

## RIGHTS OF MINORITY SHAREHOLDERS IN THE NETHERLANDS

L. Timmerman and A. Doorman\*

III A 3

### 1 Introductory remarks

#### 1.1 *Position of shareholders under Dutch company law*

Historically, the position of shareholders in Dutch companies has been rather weak, especially when compared with that of the board of directors. As far as we know, no serious investigation has ever been conducted into the question of why the board of directors of a Dutch company has such a strong position. A parallel may exist with other phenomena in Dutch society, most notably the trust Dutch citizens have always put in their government and the acceptance of a very indirect form of democracy. Whatever the reasons may be, the weakness of the position of shareholders has made it unnecessary to direct special attention to the position of minority shareholders.

#### 1.2 *Shift in power in favour of shareholders*

Recently, we have witnessed a strengthening of the position of the shareholder at the expense of the power of the board of directors and the supervisory board. This shift in power in favour of shareholders may result in increasing attention for the position of minority shareholders in the coming years.

The shift in power in favour of the shareholder has many reasons, including a recent influential advice from the Social and Economic Council to the Dutch government and parliament,<sup>1</sup> the pressure exercised by institutional investors on the Dutch government and companies to limit the use of anti-take-over devices, the expanding shareholder base in the Netherlands and the increasing number of foreign professional investors in Dutch companies. This strengthened position of shareholders has also resulted in increased attention for the position of minority shareholders in the Netherlands. A good illustration of this is the legislative proposal for a new section 2:118a that will give shareholders who hold 1 percent of the issued capital the right to place an item on the agenda of the general meeting of shareholders.

#### 1.3 *Why minority protection?*

Before elaborating on the protection of minority shareholders in the Netherlands, it will be useful to make some short remarks on why minority shareholders should receive protection and what the ultimate goal of this protection should be. At least three different reasons justifying minority protection come to mind. First, if the Dutch legal system does not provide adequate protection of minority shareholders compared with foreign legal systems, foreign investors will not invest in Dutch companies and Dutch investors will increase their investments in foreign companies. Second, and related to the first point, weak protection of minority shareholders

---

\* University of Groningen.

1. Entitled *Advies over het functioneren en de toekomst van de structuurregeling (Advice on the functioning and the future of the rules applicable to statutory two-tier entities)*, 5 January 2001.

increases the average cost of capital for a company, putting it at a competitive disadvantage with foreign companies. A final reason for an adequate protection of minority shareholders' rights is more normative. There seems to be no good reason why it should be considered fair and equitable to disproportionately disadvantage minority shareholders compared with larger shareholders, only on the grounds that they hold fewer shares. In our opinion, all shareholders, large or small, should receive adequate protection from the law.

#### *1.4 Who is the minority shareholder?*

In Dutch legislation, established case law and doctrine, you can look in vain for a general definition of a minority shareholder. Dutch law assesses whether a specific right or action should be given to a minority shareholder on a situation-to-situation basis and also decides from case to case whether one qualifies as a minority shareholder. This decision whether one has a right or an action is usually described in Dutch law in terms of percentage of the issued share capital, but sometimes also in terms of the absolute book value of the shares required, or as a combination of both. The fairness of this adherence to percentages in deciding whether a shareholder is a minority shareholder can be questioned. Dutch law, for instance, permits the issue of priority shares. These shares have special controlling rights attached to them, making it possible to control the company without holding a large percentage of the shares and without providing a large share of the company's capital. A consequence of this is that a shareholder providing the majority of the capital may sometimes not control the company. In such a case the 'majority' shareholder is effectively in a minority position with regard to the exercising of controlling rights. Under Dutch company law, capital and control are not necessarily in line, so it is, in our opinion, impossible to define the concept of 'minority shareholder' without bearing in mind the control situation in the company. When a company makes use of a specific control structure, whether that be priority shares, a pyramid structure, or preference shares, percentages lose much of their relevance. Under these circumstances we would define minority shareholders as those shareholders who, irrespective of the amount of capital they provide, are unable to exercise any significant form of control within the company.

#### *1.5 What are minority rights?*

In Dutch company law several rights are given to all shareholders, irrespective of the number of shares they hold. Not all of these rights can be qualified as minority rights. The right to vote in the general meeting of shareholders, for example, will usually not be a minority right for two reasons. First, because this right is not specific to minority shareholders and second, because this right usually has no significant meaning for minority shareholders. In the event of a disagreement, they will be the ones to lose the vote at the general meeting of shareholders. In our opinion, for a right to be a true minority right, it needs to possess the characteristic that it creates the possibility that an outcome can be reached that is different from the outcome that the majority of the shareholders wish. This means that the minority shareholder can interfere through a minority right in the affairs of the company,

thereby correcting the policies of the majority shareholder. Within the minority rights we draw a distinction between positive and negative rights. By positive rights we mean the ability to initiate policies by the company that would not have been pursued without the initiative (see nos 15-20). By contrast, negative rights refer to the possibility for a minority shareholder or a group of minority shareholders to block a resolution that is desired by the majority (nos 21-26). In addition to these two categories we can mention a third: that of the so-called "normalising" minority rights. These are rights that the minority shareholder can exercise to force the company to comply with statutory provisions or the articles of association. In this report we will not treat these rights as a separate category since Dutch company law does not contain many of them<sup>2</sup>.

In this report Chapters II and III give general overview of minority rights in the Dutch legislation. Chapters IV, V and VI deal with specific aspects of minority protection. The report ends with a conclusion. In this report decisions from the Enterprise Section of the Amsterdam Court of Appeal will be indicated with OK (Ondernemingskamer) Decisions of the Supreme Court of the Netherlands will be indicated with HR (Hoge Raad). Their most important decisions are published in the Nederlandse Jurisprudentie (NJ) en Jurisprudentie, Onderneming en Recht (JOR) and referred to by year of publication and by case number. With BV we mean the Dutch variant of the private limited company, with NV the public limited company.

## 2 Rules protecting minority shareholders

### 2.1 *Methods of protection of minority shareholders*

In Dutch company law, rules protecting minority shareholders are mainly but not exclusively statutory in nature. As a result of the fact that minority shareholder protection has never received much attention, protection provisions are found scattered over several sources, both in "hard" law and in "soft" law. Another distinction that can be made is between provisions that provide minority protection in the narrow sense, usually giving shareholders certain rights and a remedy to effectuate these rights, and rules that are primarily directed at improving the availability of information and of market transparency. This second set of rules usually has as a side-effect an improvement in the position of minority shareholders. We will refer to this method of protection as protection in the broad sense. We will now discuss eight sources of minority shareholder protection.

### 2.2 *Book 2 of the Dutch Civil Code*

Book 2 of the Dutch Civil Code which regulates the legal persons, such as the BV and the NV, may be regarded as the most important source for minority shareholders protection. It can be characterised as "hard" law and provides protection in the narrow sense. Perhaps its most fundamental provision offering protection for minority shareholders is section 2:201(92) which provides for equal protection of

---

2. We can mention section 2:222(112), sections 999-1002 of the Code of Civil Procedure and to a certain extent, sections 2:345-359 and 2:15-16.

the shareholders (see further nos. 27-29).

Section 2:201(92):<sup>3</sup>

Except as is otherwise provided for in the articles, all shares shall rank *pari passu* in proportion to their amount.

A company limited by shares must treat shareholders and holders of depository receipts whose circumstances are equal in the same manner.

Other important provisions for the protection of minority shareholders in Book 2 are sections 2:15 about the nullification of resolutions, section 2:220(110) about the right for shareholders who together hold a certain percentage of the shares to convene a general meeting of shareholders, section 2:343 providing a shareholder an exit-opportunity in case the continuation of his shareholding can no longer be reasonably expected of him due to the conduct of other shareholders (no. 33), and section 2:344-359 about the right to demand an inquiry (nos 30-31).

### 2.3 *Book 3 of the Dutch Civil Code; class action*

Book 3 of the Dutch Civil Code, on property law in general, contains several important provisions for minority shareholders. For minority shareholders in Book 3 is section 3:305 relevant. This section allows minority shareholders to organise into an association or a foundation and to have the entity bring an action against the company for the benefit of the collective. It is not possible for the entity to sue for damages but it is able to request a declaratory judgement. With this declaratory judgement, the individuals involved can then sue for damages. An association or foundation is entitled to initiate a class action if the association or foundation, according to its articles of association and in practice, protects the same interest as the interest of the individuals that has been violated and that the interests are fit for bundling. Representativeness is not a condition or a hurdle, especially not when the association or foundation limits its actions to its members. Section 3:305a reduces the cost of litigation. These costs can be high, caused among other things by the obligation to be represented by counsel and the danger of being ordered to also pay the other party's legal costs.

### 2.4 *Code of Civil Procedure*

This book contains three relevant sets of provisions for the protection of minority shareholders. These are first, sections 999-1002, which concern the annual accounts, the annual report and the information that has to be added to the accounts and the report. Any affected party can demand that the company alter the aforementioned documents and bring them into line with a legal injunction, provided by the Enterprise Section of the Amsterdam Court of Appeal. Refusal to do so is a criminal offence. Second, section 214 offers minority shareholders the opportunity to request a provisional examination of witnesses in preparation for proceedings which are being considered. Finally, section 843a offers minority shareholders the opportunity to demand in court that they will be allowed to inspect a private instrument.

---

3. Section 2:201 is the relevant section for the BV; section 92 for the NV.

### 2.5 *Commercial Code*

In sections 8 and 11, the Commercial Code contains two provisions that can be applied to protect the interests of a minority shareholder. Section 8 gives a minority shareholder the right to ask the court to demand the disclosure of the books and documents that the company is obliged to keep by law during legal proceedings. Section 11 of the Commercial Code contains the obligation to submit the entire accounts to the other party in legal proceedings. This obligation to submit is restricted in the sense that it only exists with regard to "partners", while it is uncertain at best whether a minority shareholder qualifies as a partner.

