

The Act Amending the Right of Inquiry



Further information

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INTRODUCTION

On 12 June 2012 the Upper House adopted the legislative Act introducing amendments to the Dutch inquiry proceedings (*Wijziging van boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van het recht van enquête*) (the "Act")¹. The Act will come into effect on 1 January 2013.

The Act aims at optimizing the inquiry proceedings by introducing four principal changes:

- a. new rules regarding access to an inquiry proceedings;
- b. enhancement of the rules regarding immediate measures;
- c. more safeguards during the inquiry phase of the proceedings;
- d. restriction of the liability of investigators.

GENERAL

The Dutch inquiry proceedings is considered an important and effective instrument for the settlement of disputes within Dutch companies and other legal entities.

The inquiry proceedings commences with a request to the Enterprise Division of the Amsterdam Court of Appeal (the "**Enterprise Court**") to undertake an inquiry into the policy and affairs of a company. The request will only be granted if well-founded reasons to doubt the company's policy appear. In that case the Enterprise Court may appoint an investigator. The investigator will report the results of the inquiry back to the Enterprise Court and to the parties involved in the proceedings. If the Enterprise Court decides on the basis of the report of the investigator that the company has been mismanaged, the Enterprise Court may take the measures it considers necessary. These measures include, amongst other things, appointment, dismissal or temporary suspension of board members and annulment of decisions of the management board, the supervisory board or the general meeting of shareholders.

NEW RULES REGARDING ACCESS TO AN INQUIRY PROCEEDINGS

The company in question

According to the Act the company itself will become entitled to request an inquiry proceedings into its own affairs. The request must be filed by the management board on behalf of the company. The supervisory board and works council must be informed about the request as soon as possible.

Furthermore, the Act grants the supervisory board or, in case of a one-tier board, the non-executive board members, the authority to file the request.

Bankruptcy trustee

The Act entitles the bankruptcy trustee to request an inquiry in the event of a bankruptcy of the company.

Shareholders and depositary receipt holders

The Act introduces a new threshold for shareholders and/or depositary receipt holders of a "large" company (i.e. a company with an issued capital of more than EUR 22,5 million). For these large companies a request may be made by shareholders and/or depositary receipt holders alone or together holding (i) at least 1% of the issued capital or (ii) shares and/or depositary receipts in a listed company with a market value of at least EUR 20 million.

The rules for companies with an issued share capital of EUR 22,5 million or less will remain unchanged. A request may be made by shareholders and/or depositary receipt holders alone or together holding (i) at least 10% of the issued capital or (ii) holding shares and/or depositary receipts with a nominal value of at least EUR 225,000, or any lower amount laid down in the articles of association.

ADDITIONAL RULES REGARDING IMMEDIATE MEASURES

The Enterprise Court may impose immediate measures if necessary for the company's course of affairs or in the interests of the inquiry. According to case law of the Dutch Supreme Court, immediate measures should be imposed with restraint and in accordance with the principle of proportionality. When imposing immediate measures, the Enterprise Court must carefully weigh the interests of the parties involved. The Act implements these rules in the Dutch Civil Code.

The Act also provides that the Enterprise Court must decide within a reasonable time after the immediate measures have been ordered whether or not an investigation has to take place.

¹ *Wet van 12 juni 2012 tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van het recht van enquête*. Legislative number 32 887.

**ADDITIONAL SAFEGUARDS DURING THE INQUIRY
PHASE OF THE PROCEEDINGS**

The Act provides for additional safeguards during the inquiry phase of the proceedings:

- a. All persons mentioned in the report of the investigator must have the opportunity to take note of findings relating to them and to respond to these findings.
- b. Each interested party may file a defence until a specific date before the hearing as determined by the Enterprise Court.
- c. An examining judge (*raadsheer-commissaris*) of the Amsterdam Court of Appeal, to be appointed at the same time as the investigator, will supervise the inquiry phase of the proceedings. The examining judge may issue instructions regarding the manner in which the investigation is to be conducted.

LIMITATION OF THE LIABILITY OF INVESTIGATORS

In order to make sure that the risk of liability which investigators face while performing their duties will not prevent them from accepting an appointment as an investigator, the Act limits the liability of investigators.

The Act clarifies that the liability of investigators for damages resulting from the investigation report is limited to intentional misconduct or gross negligence of the obligation to properly perform their duties.

Furthermore, the Enterprise Court may decide that all reasonable costs of defence of the investigators or other persons appointed by the Enterprise Court must be borne by the company.

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