of public company law (the 'Expert Group').[1] The Expert Group consists of thirteen members with a diverse background, amongst other legal scholars, corporate/M&A lawyers, and retail/ institutional shareholder representatives. The Expert Group has submitted seven reports, a final report in January 2025. This editorial contains an overview of the various reports providing an insight into several developments in Dutch company law over the years.
2. The establishment of the Expert Group follows a major overhaul of Dutch law on private companies in 2012, also known as the Flex BV. This overhaul resulted, amongst others, in the abolishment of capital protection and related rules, more flexible governance rules and shares without voting or profit rights. The BV (private limited liability company) is the most popular business form, there are more than 1.1 million BVs active in The Netherlands.
3. Following the Flex BV-operation, there have been many appeals for a similar overhaul for the public company, the NV. Such an overhaul is subject to limitations following from EU-Directives on company law. These limitations have a greater impact on NVs than BVs.
4. Next to a more general formulated request for advice on modernization of company law, the assignment for the Expert Group included two more specific requests, advice on remuneration and advice on loyalty schemes. These requests related to motions carried by parliament.
5. As to remuneration, Dutch law included until 2017 a claw back possibility for bonuses of directors where according to criteria of reasonableness and fairness the amount would not be acceptable. This discretionary power for the Supervisory Board was combined with a mandatory principle of freezing the value of security instruments awarded as remuneration to directors. The ratio of this instrument was to mitigate disproportionate benefit and conflicts in case of a corporate event such as a merger or a public offer. A difference in value of such securities between the date of the announcement of such a transaction and completion (or a sale in between) should be settled with future remuneration payments to the relevant directors. The motion of parliament included the request to reintroduce a claw back scheme. The advice of the Expert Group on this topic includes an ample discussion on developments on remuneration since 2017, including the obligation of companies to maintain a remuneration policy for directors, to be approved by the shareholders and the experiences with these policies. The discussion also reflects the fiduciary duties of supervisory directors in respect of remuneration. The Expert Group concludes that if new rules on remuneration were to be introduced, it may be considered to introduce a new element to the remuneration policy. This new element would describe the policy of a company on remuneration in the context of major corporate events, also setting forth the possibility to revise ex ante the level of remuneration or a claw back. Such a new element would provide ample opportunity for companies and its shareholders to create a custom made arrangement rather than providing for a one size fits alle arrangement by the legislator.

1 The Expert Group has its own website: Expertgroep modernizering NV-recht | Ministerie van Justitie en Veiligheid | Rijksoverheid.nl. Prof. Martin van Olffen and Prof. Claartje Bulten acted as Co-Chairs of the Expert Group.

'Modernization of Dutch Company Law'. *European Company Law Journal* 22, no. 2 (2025): 22–23.

6. As to loyalty schemes, some listed Dutch companies have introduced such a scheme, sometimes combined with a migration to The Netherlands.[2] There is heavy debate on the pros and cons of such schemes which is reflected in the Expert Group report.[3] As these schemes are already in place in Dutch practice, the Expert Group concludes that there is no need for legislation to cater for these schemes or to provide for other accommodation. The Expert Group, however, appreciates that there is a discussion on whether there should be a maximum ratio for loyalty schemes, a maximum bandwidth. Currently there is no maximum ratio and as seen in case law, this may lead to uncertainty.[4] In the Netherlands a scheme involving loyalty shares typically requires participating shareholders to move their shares into a register that is not eligible for trading the relevant shares on the stock exchange. Upon lapse of the relevant period (typically two or three years) a shareholders is entitled to loyalty shares. The movement of shares to and from a register that is not eligible for stock exchange transactions takes some time. This is an important obstacle for institutional shareholders to participate in such schemes. There is room for improvement for such registers.
7. In the context of modernization of the NV, the Expert Group discussed the current scheme of Dutch corporate law that includes the BV and the NV. The NV is historically the first company that could be incorporated as a legal entity. The existence of the BV is based on the introduction of the fourth EU-Directive in the seventies, obligating the NV to prepare and publish annual accounts. As many other countries, The Netherlands introduced another legal form, the BV, which was not subject to the obligation to prepare and publish annual accounts. This has changed over the years, BVs are now also subject to obligations regarding annual accounts. Until the Flex BV operation, the NV and the BV were more or less similar. In view of a possible overhaul of NV-legislation, the Expert Group raises the question whether there is a need to continue the two legal forms as we know them today. Going forward, an alternative could be to have only one legal form or one set of rules that would apply to both the NV and the BV with some supplemental rules for the NV based on EU-Directives that apply to NVs only. The Expert Group reviews various alternatives and concludes that it would seem most appropriate to continue with both the NV and the BV and their respective regimes. This does not mean, however, that many of the Flex BV amendments are not suitable for the NV. The Expert Group concludes that most of these amendments should equally apply to the NV. Such amendments are of course subject to applicable EU-Directives, most notably in the context of capital protection. It would seem appropriate, however, to review the effect of the capital protection provisions and discuss within the EU whether these need to be maintained or be replaced by more practical schemes. And even without change in the relevant EU-Directives, there is room for clarification in Dutch law for some topics, such as the repurchase of shares and capital reduction
8. Both the NV and the BV are used nowadays for listings on national or international stock markets. Some of the statutory provisions that apply to listed NVs, however, are not applicable to a listed BV. Examples are the mandatory filings of voting/capital interest and the mandatory offer when a person acquires 30% more of the voting rights. The Expert Group advises to synchronize these provisions.
9. Over the last decades, based on EU-Directives and case law, both NVs and BVs have been enabled to enter into cross-border mergers, divisions and conversions. The cross border legislation is, however, limited to NVs and BVs. Other legal entities such as foundations and associations cannot benefit from a similar legal framework. Furthermore, the current legal framework is limited to cross border transactions within the EU, requiring Dutch companies who want to enter into cross border transactions with entities outside the EU to make a two step approach. First, moving to an EU country that does cater for transactions outside the EU (e.g., Luxembourg) and then making a second step to the preferred destination. Also important, although there are legal structures available for companies outside the EU to migrate to The Netherlands, legislation for a direct and straight forward transaction structure is not available. The Expert Group advises to cater for more flexible transaction structures for cross border transactions with companies outside the EU.
10. With these reports, the Dutch legislator has ample materials to review and to digest. A solid basis for modernization of Dutch corporate law is available and deserves a follow up.

Martin van Olffen,
Law professor Radboud University.

2 For example CNH, Exor and Stellantis.

3 Some interesting publications in this respect: SSRN-id2625926. Dallas/Barry, Long-term Shareholders and Time-Phased Voting; SSRN-id2574236. Ventoruzzo, The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat, 2015; SSRN-id3475429, Belot, Ginglinger, Starks, Encouraging Long-Term Shareholders the Effects of Loyalty Shares with Double Voting Rights, 2019/2022.

4 Enterprise Chamber of the Amsterdam Court of Appeal, 1 Sep. 2020 (ECLI:NL:GHAMS:2020:2379), where the Enterprise Chamber ruled that in the case at hand a ratio of 1:10 was disproportionate.