### 2.6 *Securities Transaction Supervision Act 1995*

This statute provides protection in the broad sense. For the purposes of minority shareholder protection, three aspects seem relevant. First, sections 3-6 prohibit the issue of shares to the public unless the company has made sure that adequate information is available to the investors. Second, sections 29-42 regulate the control and supervision of the securities markets by the Minister of Finance, or by other entities after delegation; the Minister of Finance has delegated his powers to the Stichting Toezicht Effectenverkeer. Finally, sections 46-47 make insider trading a criminal offence. Recently, rules relating to a public offer have been incorporated into the Securities Transaction Supervision Act 1995. The purpose of these rules is to ensure that shareholders receive adequate and timely information about the public bid.

### 2.7 *Disclosure of Major Holdings in Listed Companies Act 1996*

This statute provides protection to minority shareholders through the improvement of market transparency and information provision. This statute obliges anyone who passes certain shareholding thresholds in either direction to report this to the company and the Minister of Finance, who will make the information available to the public. Again, the Minister of Finance has delegated his powers under this statute to the Stichting Toezicht Effectenverkeer.

### 2.8 *Listing and Issuing Rules*

These are rules developed by the Amsterdam Exchange, which is now a subsidiary of the Euronext Exchange, and to which a company that seeks a listing is bound through the listing agreement it enters into with the exchange. They can therefore be characterised as legally binding, but only in the relationship between the listed company and the exchange. The rules contain several provisions that protect minority shareholders. Examples are sections 8-24, which contain the obligation to make a prospectus available when issuing securities and that give detailed information on what to include in the prospectus. A second example is section 26, which explicitly states that the issuing company is obliged to treat all shareholders who are in equal circumstances in an equal manner. Finally, section 28 is an

important section, giving a detailed overview of the information that the issuing company has to provide to the public. It contains the general obligation to make available all the facilities and information necessary for the shareholders to be able to exercise their rights. The most important, more specific, obligation can be found in section 28h. This provision contains the obligation to immediately make available a publication on every fact or event concerning the issuing company that can be expected to significantly influence the price of the company's stock.

### *2.10 Corporate Governance in the Netherlands; report by the Peters Committee*

In 1996 and 1997, the Corporate Governance Committee (also called the Peters Committee after its chairman) presented two reports<sup>4</sup> (a draft and a final version). Among other things, these reports contained 40 recommendations concerning corporate governance in the Netherlands. The report mainly focuses on the relationship between the board of directors, the supervisors and the shareholders. It pleads for a strengthening of the position of shareholders and urges them to participate more actively in the affairs of the company. The report is an example of a code of best practice in the sense that it is not legally binding; it merely makes recommendations. However, it does try to improve the position of the shareholder in a direct way. Examples include recommendation 26, which asks companies and investors to reassess the role played by shareholders, based on the principle that capital and control should be in line, and recommendation 29 which asks management to assess the desirability of an increased influence of investors and how to achieve this. Recommendation 27, the general meeting of shareholders should be the forum to which the supervisory board and the board of directors report and are accountable, recommendation 28, the board of directors and the supervisory board should have the confidence of the general meeting of shareholders, and recommendation 30, requests made by investors who represent 1% of the issued capital or NLG 500,000 in shares to have items placed on the agenda should in principle be honoured, are more detailed.

It was left to companies to voluntarily adopt the recommendations. Evaluation showed that only a small percentage of Dutch firms made significant changes to their corporate governance policy and that conformation was particularly weak with regard to those recommendations concerning increased shareholder power. Therefore, the Dutch government has started to translate some of these recommendations into legislation. A good example is the proposal for a new section 2:114a that will give shareholders who hold 1 percent of the issued capital or shares with a market value of \_ 50 million (this concerns listed companies) the right to place an item on the agenda of the general meeting of shareholders. This is a direct legal translation of recommendation 30 of the Peters Committee. Another example is the new provision in Book 2 that adoption/approval of the annual accounts does not imply a discharge for the board members from liability for their management.

---

4. Commissie Corporate Governance, *Corporate Governance in Nederland: Een aanzet tot verandering en een uitnodiging tot discussie* (Corporate Governance in the Netherlands: An initial impetus for change and an invitation for discussion), 28 October 1996 and Commissie Corporate Governance, *Corporate Governance in Nederland: Veertig aanbevelingen* (Corporate Governance in the Netherlands: Forty recommendations), 25 June 1997.

Under this new rule, both have to be separate items on the agenda of the general meeting of shareholders.

### **3 An overview of minority rights**

#### *3.1 Overview of the thresholds for minority shareholders' rights (positive minority rights)*

Scattered throughout Book 2 of the Civil Code, there are several different thresholds for minority shareholders to qualify for a right. The most important positive minority shareholders' rights are listed below, including the number of shares the shareholder has to hold in order to be able to exercise the corresponding right.

#### *3.2 A single share*

The following rights attached to a single share are minority rights.

*Section 2:222(112)* The right to convene a general meeting of shareholders when those who are authorised under section 2:219(109) or the articles have failed to do so, but only after authorisation by the President of the District Court. Section 2:222(112) is an example of a normalising minority right (see no. 5).

*Section 2:343* The right to demand in court that one's shares will be acquired by other shareholders when one's rights or interests are prejudiced by the conduct of one or more co-shareholders to such an extent that the continuation of the shareholding can no longer reasonably be expected of one.

*Sections 999-1002 Code of Civil Procedure* The right to request the company to alter the annual accounts and annual report and to bring them into line with a legal injunction. These sections are also an example of a normalising minority right (see no. 5).

#### *3.3 5% of the issued capital*

*Section 2:331* The right to prevent a transferee company resolving to merge by a resolution of the board of directors. Under normal circumstances a company merges by resolution of its general meeting of shareholders (section 2:317 subsection 1). However, the law makes an exception to this rule for the transferee company on the grounds that for such company a merger can possibly be of little importance and does not substantially affect the position of the shareholders. If the articles do not prevent this, and if the company has stated its intention to do so in the published notice of the deposit of the merger proposal, a merger by a resolution of the board of directors is possible. However, subsection 3 enables a group that represents at least 5% of the issued capital to prevent this by requesting the board of directors to convene a general meeting of shareholders to decide on the merger within one month after such publication.

*Section 2:334ff* The right to prevent the transferee company resolving upon the division by a resolution of the board of directors. This right is comparable with the right to prevent a the company resolving to merge by a resolution of the board of directors.

### 3.4 *10% of the issued capital*

*Section 2:220(110)* The right to convene a general meeting of shareholders. This right is restricted in several ways because convening a general meeting of shareholders without the consent of the board of directors amounts materially to a deed of mistrust and can thereby harm the interests of the company.

*Section 2:346* The right to ask for an inquiry. This right will be discussed in more detail in nos. 30-31.

### 3.5 *1/3 of the issued capital*

*Sections 2:336 and 2:342* The right to demand in court that a shareholder, usufructuary or pledgee of a share who has the right to vote transfers his shares or his voting right should his conduct prejudice the interests of the company to such an extent that continuation of his shareholding or of his exercise of the voting right cannot reasonably be tolerated.

### 3.6 *Analysis of the above-mentioned thresholds.*

The rights of shareholders or a group of shareholders who have reached a certain threshold refer to four different criteria: a single share, 5%, 10% and 33 1/3%. First, it is interesting to note the low threshold for asking for an inquiry. Even though the initial hurdle seems rather high, 10% of the issued capital, it is significantly lowered by stating that it also suffices to hold shares with a nominal value of \_ 225,000. Especially for large companies, this \_ 225,000 threshold is much lower than the 10% of the issued capital hurdle. This cannot but reflect the fact that the Dutch legislator has considered it necessary for the inquiry proceedings to provide adequate protection to (smaller) minority shareholders. A second interesting point is that Dutch company law contains four different hurdles for exercising minority rights. However, there does not seem to be any coherent thought behind this division into four categories. There seems to be no reason why, for example, a minority shareholder should require only 5% before being able to exercise the right to prevent a transferee company resolving to merge by a resolution of the board of directors, but 10% before he is able to exercise the right to convene a meeting of shareholders.

### 3.7 *Negative minority rights*

In the following nos. an overview of qualified quorums and majorities is given which Book 2 prescribes.

### 3.8 *Blocking power for a single shareholder.*

*Section 2:15* The right to ask for nullification of a resolution if the shareholder who requests nullification has a reasonable interest in the due performance of the obligation which has not been performed. This right can be exercised with regard to a resolution by any constituent body of the legal person.

*Section 2:231(121)* Subsections 1 and 3 limit the amendment of the articles of association. They state that if the articles exclude the power to amend certain provisions in the articles from the general meeting of shareholders or even completely exclude the power to amend the articles, such is nevertheless possible by a unanimous vote at a general meeting of shareholders at which the entire issued capital is represented.

*Section 2:323* The right to ask for avoidance of a legal merger if the requesting shareholder has a reasonable interest. This section lists four grounds for avoidance of a legal merger. For the protection of minority shareholders, the right to declare avoidance of the merger on the grounds of avoidance of a resolution of the general meeting of shareholders required for the merger is particularly relevant.

*Section 2:334u* The right to ask for avoidance of a division of the legal person if the requesting shareholder has a reasonable interest. Generally speaking, the division of a legal person can be declared void for the same reasons as apply to a legal merger.

*Section 2:238(128)* The articles of association may contain a provision that allows for the passing of resolutions by shareholders outside the context of a general meeting of shareholders. Relevant in this context is that even should the articles explicitly provide this option, resolutions may only be passed by a unanimous written vote of the shareholders entitled to vote.

