MANDATORY AND NON-MANDATORY RULES IN DUTCH CORPORATE LAW

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1 Introduction

Dutch corporate law has gradually expanded during the last three decades. Due to national and European government action it has increasingly become more detailed and complex. A large part of the law is considered to be mandatory. The aim of this paper is to clarify the scope of mandatory corporate law by examining the limits it places on modifications in by-laws and agreements between shareholders.

There is a certain tension between the amount of mandatory corporate law and the freedom of the individual guaranteed by private law. On the one hand, the freedom of the individual to contract and set up organizations is limited by mandatory corporate law. From the opposite point of view, it is mandatory corporate law which is limited by private law. In that respect, the mandatory effect of corporate law is lessened if shareholder agreements are allowed to circumvent corporate law. On the other hand, mandatory corporate law may be used to ensure the freedom of the individual.

First, a brief introduction of the main features of Dutch corporate law will be given, followed by more general remarks on the impact of statutory rules and the possibilities of self-regulation by the shareholders. Finally, a number of statutory rules will be scrutinized more closely to establish their mandatory effect in practice.

2 Different models of corporations

Dutch law offers various legal forms to individuals conducting business activities. A distinction is made between partnerships and corporations. Only corporations have legal personality. The civil partnership (maatschap) is a contract to co-operate between members of an independent profession. The general partnership (vennootschap onder firma) and the limited partnership (commanditaire vennootschap) are special kinds of civil partnerships, which apply if a business is conducted. Each member of a general partnership has the authority to act on behalf of the partnership. Moreover, the partners in a general partnership and the executive partners in a limited partnership are jointly and severally liable as distinct to the liability for equal parts of the members of a civil partnership. The silent or limited partners of a limited partnership, however, are not obliged to pay up more than their contribution, as long as they do not act on behalf of the limited partnership.¹

Individuals who want to set up a corporation, can opt for a public limited company (naamloze vennootschap, hereafter NV) or a private limited company (besloten vennootschap, hereafter BV). Most statutory rules applying to NVs and BVs are identical. The main differences are firstly, that a BV has to have a minimum capital of at least 18,000 euro, as opposed to 50,000 euro for an NV and secondly, ¹

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¹ Currently, a partnership law reform is being proposed, creating a single form partnership with an optional legal personality.
that only a BV is subject to a mandatory share transfer restriction regime to ensure its closed character. As a consequence, only NVs may issue bearer shares (to the public) and be listed at a stock exchange. The provisions resulting from European Community directives apply mostly to NVs and BVs alike.

The freedom of choice of corporation appears from the fact that the incorporation requirements are mainly formal. There is no limit as to the amount of shareholders of an NV or a BV. Moreover, a legal entity may set up a company and be a director at the same time. Law firms and other partnerships may incorporate as an NV or a BV, an NV or BV may be used to pursue non-profit activities and other legal entities as foundations and associations may be used to conduct a business or to complete the legal structure of an enterprise. Special provisions do apply to banks, insurance companies and investment companies.\(^2\)

The freedom of choice of corporation is further illustrated by the easy conversion rules. A legal person may convert itself into a different legal person, art. 2:18 BW. It has to change its articles, a notarial document of conversion has to be executed and the necessary formation requirements have to be fulfilled. In case of conversion of or into a foundation and of an NV or BV converting into an association, judicial authorisation is required.

If NVs and BVs qualify as \(\text{large companies}\), a special regime applies. In order to qualify as a \(\text{large company}\) \((\text{structuurvermootschap})\), a company must have an issued capital of at least 13 million euro, employ at least a hundred workers (by itself or its subsidiaries) and it (or a subsidiary) must have established a works council \((\text{ondernemingsraad})\) pursuant to the Works Council Act \((\text{Wet op de Ondernemingsraden})\), hereafter WOR. A large company is obliged to institute an independent supervisory board \((\text{raad van commissarissen})\). The supervisory board has the power to appoint and remove executive directors, to adopt annual accounts and its consent is required for certain decisions of the executive board \((\text{raad van bestuur})\). To ensure its independence a rather complicated system of \(\text{controlled co-appointment}\) has been created. Both the general meeting of the shareholders and the works council may propose candidates to the supervisory board. The members of the supervisory board are free to appoint whomsoever they choose, provided that the general meeting or the works council do not have any objections against a certain candidate. When one of them does, the supervisory board needs to enter proceedings at the Enterprise Chamber \((\text{Ondernemingskamer})\) - a special branch of the Amsterdam Court of Appeal \((\text{Gerechtshof})\) - to be able to carry the appointment through. International holdings or subsidiaries of international corporations are subject to a more lenient regime (the so-called \(\text{mitigated regime}\)). In that case, it is the general meeting of the shareholders which has the power to appoint and remove executive directors and to adopt the annual accounts.\(^3\)