3.9 *90% of the issued capital (blocking power when the minority group possesses more than 10% of the issued capital).*

*Section 2:18* A resolution to convert, passed in accordance with the requirements for a resolution for an amendment of the articles, and a 9/10 majority of the votes cast at the general meeting of shareholders are needed for a conversion from one legal entity into another. *Section 2:181(71) subsection 2* These sections give an additional right to minority shareholders. This right can be characterised as a positive right but will be discussed here because it is attached to the right embedded in section 2:18. When a public or a private limited company is converted into an association, a cooperative or an insurance guarantee company one loses the quality of shareholder and becomes a member. Because this conversion fundamentally changes one's proprietary rights position, section 2:181(71) offers any shareholder who has not consented to the conversion resolution the right to request that the company indemnify him for the loss of his shares.

3.10 *2/3 of the votes cast (blocking power when the minority group possesses more than 1/3 of the votes cast).*

*Section 2:206a(96a) subsection 7* In the event of a capital increase, there is in general a pre-emption right for the existing shareholders. However, section 2:206a(96a) subsection 6 states that this pre-emption right may be restricted or excluded and that the general meeting of shareholders can transfer its powers in this matter to another constituent body. Subsection 7 then states that for these decisions, a 2/3 majority of the votes cast is required if less than half of the issued capital is represented.

*Section 2:209(99) subsection 6* A reduction of the capital is possible by a resolution

of the general meeting of shareholders. For the NV, this resolution requires the approval of  $2/3$  of the votes cast if less than half of the issued capital is represented at the meeting. There is no corresponding section for the BV, mainly due to the fact that this provision serves to protect the shareholders not present at the meeting. The underlying view was that shareholders in a BV have closer links with the affairs of the company and that they will sooner appear at a meeting should they disagree with a proposed resolution.

*Section 2:330* This section contains a provision concerning the majority required for a legal merger.

*Section 2:334ee* Analogous to the legal merger, in the case of a legal division of a company, a resolution to divide an NV or a BV requires  $2/3$  of the votes cast should less than half of the issued capital be represented at the general meeting of shareholders.

### *3.11 $1/3$ of the votes cast (blocking power when the minority group possesses more than $2/3$ of the votes cast).*

*Section 2:243(133) subsection 2* It seems strange to discuss a provision that requires  $2/3$  of the votes cast and also represents at least 50% of the issued capital as a right belonging to a minority. However, if we define minority in a broad sense, not only with regard to percentages of the capital, but also with regard to the controlling position in the company (see no. 5), this right can be seen as a minority right. The articles may contain a provision that states that the appointment of a director by the general meeting of shareholders shall be made from a list of candidates containing the names of at least two candidates for each vacancy. The articles may grant this binding right of nomination to everyone. Subsection 2 then states that the general meeting may resolve by a resolution passed by a  $2/3$  majority representing more than half of the votes that such a nomination list shall not be binding.

### *3.12 Analysis of the above mentioned thresholds*

As with the positive rights described in nos. 15-20, we can observe several thresholds before a minority shareholder obtains the negative right to block a decision desired by the majority. However, because the exercise of the aforementioned negative right is made dependent on the size of the stake of the majority, it is unnecessary for minority shareholders to combine their holdings before being able to exercise their rights. Analogous to the positive minority rights, the allocation of negative minority rights either on an individual or on an aggregate level is not elaborately thought-out and seems to be more or less random. It is interesting to note that Dutch company law does not prescribe any qualified majorities for two important decisions within a company. These are the amendment of the articles (section 2:231(121)) and the winding up of the company (sections 2:19-21). However, in practice, many articles of association contain provisions that prescribe a qualified majority for amendment of certain, or in some cases all, sections of the articles.

## 4 The principle of equality

### 4.1 Relation to reasonableness and fairness

The relevant section of Dutch company law with regard to the principle of equality (section 2:201(92) subsection 2) (see no. 7) is a direct result of the EC's second company law directive.<sup>5</sup> This directive is limited to subjects related to capital protection and is also only applicable to public companies. This means that the Dutch legislator is under no obligation to extend the range of the principle of equality beyond the subject of capital protection. Examining the Dutch text however, it gives no indication that its scope is limited to capital protection issues. The conclusion that section 2:201(92) subsection 2 is not limited to capital protection becomes even stronger when we examine the Memorandum of Reply.<sup>6</sup> It states explicitly that the principle of equality extends beyond issues of capital protection.

Two important rules following on from the principle of equality as defined in section 2:201(92) can be found in sections 2:206a(96a) and 208(99). These sections indicate that, in principle, existing shareholders have a pre-emption right on any issue of shares *pro rata* to the aggregate amount of their shares. Section 2:206a(96a) subsection 6 states that the general meeting of shareholders can decide to pass off the pre-emption right. Nevertheless, the principle of equality overrides such a decision<sup>7</sup>. Section 2:208(99) subsection 4 states that a partial repayment on shares or a release from the obligation to pay up must be made *pro rata* to all the shares unless, in respect of the issue of a certain class of shares, the articles provide that a repayment may be made or a release may be given exclusively in respect of such shares.

The principle of equality is of the utmost importance for the protection of minority shareholders. The Dutch Supreme Court does not regard section 2:201(92) subsection 2 as a provision from which no departure is allowed. It interprets the rule of section 2:201(92) flexibly. First of all, it is important to realise that, as Van Schilfgaarde mentions<sup>8</sup>, the equality defined in subsection 2 is not an absolute equality but rather a relative one; equality in proportion to the amount of capital the shareholder in question provides.

However, the exact content of the principle of equality is in our opinion dependent on the nature of

- 
5. It is based on section 42 of the directive of the European Council, 13 December 1976, Pb L 26/1, 31 January 1977.
  6. See Memorandum of Reply, TK 1978-1979, no. 15 304, no. 3, p. 18 (the treatment of shareholders with regard to the subjects of the second directive and moreover every other form of treatment of the shareholders by the company).
  7. See again the case of Van den Berge v. Verenigde Bootlieden, HR 31 December 1993, NJ 1994, 436 (section 2:201 subsection 2 contains a mandatory provision and is not overridden by the provision of section 2:206a).
  8. See P. van Schilfgaarde in *Corporate governance voor juristen (Corporate governance for lawyers)*, Kluwer Deventer, 1998, p. 19-28. Even when there is a principle, it is not the principle of equality, not even the principle of democracy, but the principle of plutocracy. The equality is a relative one.

the subject in question. With regard to certain rights, for example, the right to vote in a general meeting of shareholders and the right to receive a dividend, equality is indeed relative; there it is proportional to the number of shares the shareholder holds. With regard to certain other rights however, mainly information related rights, the equality has a different nature; there it is absolute, for under Dutch company law a company is not generally permitted to provide certain (important) information to large shareholders but not to smaller shareholders.

Second, departure from the principle of equality is permitted when shareholders are not in equal circumstances. Finally, departure is also permitted when there is a reasonable and objective justification for the unequal treatment<sup>9</sup>. The relationship between subsection 2 and subsection 1 is intriguing, as subsection 1 of section 2:201 (92) opens up the possibility to provide in the articles that the rule that all shares rank *pari passu* in proportion to their amount is not applicable. The Dutch legislator has indicated that in his opinion a provision in the articles as mentioned in subsection 1 can mean that the shareholders are not in equal circumstances, as mentioned in subsection 2<sup>10</sup>. However, we question the opinion that different shareholders can be said to be in different circumstances on the basis of the articles *alone*. The legislator has clearly indicated that in his opinion section 2:92 subsection 2 is nothing more than an elaboration of section 2:8, which prescribes the dictates of the reasonableness and fairness of the relation between the company and its shareholders. We are of the opinion that not only is subsection 2 an elaboration of section 2:8, but that subsection 1 and the subsections 1 and 2 together cannot be understood correctly either without paying attention to the influence of reasonableness and fairness. The question, in our opinion, should therefore be do the principles of reasonableness and fairness ensure that a different treatment of shareholders solely based on a provision in the articles is reasonably and objectively justified?. We do not think that, generally speaking, the answer to this question can be in the affirmative.

A further question is whether a company may include provisions in its articles that draw a difference between shareholders who are in equal circumstances, if all the shareholders agree? Would such a provision of inequality also be used against shareholders who do not belong to the group of shareholders which voted in favour of such a provision, but became shareholders later, assuming that the provisions in the articles are sufficiently known to these new shareholders? Would it be allowed to treat shareholders unequally if all of them agreed, even if there is no explicit provision in the articles that allows this? These are all fundamental questions for which Dutch company law, established case law and doctrine hardly provide any answers. On the grounds of section 2:201(92) subsection 1, it is undoubtedly possible to determine in the articles that *in certain cases* shares have different rights and obligations attached to them. But, as in all matters concerning company law, the principles of reasonableness and fairness (section 2:8) play a decisive role in the

9. As decided by the Supreme Court in the case *Van den Berge v. Verenigde Bootlieden* (HR 31 December 1993, NJ 1994, 436).  the court of appeal has not, when judging the question whether a justification as aforementioned could be found in the special circumstances of the given case, applied an incorrect criterion.

10. See the Memorandum of Reply 15 304, no. 6, p. 18.

background. From a company law point of view, equality and freedom of contract are not principles that take precedence over the principles of reasonableness and fairness, but can and should be seen either as resulting principles (equality) or principles that may never conflict with the demands of reasonableness and fairness (complementary therefore means freedom of contract). This point of departure means that the following frame of reference could in our opinion be useful when studying these questions.

On the basis of section 2:201(92) subsection 1 *alone*, it is impossible to legally validate divergence in the articles from the principle of equality as described in subsection 2. However, a divergence in the articles is possible when the law explicitly states elsewhere that divergence from the principle of equality in the articles is allowed *with regard to a specific subject*. By restating the principle from section 2:201(92) subsection 1 and limiting the opportunity for divergence to a specific subject, the legislator has made it clear that it has *in abstracto* made the trade-off between the principles of equality and that of freedom of contract □ the principles of reasonableness and fairness do not oppose an unequal treatment of shareholders with regard to this specific subject. One example of this approach in our opinion is section 2:99 subsection 4 (the articles may provide for a partial repayment on the shares or a release from the obligation to pay up may be given exclusively in respect to a certain class of shares). What happens if the articles contain a provision with regard to a specific subject that diverges from the principle of equality but this diverging provision has no other basis in the law than section 2:201(92) subsection 1? As mentioned above, in our opinion the point of departure should be that, in general, the principles of reasonableness and fairness speak against this diverging provision in the articles. However, since it concerns a weighing-up of the interests *in concreto*, circumstances may lead to the conclusion that divergence in the articles solely based on section 2:201(92) subsection 1 must be considered legally valid. In this the fact that none of the parties concerned with the company (which group may be larger than the shareholders alone, since the interests of the company as an entity of its own should sometimes also be taken into account) object to the unequal treatment of the shareholders could play a role. This general approval means that a divergence from the principle of equality in the articles solely based on section 2:201(92) subsection 1 is less quickly in conflict with reasonableness and fairness. Another reason why divergence in the articles from the principle of equality solely based on section 201(92) subsection 1 could be considered legally valid is that such divergence has been long-term practice in Dutch company law, as for example the practice of so-called priority shares.

#### 4.2 *Relation of the principle of equality to securities law*

There are certain subjects with regard to which it is impossible to legally validate divergence from the principle of equality through a provision in the articles. This impossibility exists mainly with regard to subjects like transparency, predictability, information disclosure, etc. For these subjects, the distinction between listed and unlisted companies is relevant. The aforementioned subjects are mainly important for listed companies, and also for the shareholders of these types of companies, who in general do not know each other and therefore find no protection in the private character of the company. Provisions in the articles cannot be applied for these kind of companies with regard to divergence from the principle of equality on subjects like transparency, predictability and information disclosure. An unequal treatment of shareholders with regard to these subjects may violate the legislative provisions of

securities law. Examples include section 28h of the Listing and Issuing Rules and section 46a of Securities Transaction Supervision Act 1995. One may go so far as to say that in securities law the principle of equality plays a more important role than it does in company law.

#### 4.3 *Selective distribution of information.*

Closely related to the principle of equality in securities law is the issue of selective distribution of information. Eisma describes selective contacts as "contacts between the board of directors of a listed NV and one or more, but not all shareholders, especially institutional investors outside the formal general meeting of shareholders."<sup>11</sup>

These selective contacts can be between certain shareholders and the company directly, but also between the company and financial analysts. Eisma notes that in his opinion institutional investors are increasingly demanding these selective contacts and that companies are willing to fulfil these demands, probably even to a greater extent than can be derived from publicly available information.

It is not hard to imagine that during these selective contacts the company provides certain shareholders with information that is not yet available in that form to the other shareholders: so-called selective disclosure of information. Dutch law, doctrine and established case law contain no specific answer to the question of whether these selective contacts are allowed. However, two provisions contain rules that affect the answer to this decision. The first is section 46a of the Securities Transaction Supervision Act 1995. This section forbids the disclosure of inside information to third parties, unless in the normal exercise of one's job, profession or function. This means that the structural disclosure of inside information as part of an investor relations policy is not allowed, since that cannot be considered as being part of the board's normal job, profession or function<sup>12</sup>.

The second relevant "rule" is the principle of equality, which can in Dutch company law be found in the aforementioned section 2:201(92) subsection 2 and in section 26 of the Listing and Issuing Rules. Both sections put an obligation on the company to treat shareholders who are in equal circumstances in an equal manner. In our opinion one cannot base the conclusion that certain shareholders are not in equal circumstances solely on the fact that one shareholder holds more shares than another, since for both categories of shareholders, receiving adequate information is relevant<sup>13</sup>. This means that in general the principle of equality prevents selective contacts and selective disclosure of information. However, existing case law<sup>14</sup> states that departure from the principle of equality is allowed if there is a reasonable and objective justification for this departure. Therefore, generally speaking, the principle of equality prevents selective contacts and disclosure because institutional investors

---

11. See Eisma, *Investor relations*, inaugural address, 1998, p. 1, hereafter referred to as Eisma.

12. See Eisma, p. 22-23.

13. Both Eisma (p. 23-29) en Vletter-van Dort (p. 125) hold the same opinion.

14. See Van den Berge v. Verenigde Bootlieden, HR 31 December 1993, NJ 1994, 436.

and other<sup>15</sup> large shareholders are in equal circumstances, but one has to determine on a case-to-case basis whether departure from the principle of equality is allowed in this situation because there is reasonable and objective justification.

One could argue that selective contacts and disclosure are under certain circumstances in the best interests of the company and that it is therefore compatible with the duty of the board of directors to engage in these selective contacts and disclosure.<sup>16</sup> The reasoning behind this is that certain large shareholders make their shareholding dependent on the fact that they belong to the group of shareholders with which the company has selective contacts. If the company did not engage in selective contacts, demand for its shares would reduce, thereby increasing the cost of capital for the company. Not only is this not beneficial for the company itself, it is also harmful to the other shareholders.

## 5 Special audit (the inquiry proceedings)

### 5.1 Introduction

The inquiry proceedings have developed into an important, if not the most important, source of minority shareholder protection.

Its success is also revealed by the statistics: between 1971 and 2001 approximately 260 requests to start inquiry proceedings were filed. In approximately 205 of this 260 cases, the Enterprise Section ruled that there were well-founded reasons to doubt the correctness of the policy.<sup>17</sup> Moreover, between 1997 and 2001, the request for immediate measures was granted in about 60 cases (see no. 31). In approximately 20 of these 60 cases, the decision to grant immediate measures was coupled with the direct judgement that there were well-founded reasons for doubting the correctness of the policy of the company. In another 14 cases, this judgement was made at a later stage in the proceedings. In the remaining cases (approximately 26) the Enterprise Section did not decide that there were well-founded reasons to doubt the correctness of the policy, even though it had granted immediate measures. The fact that the inquiry proceedings seem a popular method for minority

- 
15. The question whether institutional investors may be regarded as large shareholders remains, because they typically hold no more than 5% in the company.
  16. Section 2:250(140) subsection 2 states explicitly that, in the performance of its duties, the supervisory board shall be guided by the interests of the company and the enterprise connected therewith. It is generally thought that the board of directors should also act according to this norm.
  17. For the period between 1971 and 1987, these figures are based on M.J. van Vliet, *De ontwikkeling van incidentregels in het vennootschaps- en rechtspersonenrecht en de betekenis van het recht van enquête (The development of incident rules in the law regarding companies and legal persons and the meaning of the right of inquiry)*, in: *Handelsrecht tussen Koophandel en NBW (Commercial law between Koophandel and NBW)*, 1988, for the period between 1988 and 2001 they are based on research by P.F.G.A. Geerts and A. Doorman. In another 13 cases the Enterprise Section ordered, with the consent of parties, the appointment of an independent expert to report on the price for the shares to be transferred in a dead-lock situation. Also, one has to keep in mind that from the moment that the Enterprise Section obtained the power to order immediate measures, the (preliminary) judgement that there appear to be well-founded reasons to doubt the correctness of the policy does not automatically imply that an inquiry is also ordered.

protection could very well be caused by the fact that the proceedings contain a cost allocation system that is beneficial for the plaintiff, since it is the company that pays the costs of the inquiry. This is different in other proceedings that purport to protect minority shareholders. This may explain their comparative unpopularity.

The scope of the inquiry proceedings is very broad; section 2:345 subsection 1 states that the object of the inquiry is the policy and the conduct of business. The court may limit the inquiry either to a specific subject or to a specific period of time. The plaintiff cannot claim for damages through the inquiry proceedings. At the end of the proceedings he can only request measures which are purported to further the interests of the company.

## 5.2 *The proceedings*

### *Goal of the inquiry proceedings.*

The goal of the inquiry proceedings can be characterised as twofold. First, its aim is to restore the relationship between the parties involved with the company in the case of conflict. The underlying assumption is that a judicial proceedings can bring some sort of relief. This is the forward-looking aspect of the inquiry proceedings. There is also a backward-looking aspect. The inquiry proceedings can also be used in hindsight, to establish factually what has happened and to assess responsibility for mistakes that may have been made. The Enterprise Section decided that using the inquiry proceedings solely to enable the use of the measures described in section 2:356, without the necessity of holding an inquiry to establish misconduct, does not amount to misuse of the inquiry proceedings.<sup>18</sup> In this example, the forward-looking aspect strongly dominates. However, there are other examples where the backward-looking aspect prevails. The Supreme Court has ruled<sup>19</sup> that the Enterprise Section is permitted to establish that there has been a case of misconduct without attaching any measures to it. This also means that the plaintiff is allowed to merely demand a declaratory ruling that there has been a case of misconduct, without asking for any further measures.

### *Subject of the inquiry proceedings.*

Section 2:345 subsection 1 states that the subject is *the policy and conduct of business of a legal person* either as a whole or in respect of a part thereof or in respect of a specific period. The above phrase in italics makes clear that the inquiry proceedings is not limited to actions by the board of directors or the supervisory board. In the Ogem inquiry the Supreme Court decided that the misconduct of constituent bodies of the company or of persons as part of those constituent bodies must be attributed to the company.<sup>20</sup> Even before the Ogem inquiry, the Enterprise

---

18. See OK 26 April 1972, NJ 1973, 6, commented on by Boukema in TVVS 1973, p. 105-106. However, as the Supreme Court ruled in the Gucci-case (HR 27 September 2000, NJ 2000, 653), the Enterprise Section is not capable of granting remedies without having ordered an inquiry.

19. See HR 10 January 1990 (Ogem inquiry), NJ 1990, 466.

20. See HR 10 January 1990, NJ 1990, 466, consideration 7.4 (mismanagement of the constituent bodies of the company or of those who are part of them, must be attributed to the

Section had decided that actions from the general meeting of shareholders can lead to the conclusion of misconduct.<sup>21</sup>

*Who may demand an inquiry?*

The next relevant question is who may request the Enterprise Section to order an inquiry into the affairs of the company. Section 2:346 subsection b gives this power both to a shareholder and to a group of shareholders and to a depositary receipt holder or to a group of depositary receipt holders who represent at least 10% of the issued capital, or who are entitled to an amount in shares or depositary receipts issued therefor with a nominal value of Euro 225,000 or such lesser amount as is provided by the articles.

Section 2:347 describes a second group that is competent to demand that the Enterprise Section initiate an inquiry proceedings. It states that the right to file an application shall be also vested in an association of employees which has amongst its members persons working for the company and has had full legal capacity for at least two years, provided its subject under its articles is to promote the interests of its members as employees and it is active in such capacity in the business sector or in the company. This section gives the power to demand an inquiry to trade unions, not only large, central unions, but also to smaller, more specific unions. The law explicitly does not grant the right to demand an inquiry to the works council.

A third person who may demand an inquiry is the advocate general of the Amsterdam Court of Appeal. Section 2:345 subsection 2 states that he may do so for reasons of public interest. This subsection also gives him the power to charge one or more experts with the gathering of information about the policy and the conduct of business. The company is obliged to provide the requested information and shall allow the experts to inspect its books and records, even though the law does not provide a sanction should the company not co-operate. Finally, the law explicitly does not grant the power to demand an inquiry to the constituting bodies of the legal person. This means that the board of directors, supervisory board and general meeting of shareholders in themselves do not have the power to initiate an inquiry proceedings.

*Other conditions; previous written notice of objections*

Section 2:349 subsection 1 states that the applicants shall have no *locus standi* if it appears that they have not given advance written notice of their objections to the policy or the conduct of business to the board of directors and the supervisory board and that a period has elapsed such as is needed to provide the company with a reasonable opportunity to examine such objections and take the necessary measures. This section has been included to prevent companies being taken by surprise, acknowledging the fact that the initiation of an inquiry proceedings is usually

---

company).

21. See OK 22 January 1976, NJ 1977, 341 (because that general meeting of shareholders as constituent body of the company falls under the term 'company' used in section 53 subsection 1 and OK 14 January 1993, NJ 1993, 460 (Moreover, the court rejects the proposition that a decision which is taken in the general meeting of shareholders with the help of the majority shareholder must be attributed more to it than to the company)).

harmful to the public image of the company. The Enterprise Section interprets the obligations of section 2:349 subsection 1 for the application reservedly.

*Immediate measures*

Since 1994, section 2:349 subsection 2 makes it possible to ask the Enterprise Section to take immediate measures. The most remarkable feature of section 2:349 subsection 2 is its broadness. It requires that the plaintiffs also file an application for the initiation of the inquiry proceedings. However, when choosing an appropriate immediate measure or measures, the Enterprise Section is not limited to the list of remedies in section 2:356. Possible immediate measures include a prohibition on directors or supervisory board members to act on behalf of the company, the appointment of temporary directors or supervisory board members and the prohibition to carry out a resolution. One does not have to specify which immediate measure one is requesting from the Enterprise Section, nor is the Enterprise Section in any way limited by the application of the plaintiffs.<sup>22</sup> The plaintiff may demand immediate measures at any stage in the proceedings, their application, however, cannot be extended past the end of the proceedings. Grounds for demanding immediate measures include the condition of the legal person and the interest of the inquiry.

As mentioned above (see no. 30), in approximately 60 cases in the period 1997-2001 the Enterprise Section decided that immediate measures should be taken. In approximately 50 of these, immediate measures were taken due to the existence of a deadlock situation in the company. The aim of the immediate measures in these cases was to re-enable effective management of the company. Recent examples in case law include OK 26 October 2000, JOR 2001, 5. In this case the Enterprise Section decided that there was a deadlock in the decision-making process in the board of directors and the general meeting of shareholders. By way of an immediate measure, thus postponing its decision to order an inquiry, the Enterprise Section appointed a supervisory board member with a decisive vote in the board of directors and the general meeting in the event of deadlock. Other examples can be found in OK 16 November 2000, JOR 2001, 9, suspension of a director and appointment of another director, and OK 30 November 2000, JOR 2001, 11, appointment of a director, appointment of an independent supervisory board member with a decisive vote in the board of directors in the event of deadlock and the transfer of the voting rights on the shares from the shareholders to an independent supervisory board to be appointed. In the remaining 10 cases, immediate measures were granted because of an entanglement of interests of those involved with the company. In these situations, the immediate measures should rather be characterised as standstill measures, i.e. measures to prevent the continuation of a situation that is harmful to the company, and its minority shareholders. Recent examples in case law include OK 30 November 2000, JOR 2001, 4, in which case the Enterprise Section appointed a supervisory board member. The Enterprise Section determined that [taking into account the special circumstances of the case, the supervisory board member to be appointed shall guard the legitimate interests of the minority shareholders in particular]. For the supervisory board member to be able to do so, the Enterprise Section decided that all transactions between the company and the majority shareholder(s) should

---

22. See Asser-Maeijer, 2-III, no. 518 ([It does not have to be specified which immediate measures one wants to see taken. And here too, the Enterprise Section can take different measures than those that are demanded].

## RIGHTS OF MINORITY SHAREHOLDERS IN THE NETHERLANDS

be approved by him and that he would have the power to appoint the external accountant and external experts, if necessary. The Enterprise Section also nullified two resolutions on the grounds that they were not in the interests of the company. Another example can be found in OK 1 March 2001, JOR 2001, 106, in which case the Enterprise Section considered that [there are strong indications that Den Boer, through the policy conducted by her in her capacity of director] purports more to serve her personal interests than the interests of the company, contrary to her role as director]. Among other things, the Enterprise Section based this judgement on the fact that Den Boer, as director and shareholder, did not provide enough information to the other shareholder, who was not a director. On the basis hereof, the Enterprise Section suspended Den Boer as director and appointed an independent director.

### *Phases in the inquiry proceedings; well-founded reasons and misconduct*

There are five decision points for the Enterprise Section in each full inquiry proceedings. First, the Enterprise Section has to decide whether the inquiry request is admissible (section 2:349). Second, the Enterprise Section must decide whether there are well-founded reasons for doubting the correctness of the policy (section 2:351 subsection 1). Third, on the basis of the report by the persons appointed, the Enterprise Section has to establish whether it is of the opinion that the case amounts to a case of misconduct (section 2:355). Fourth, once it has established misconduct, it has to decide whether or not to take measures, and if so, which measures to take (section 2:355 and 2:356). These four decisions are taken in each full inquiry proceedings. The fifth, concerning immediate measures, is only relevant if the plaintiffs desire these immediate measures.

An important question that needs to be answered is what exactly falls under [reasons to doubt the correctness of the policy]. From studying case law, the following picture arises. Maeijer defines [well-founded reasons] as the facts and circumstances that together amount to a reasonable chance that the inquiry will reveal misconduct.<sup>23</sup> In the appreciation of these facts and circumstances, the Enterprise Section has to respect a certain discretion with regard to the company's policy. The circumstances that most often led to this conclusion were not keeping interests separate, a deadlock in the decision-making process and not preparing or publishing the annual accounts.<sup>24</sup> Apart from these fairly general grounds for assuming that there are well-founded reasons for doubting the correctness of the policy, there are also more specific grounds, related to the protection of the minority or other shareholder. These can be divided in three categories.

First, ignoring statutory rules or rules in the articles of association that protect minority or other shareholders. In OK 26 January 1978, TVVS 1978, p. 251, the Enterprise Section decided that one of the reasons why well-founded reasons existed was that the company had not complied with provisions in the articles concerning the convocation of the general meeting (no invitation to

---

23. See his commentary under OK 29 October 1980, NJ 1981, 272 and HR 18 June 1980, NJ 1981, 547 and Asser-Maeijer 2-III, no. 526.

24. See A.F.M. Dorresteyn, *De ondernemingskamer en het enquêterecht (The Enterprise Section and the right of inquiry)*, in: W.J. Slagter et al., *25 jaar Ondernemingskamer. De betekenis van de OK voor ondernemend Nederland (25 years Enterprise Section. The meaning of the Enterprise Section for entrepreneurial Netherlands)*, The Hague, 1996, p. 49.

shareholder) and that it therefore [was doubtful whether the company had taken the legitimate interests of this shareholder sufficiently into account]. In OK 1 May 1980, NJ 1981, 243, the Enterprise Section found that both the fact that [the taking of decisions by which the interests of the applicant as minority shareholder could be damaged] and the fact that [there are no members of the supervisory board, even though the articles require these] mean that there are well-founded reasons. We can also mention the decision OK 14 January 1993, NJ 1993, 460. In this judgement, the Enterprise Section decided that lending out a large sum of money, thereby factually handing over the power to decide over a large part of its property, without demanding guarantees for the repayment, can amount to a well-founded reason for doubting the correctness of the policy, especially when no guarantees were demanded to protect minority shareholders, and the company had not adequately communicated with these minority shareholders about this matter. Finally, a judgement by the Enterprise Section of 1 March 2001, JOR 2001, 131 is also relevant. A board member, who was also a majority shareholder, concluded transactions without the approval of the general meeting of shareholders, notwithstanding the fact that the articles of association required such action. The transactions also contained the risk of conflict of interest. In such cases, there are special information rights for minority shareholders. The Enterprise Section concluded that these special information rights had not been respected, leading to the conclusion that there were well-founded reasons for doubting the correctness of the policy.

A second ground to doubt the correctness of the policy related to minority protection lies in a conflict between a majority and a minority shareholder, especially if this conflict results in a deadlock in the management of the company. In the case of OK 3 January 1977, NJ 1977, 342, the Enterprise Section decided that [through insoluble differences between applicant (*majority shareholder*) and her son (*minority shareholder*, together they formed the board of directors), the management of the company is in deadlock]. Interesting to note in this decision is that the applicant was the *majority* shareholder, implying that actions by the *minority* shareholder can also give reason to doubt the correctness of the policy

Third, providing insufficient or incorrect information to the minority or other shareholder. In OK 21 September 1978, NJ 1979, 403, the Enterprise Section decided that the company had failed to provide the applicants with information concerning the allocation of costs. Insight into this cost allocation is a legitimate aim of the applicants. Because the company failed to provide this information, there was room to doubt whether the company had adequately taken the legitimate interests of the applicants into consideration. This, together with the fact that the mandatory supervisory board was non-existent, led to the conclusion that there were well-founded reasons for doubting the correctness of the policy. An important recent Enterprise Section decision concerning the distribution of information to minority shareholders is OK 8 October 1998, NJ 1999, 348. In this decision, the Enterprise Section decided that the applicants do not as such have the right to receive all information about the policy and the conduct of business. But the starting point is that the company has to observe special care in relation to the applicants - minority shareholders - and, more specifically, prevent entanglement of the interests of the company and of the board of directors and/or the majority shareholders, whether or not at the expense of the minority shareholders, and that with regard to this, the company discloses the state of affairs as far as possible.

Section 2:353 subsection 1 states that once the investigators have finished their work and have written their report, this report shall be deposited at the Office of the Clerk of the Amsterdam Court of Appeal. Subsection 2 states that the advocate general, the company and the applicants and their lawyers shall receive a copy of the report. The

Enterprise Section may determine that the report shall also be available for inspection, either in full or in part, by any other persons designated by it or that it shall be open for public inspection. Subsection 3 contains another provision aimed at securing the secrecy of the outcome of the investigation. Persons other than the company shall be prohibited from divulging information from the report to third parties to the extent that such a report is not available for public inspection unless authorised by the President of the Enterprise Section.

The Enterprise Section may decide on the basis of the report that there has been a case of misconduct. The decision that there has been a case of misconduct is a judgement that the Enterprise Section and not the investigators has to make. However, the investigators may in their report give their opinion on the question whether there has been a case of misconduct and which measures should in their opinion be taken. The Enterprise Section will take note of these opinions but is not bound by them.<sup>25</sup> As with the criterion 'well-founded reasons for doubting the correctness of the policy', there is no easy test to determine whether there has been a case of misconduct. Usually, the test that is applied is whether the company has acted contrary to the elementary principles of responsible entrepreneurship.<sup>26</sup> The notion of misconduct is not limited to matters of business economics or of social affairs.<sup>27</sup> Moreover, from the word 'elementary', it becomes clear that the test by the Enterprise Section is a marginal one, assuming a large amount of discretion for the company. 'Was it reasonably possible for the company, given the circumstances, to pursue the policy it has pursued' is the question the Enterprise Section will seek to answer. We can draw a distinction between material and procedural grounds for misconduct. In general, the test by the Enterprise Section with regard to procedural matters is less marginal than with regard to the material side of the policy. The notion of misconduct was further explained in the Ogem inquiry decision.<sup>28</sup> From it, the following five lessons can be drawn.<sup>29</sup> First, not every mistake with regard to the policy of the company means that there has been misconduct; the mistake has to be of a certain minimum seriousness. Second, a single act can amount to misconduct, especially if this single mistake has serious negative consequences for the company. Third, misconduct must be established at the level of the legal person; misconduct by constituent bodies or people within these constituent bodies must be attributed to the legal person. Fourth, for the conclusion of mismanagement it is unnecessary to determine that the directors and/or the supervisory board members can personally be blamed for the misconduct, nor is it necessary for damage to have been caused. Finally, the question of whether there has been a case of misconduct must be answered on the basis of the circumstances and the tasks of the directors and supervisory board members at the time of conducting the policy.

25. See, for example, OK 18 March 1976, NJ 1978, 317, OK 21 June 1979, NJ 1980, 71 and OK 26 May 1983, NJ 1984, 481.

26. This criterion was first formulated in the Batco-inquiry (OK 21 June 1979, NJ 1980, 71).

27. See OK 15 November 1973, NJ 1974, 293 ('the opinion of the defendant that misconduct is restricted to misconduct with regard to business economic considerations and social affairs is too limited and finds no support in the history of the realisation of the new inquiry law').

28. See HR 10 January 1990, NJ 1990, 466.

29. Maeijer also mentions these five points in Asser-Maeijer, 2-III, no. 534.

One decision which is particularly relevant for the protection of minority shareholders is OK 11 January 1990, NJ 1991, 548. In this judgement, the Enterprise Section based its decision that there had been a case of misconduct on three grounds. These are the fact that continuation of the policy, resulting in decreasing turnover and very low profitability, would have led to serious problems for the company, the fact that the director had not taken adequate measures to secure a suitable successor and the fact that *the director was not concerned with the interests of the minority shareholders, even though they owned nearly half of the shares in the company.*

Another important decision for the protection of minority shareholders is OK 30 November 2000, JOR 2001, 4. In this judgement, the Enterprise Section again decided that a company has to observe a specific standard of due care towards minority shareholders. More specifically, it decided that a company must prevent entanglement of its own interests, the interests of the board of directors and/or the interests of the majority shareholder(s), especially if family relationships are involved, since this may damage minority shareholders. In addition to all this, the Enterprise Section also re-emphasised the importance of an adequate provision of information to minority shareholders and of adherence to formal legal requirements.

#### *Remedies*

If the Enterprise Section establishes that there has been a case of misconduct, it can order one or more of the remedies listed in section 2:356. The Enterprise Section may only order remedies when such is demanded by the original applicants, others entitled to demand an inquiry or the advocate general. However, these persons do not have to specify which remedies they want the Enterprise Section to take.<sup>30</sup> If they do demand certain specific remedies, the Enterprise Section is not bound by their request.<sup>31</sup> The list of remedies is a comprehensive enumeration. Section 2:356 mentions the following six remedies.

First, the Enterprise Section can order the suspension or nullification of a resolution of the directors, the supervisory board members, the general meeting of shareholders or of any other constituent or corporate body of the legal person. This nullification works with regard to everyone, with section 2:357 subsection 2 giving the Enterprise Section the power to regulate the consequences of the nullification. A second possible remedy that the Enterprise Section may order is the suspension or dismissal of one or more directors or supervisory board members. This remedy is mainly applied in situations in which there is a deadlock in the decision-making process, usually together with the next remedy, the temporary appointment of directors and/or supervisory board members. The third remedy can be seen as complementary to the second; the Enterprise Section may temporarily appoint one or more directors or supervisory board members. Once appointed by the Enterprise Section, the company cannot suspend or dismiss temporary directors or supervisory board

---

30. At least in the opinion of Maeijer (see Asser-Maeijer 2-III, no. 533 and Maeijer's comment under HR 4 November 1987, NJ 1988, 578). Van der Grinten does not agree with this view (see Van der Heijden-Van der Grinten, no. 367).

31. Compare OK 16 July and 1 October 1987, NJ 1988, 579 and Maeijer's comment under this decision (‘Striking in this case is that the Enterprise Section ordered more and different remedies than were requested by the applicant and *procureur-generaal*’).

## RIGHTS OF MINORITY SHAREHOLDERS IN THE NETHERLANDS

members. Fourth, the Enterprise Section can order the temporary derogation from such provisions in the articles of association as it considers necessary. This measure is usually taken together with the suspension, dismissal and/or appointment of a director and/or a supervisory board member in order to end the deadlock in the decision-making process and is always a temporary measure. The fifth remedy enables the Enterprise Section to order the temporary transfer of the shares to a nominee. This remedy will usually be applied if there is a deadlock in the decision-making process in the company due to the fact that two or more groups of shareholders cannot reach agreement, resulting in the situation that decision-making in the general meeting of shareholders becomes impossible. Finally, as a last possible remedy, the Enterprise Section can order the winding up of the company. This is equivalent to the "death penalty" in company law; this remedy is hardly ever taken.<sup>32</sup> The legislator realises the severe consequences of winding up the company. Section 2:357 subsection 6 takes this into account. It states that the Enterprise Section shall not issue an order to wind up the company if this would be contrary to the interests of the shareholders or the employees of the company or to the public interest. With regard to this remedy, it is important to remember that it is technically the legal person that is wound up. This means that the enterprise itself can be sold, thereby continuing its activities.

Two cases which show examples of remedies after the conclusion of misconduct with regard to the protection of minority shareholders are the following. In OK 22 December 2000, JOR 2001, 29, the Enterprise Section grounded its decision of misconduct on the fact that the company continued to provide substantial loans to a company which was in financial trouble and which did not pay interest on existing loans, nor repay them without asking for security rights. The request was filed by a minority shareholder (10%) who was not a director of the company. As remedies, the Enterprise Section ordered the dismissal of the two directors (one of which also provided the remaining 90% of the share capital), the appointment of the minority shareholder as director for a period of two years, and the temporary transfer of the shares of the majority shareholder to a nominee, in this case the minority shareholder. In OK 21 June 2001, JOR 2001, 184, the Enterprise Section decided that "the Enterprise Section agrees with the investigator that in obliging the company to pay a management fee in this case, the interests of the company and those of the minority depository receipt holder were not taken into account to the extent necessary". Coupled with the judgement that the company had seriously breached its duty to provide information to the minority depository receipt holder, the Enterprise Section concluded that there had been a case of misconduct. The Enterprise Section appointed a supervisory board member, with the powers of supervisory board members of statutory two-tier companies. The Enterprise Section further explained this appointment by stating that "it could be useful to appoint a supervisory board member to provide for supervision and communication on the policy of the company" so that he can, to the extent necessary, forcefully intervene to protect the interests of the minority depository receipt holder".

Finally, section 2:357 contains several more provisions that are related to the remedies of section 2:356. These include the rule that the Enterprise Section shall set the period of the validity of the temporary orders, which period may be extended or shortened (subsection 1), and more importantly, the rule that an order made by the Enterprise Section may not be nullified by the company, any resolution to that effect

---

32. Maeijer lists 5 examples (Asser-Maeijer, 2-III, no. 537): OK 12 January 1974, NJ 1974, 292, OK 1 April 1982, TVVS 1983, p. 310, OK 30 September 1982, TVVS 1983, p. 70, OK 8 October 1987, NJ 1989, 270 and OK 9 May 1996, JOR 1996, 57.

being null and void (subsection 3).

## 6 Squeezing out and exit

### 6.1 *Squeezing out*

Dutch company law contains two different sets of proceedings which, either at the request of the large shareholder or at the request of the minority shareholder, enable a minority shareholder to terminate his shareholding in the company. Even though in both proceedings the same result is obtained, the proceedings differ fundamentally. The first proceedings is described in sections 2:335-343 (the rules concerning the settlement of disputes), the second in section 2:201a(92a). In no. 32 we will describe section 2:336 and section 2:201a(92a), which provide the large shareholder with the possibility to squeeze out a minority shareholder. In no. 33 we will describe the corresponding right of a minority shareholder, i.e. the right to be bought out (section 2:343).

Section 2:336 contains as a rule that one or more holders of shares who, solely or jointly, contribute at least one-third of the issued capital may institute proceedings against any shareholder, who, by his conduct, prejudices the interests of the company to such an extent that the continuation of his shareholding cannot reasonably be tolerated, demanding the transfer of his shares. This proceedings can be applied to the BV and the NV, the articles of which exclusively provide for registered shares, contain restrictions on transfer and do not permit the issue of bearer depositary receipts with the co-operation of the company. This means that the rules concerning the settlement of disputes are not applicable to listed NVs. It is remarkable that a shareholder is only required to provide one-third of the issued capital in order to be able to squeeze out another shareholder; this could lead to a situation where a minority is able to squeeze out a majority in the company. The purpose of the rules concerning the settlement of disputes, and therefore also of the corresponding exit right, as described in section 2:343, is the termination of a deadlock in the company; the proceedings try to provide a solution should there be irreconcilable differences of opinion between groups of shareholders in the company.

When are the conditions for the application of section 2:336 met? A general rule cannot be given, partly because case law on this topic is rather scarce. The following four issues, however, seem to play a role in the squeezing out proceedings of section 2:336. First, it has to concern behaviour of the shareholder *in that capacity within the context of the company*.<sup>33</sup> Second, a characteristic trait of the squeezing out proceedings seems to be that the decision-making within the company is in deadlock. Third, and related to the previous issue, the conflict between the groups of shareholders needs to be lasting; a mere temporary difference in opinion does not suffice. Finally, the company's continued existence must be in doubt due to the lasting deadlock in the decision-making within the company.

---

33. See OK 27 October 1994, NJ 1996, 167, in which case the Enterprise Section considered that [to this extent the condition that Muller's behaviour *as a shareholder* (too) prejudices *the interests of the company* is then met [ ]].

## RIGHTS OF MINORITY SHAREHOLDERS IN THE NETHERLANDS

The squeezing out proceedings consist of two stages. In the first stage the court decides whether it can indeed no longer reasonably be tolerated that this shareholder remains a shareholder in the company. If the court decides that this is the case, the second stage commences. The court shall then appoint one or three experts to report in writing on the price of the shares (section 2:339 subsection 1). When determining the price of the shares, the experts must set the price at the value they expect the shares to have on the date the court's decision becomes final. After having received the experts' report, the court independently determines the price to be paid for the shares (section 2:340 subsection 1), taking into account the effects on the price of unexpected events between the date of reporting by the experts and the date of actual transfer. When the court's decision becomes final, the defendant-shareholder is obliged to transfer his shares. The plaintiff-shareholder is obliged to accept these shares against cash payment of the determined price (sections 2:341 subsection 1 and 2:340 subsection 2). If the defendant remains in default in delivering his shares, then the company shall transfer the shares on his behalf against simultaneous payment (section 2:341 subsection 4).

Even though the buying out proceedings of section 2:201a(92a) result in the same situation that a shareholder is forced to transfer his shares in the company to another shareholder, this proceedings differs strongly from the squeezing out option in the rules concerning the settlement of disputes both in character and in the way it is given shape. The purpose of the section 2:201a(92a) proceedings is not the settlement of conflicts within the company. Its aim is to meet the serious objections that may exist for a large shareholder when there remains a small minority (5% or less of the issued capital) of shareholders in [his] company. Among them are the fact that certain attractive fiscal constructions, the so-called fiscal unity between parent and subsidiary, cannot be applied, the fact that one continuously has to take into account the interests of the small minority when taking certain decisions, for example, when declaring a dividend and when concluding agreements, and the burden of still having to fulfil certain formal requirements. The purpose of the proceedings logically means that the large shareholder must initiate proceedings against *all* other minority shareholders; the buying out proceedings do not purport to buy out only certain minority shareholders whose shareholdings trouble the large shareholder.

Within the context of the application of section 2:201a(92a) a material test is not applied; the minority shareholder's behaviour is irrelevant, it is not necessary that the minority shareholder prejudices the interests of the company or of the large shareholder. The only thing that the plaintiff must make sufficiently likely is that he does indeed provide at least 95% of the issued capital and that he has issued a writ of summons against all minority shareholders. If not all of the minority shareholders appear in court, the Enterprise Section will *ex officio* investigate whether these two conditions have been met. Section 2:201a(92a) in principle provides the large shareholder with the unrestricted right to demand the buying out of the minority shareholders. However, section 2:201a(92a) subsection 4 makes three exceptions to this rule: if, notwithstanding compensation, a defendant would sustain serious tangible loss by the transfer, if a defendant is the holder of a share in which, under the articles, a special right of control of the company is vested, or if a plaintiff has, as opposed to a defendant, renounced his power to institute such proceedings. In all these cases, the court disallows the proceedings against *all minority shareholders*. Another difference compared with the rules concerning the settlement of disputes is that the court is under no obligation to

appoint experts to report on the price of the shares to be transferred. A final difference compared with the squeezing out option in the rules concerning the settlement of disputes is that the buying out proceedings of section 2:201a(92a) may also be applied to listed NVs.

Proceedings related to that in section 2:201a(92a) are those described in sections 2:311 subsection 2 and 2:325 subsection 2. They state with regard to a legal merger that if a shareholder in the disappearing company is not even entitled to receive a single share in the merged company, he can be paid in cash. Section 2:325 subsection 2 limits the amount of cash so distributed to 10% of the nominal value of the shares that are used as payment. This not only means that the squeezing out option in the case of a legal merger is very limited, but also that there is no exit right for minority shareholders in the case of a legal merger<sup>34</sup>. However, in a recent decision by the President of the Amsterdam District Court<sup>35</sup>, it was decided that the instrument of a legal merger may be used to squeeze out minority shareholders, *even if the only reason for the legal merger is that the merging companies do not want to be permanently troubled by the presence of minority shareholders*.<sup>36</sup>

## 6.2 Exit

Section 2:343 may be regarded as the complement to the aforementioned section 2:336. This section gives a minority or other shareholder the option to exit the company if the continuation of his shareholding can no longer reasonably be expected of him. The reason for the fact that continuation of his shareholding can no longer be expected of him must be based in actions by one or more other shareholders, meaning that actions of the company which cannot be attributed to shareholders are not taken into account, even though it is not required that these other shareholders act in their capacity of shareholder.<sup>37</sup> Another difference compared with the proceedings of section 2:336 is that for the shareholder to be allowed to exercise his legal exit right, it is not necessary that the actions of the shareholders have also damaged the interests of the company. Similar to the proceedings of section 2:336, the section 2:343 proceedings consist of two stages, the first stage ending with the judgement that continuation of his shareholding can no longer reasonably be expected of the disgruntled shareholder. A strange aspect of the section 2:343 proceedings is that the value of the shares must be established as of the date of the expected transfer. This means that a shareholder who wishes to exit the company only receives the depressed value for his shares, even though the decrease in the value of his shares has usually been caused by the shareholder to whom he

34. See for this topic also R.W.Th. Norbruis, *Het failliet van de juridische fusie als overnemings-instrument (The bankruptcy of the legal merger as a take-over device)*, TVVS 1991, no. 2, p. 31.

35. Pres. Amsterdam District Court, 11 June 1999, JOR 1999, 174.

36. See on the subject of the squeezing out of minority shareholders after a merger also P.F. van den Berg, *De weg naar volledige fusie (The road to a complete merger)*, Ondernemingsrecht 2001, p. 420-427.

37. See for example OK 22 October 1992, NJ 1993, 411 (□□ the claim of a minority shareholder can also be successful when his interests are damaged to the extent that the continuation of his shareholding cannot reasonably be expected of him because of actions by one or more of his fellow-shareholders, not in their capacity as shareholders□, OK 9 December 1993, NJ 1994, 296 and OK 20 November 1997, NJ 1998, 392.

sells his shares under the dispute settlement proceedings. The Supreme Court decision in *Poot v. ABP*<sup>38</sup> will in most cases prevent the exiting shareholder instituting separate proceedings against the acquiring shareholder to reclaim his damages.

In no. 32, we mentioned that the rules concerning the settlement of disputes are not applicable to listed NVs. Shareholders in these companies therefore do not possess a legally enforceable exit right. However, Euronext Amsterdam policy is that before the exchange agrees to the termination of a listing, it demands that the company that wishes to terminate its listing makes a reasonable exit offer to the remaining shareholders. The rationale behind this condition is that otherwise those shareholders remaining in the company would lose their easily executable exit right through the market, meaning that they would be more or less 'stuck' in a non-listed company.

It is remarkable that Dutch company law does not contain proceedings to complement the proceedings of section 2:201a(92a), i.e. the right for minority shareholders in a company in which a single shareholder provides at least 95% of the issued capital to be bought out. This is even more remarkable when one observes that under the rules concerning the settlement of disputes there are both proceedings to squeeze out a shareholder and proceedings to be bought out.

## 7 Conclusion

### 7.1 *Exit, voice and loyalty*

In an excellent essay, Hirschman<sup>39</sup> has explained that any organisational member who is dissatisfied with the policy conducted by the organisation has a choice of two options to show his objections: he can either *exit* the organisation or make use of the participation rights within the organisation (*voice*) (see no. 5). In Hirschman's opinion, feelings of loyalty towards an organisation may cause an organisational member to choose the *voice* option. He then continues to form a part of the organisation and will try to change the policy of the organisation from within. The legal position of a minority shareholder can be analysed in terms of Hirschman's *exit, voice and loyalty*. For a good understanding of the position of minority shareholders under Dutch company law, four issues are of importance.

- a) A characteristic of Dutch company law is that shareholders are expected to be loyal to their company and to the interests pursued by this company. This loyalty point of departure has the consequence that the *exit* option for the minority shareholder under Dutch company law has not been fully elaborated. After all, exit is synonymous with disloyalty.
- b) Under Dutch company law, a shareholder may exercise his voting right at the general meeting of shareholders to serve his own interests, but he must also always act in accordance with the demands of reasonableness and fairness. This

38. See HR 2 December 1994, NJ 1995, 288.

39. See A.O. Hirschman, *Exit, voice and loyalty: responses to decline in firms, organizations and states*, Harvard University Press, 1990 (reprint).

means that he must also take into account the interests of others who play a role in the company as well as the so-called "company interests", which purport to protect the continuity of the company. Under Dutch company law, the shareholder is not entirely free to exercise his voting right as he wishes. The exercise of the *voice* option is bound by certain restrictions.

- c) In Dutch companies, capital and control are not always in line with each other. A shareholder who provides the majority of the capital in a company does not necessarily effectively control this company (see no. 4). A minority shareholder does not control the company. Under Dutch company law, it is unclear when a shareholder controls the company (see also no. 4). This means that the concept "minority shareholder" is not sharply defined in Dutch company law. Sometimes, a shareholder who provides the majority of the capital of a company is a minority shareholder with regard to the exercise of control in the company. In other cases, a shareholder who provides only a limited percentage of the company's capital can have considerable control rights because of the special nature of the shares he possesses. This is one of the reasons why the subject of protection of minority shareholders has thus far not been strongly developed (see nos. 1 and 2). In the Netherlands, we do not know exactly what a minority shareholder is. Much depends on the structure chosen by the company through its articles of association. Structure of capital and that of control can diverge strongly.
- d) Traditionally, Dutch law has not fully elaborated the protection of minority shareholders because, in general, shareholders have a weak position in Dutch company law and the Dutch legislator has traditionally feared that a strong position for minority shareholders would harm the efficiency of the decision-making process within the company (see no. 1).

## 7.2 *Exit*

Dutch company law does not contain any self-exercising exit rights.

- a) With regard to listed companies, the Dutch legislator does not oblige the shareholder who effectively obtains control of a company to make an offer for the remaining shares of the other shareholders. Herein, the fact that it is difficult to determine when a shareholder controls the company, at least with regard to Dutch listed companies, has undoubtedly played a role.
- b) Furthermore, it is remarkable that a shareholder who provides 95% of the company's capital has the right to squeeze out the remaining shareholders (see no. 32), but that the remaining shareholders do not have the corresponding right to be bought out (see no. 33). In accordance with this, the majority shareholder is allowed to use the instrument of a legal merger to squeeze the minority shareholders out of the company in which they participate and subsequently force them to participate in another company (see no. 32). The legal instrument usually used to achieve this is the triangular merger. However, after the implementation of the legal merger, the minority shareholders do not possess the right to be bought out (see also no. 32). Only if an NV or a BV is converted into a non-commercial legal entity, for example an association, co-operative or foundation, do the minority shareholders have an exit right if they voted against

the conversion at the general meeting of shareholders (see no. 24). In such cases, the damages payable to the exiting shareholders are determined by independent experts, who are appointed by the court. It is unclear why the Dutch legislator has provided for an exit right in certain cases of conversion but not in the case of a legal merger.

- c) With regard to unlisted companies, the exit right has been given shape in the rules concerning the settlement of disputes. Dutch company law does not contain an independent exit right. A shareholder can only make use of the exit right as provided for in the rules concerning the settlement of disputes if he succeeds in proving in court that he is being harmed by the actions of one or more of his fellow shareholders to the extent that continuation of his shareholding can no longer be reasonably expected of him (see no. 33). If he succeeds, the court then determines the price to be paid for his shares. It is remarkable that this price is determined on the date on which the claim to exercise the exit right was brought before the court. In determining the value of the shares, the exiting shareholder is not compensated for any decrease in the value of his shares caused by the unreasonable behaviour of the majority or other shareholder that took place before the exit proceedings were brought before the court. In addition, the doctrine as developed by the Supreme Court for derived or indirect damages usually prevents the exiting shareholder from successfully reclaiming the damage resulting from a decrease in the value of his shares, for example on the basis of tort, from the majority or other shareholder in separate proceedings.

### 7.3 Voice

Dutch company law contains several instruments that the minority shareholder can use to try to change the policy conducted by the company and the majority shareholder through the exercise of his participation rights. These possibilities to correct the company's policy are not vested in a deliberately and consistently thought-out system of minority protection in commercial legal entities (see nos. 20 and 26). Dutch company law contains a fairly randomly put together basket of measures that can be used to protect the interests of minority shareholders. Minority shareholders' participation rights can be divided into the following categories.

- a) Instruments that the minority shareholder can use in order to block certain resolutions or policy; these are the so-called *negative participation rights of the minority shareholder* (see nos. 21-26).
- b) Instruments that the minority shareholder can use in order to ensure that the company respects the law and the articles of association; these are the so-called *normalising participation rights of the minority shareholder* (see no. 5).
- c) Instruments that the minority shareholder can use in order to force the company into adopting a new and different policy; these are the so-called *positive participation rights of the minority shareholder* (see nos. 15-20).

*Re. a. Negative participation rights.* Dutch company law does not contain many instruments that the minority shareholder can use to block policy advocated by the company or the majority

shareholder. Under Dutch company law, there are hardly any blocking minorities with regard to the adoption of important resolutions. However, Dutch company law does provide ample options for the minority shareholder to demand nullification of company resolutions (see no. 22). It is likely that the Dutch legislator has provided the minority shareholder with ample options to seek nullification because it is the court and not the minority shareholder himself that decides on the nullification.

*Re. b. Normalising participation rights.* With regard to a number of issues, the convocation of the mandatory yearly general meeting of shareholders (see no. 16), the compliance of the annual accounts with the law (see no. 9), the Dutch legislator has created easily accessible court proceedings. It is particularly remarkable that the Dutch legislator has not provided a group of minority shareholders with the option to initiate an action to reclaim damages on behalf of the company from third parties that have caused damage to the company.

*Re. c. Positive participation rights.* A minority shareholder can try to adjust the policy of the company by requesting the Enterprise Section of the Amsterdam Court of Appeal to initiate an inquiry into the policy and the conduct of business of the company (see nos. 30-31). In particular, the imposition of immediate measures on the company by the Enterprise Section can force a company to adjust its policy (see no. 31).

#### 7.4 Loyalty

The aforementioned minority rights must always be exercised according to the principles of reasonableness and fairness. They must not be misused. It is remarkable that Dutch courts hardly ever deny a minority shareholder's claim on the grounds of the abuse of right, but nearly always judge the content of the claim. This becomes even more remarkable when we consider that for the exercise of a minority right the Dutch legislator often demands that the minority shareholder has a reasonable interest in exercising this right.

#### 7.5 The principle of equality

Dutch company law contains the principle of equality to the extent that shareholders are in equal circumstances (see nos. 7 and 27). With regard to unlisted companies, it is assumed that divergence from this principle is allowed on several grounds, for example if divergence is in the interests of the company (see no. 27). The principle of equality is applied more strictly to listed companies, partly because of the strict securities law on this topic (see no. 28).

#### 7.6 Perspectives

We strongly recommend that the legislator adjusts the following issues of Dutch company law in order to improve the position of minority shareholders.

- a) *The Dutch legislator should enable a derivative action;* this derivative action could take the following form: disgruntled minority or other shareholders first request the company itself to initiate the action. If the company does not acquiesce to this demand, the requesting shareholders should be able to initiate the action themselves *in the name of the company*. The proceeds of the deriva-

#### RIGHTS OF MINORITY SHAREHOLDERS IN THE NETHERLANDS

tive action should also flow to the company, with the shareholders who have initiated the action receiving just compensation to cover their expenses.

- b) *The opportunities for minority shareholders to exit the company should be improved*; the introduction of a mandatory offer for all remaining outstanding shares if a shareholder has obtained a certain percentage of the voting rights or if he can control the company should be considered (see no. 24). Furthermore, if only 5% (or less) of minority shareholders remain in a company, these shareholders should be given an exit option that can easily be exercised (see no. 33).
- c) *The opportunities to impose normalising measures on the company should be improved*; it should be easier for the court to impose enforceable judgements on the company at the request of minority shareholders.