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2. An investment company may only be an NV, art. 2:76a BW. For banks, a supervisory board consisting of at least three member is obligatory, art. 10 of the Act on the Supervision of the Credit System 1992 \((\text{Wet toezicht kredietwesen 1992})\). Insurance companies have to be either an NV or a co-operative, art. 28 of the Act on the Supervision of the Insurance Industry 1993 \((\text{Wet toezicht verzekeringsbedrijf 1993})\).

3. Currently, the \(\text{structuurregime}\) for large companies is under review. An opinion of the Social Economic Council \((\text{SER})\) a consultative committee consisting of employers\(\), employees\)
Whereas partnerships are of a contractual nature, corporations are regarded as institutions under Dutch law. The company is perceived not merely as a shareholders instrument, but as an institution where numerous interests come together: shareholders, creditors and employees. Its institutional features can be deduced from various statutory provisions. Both the executive and the supervisory board have a duty to act in the interest of the company. Furthermore, the company and all involved in its organisation have a legal duty to behave towards eachother according to reasonableness and fairness. Henceforth, all parties with a legitimate interest may start proceedings for the annulment of a resolution of a company’s organ which is in breach of a statutory provision or the articles of association or contrary to reasonableness and fairness. It is, however, questionable whether employees (or the works council) may in fact rely upon the above-mentioned provisions. Moreover, the general meeting of the shareholders is not regarded as the supreme organ of the company; it is bound by the statutory division of powers just as the other organs.

In the case law, the intitu personae character of small family companies or quasi-partnerships is recognized, most notably by increasing fiduciary duties in analogy with partnership law. Recent voices in the literature suggest a new emphasis on the instrumental character of the company.

3 Statutory and other mandatory rules

The law governing NVs and BVs can primarily be found in book 2 of the Dutch Civil Code (Burgerlijk Wetboek, hereafter BW). Its mandatory nature derives from art. 2:25 BW, which states that the provisions of Book 2 may only be modified to the extent allowed by the specific provision. Furthermore, NVs issuing securities to the public are subject to the Act on the Supervision of the Securities Trade (Wet Toezicht Effectenverkeer 1995, hereafter Wte 1995). The Wte 1995 contains obligations on filing a prospectus and on disclosing information. It also prohibits

and governmental representatives) proposes more shareholder influence in the appointment procedure.


5. The legal duty only exists towards the supervisory board, but is generally considered to apply to the executive board as well. ASSER-MAEIJER 2-III, Vertegenwoordiging en rechtspersoon. De naamloze en de besloten vennootschap, 2nd edition, Deventer 2000, nr. 293. VAN DER GRINTEN, Handboek voor de naamloze en de besloten vennootschap, 12th edition, Zwolle 1992, nr. 231.


insider dealing. The Minister of Finance has delegated his authority to supervise the compliance with the Wet 1995 to the Securities Board of the Netherlands (Stichting Toezicht Effectenverkeer, hereafter STE). The STE is also the authority responsible for the supervision of the Disclosure of Major Holdings in Listed Companies Act 1996 (Wet Melding Zeggenschap 1996). On the basis of this Act, a person who acquires or disposes of a certain holding in the capital of a listed NV must notify this forthwith to the NV and to the STE. The latter discloses the data to the general public. Both Acts are based upon European Community Directives. Furthermore, the STE carries out the assessment of licence applications for insitutions seeking admission to the Euronext Amsterdam Stock Market, as well as the possible withdrawal of a licence. It may impose penalties and administrative fines in case of infringement of the Acts. Companies listed to the Euronext Amsterdam Stock Market have to comply with its Listing and Issuing Rules (Fondsenreglement). The compliance with the Listing and Issuing Rules is supervised by Euronext NV, which decides upon advice of the Listing and Issuing Rules Advisory Committee. It may remove or suspend a listing.9

Until recently, other self-regulatory rules could be found in the field of take-overs. The Social Economic Council (SER) had issued a Code of Conduct on Take-overs (Fusiegedragsregels). Without many substantive changes, these rules are now incorporated in the Wet 1995.10 In case of a public bid the parties concerned have to give relevant information to the shareholders and trade unions. Dutch law does not provide for a mandatory take-over bid after exceeding a certain percentage of shares in a public company.

Whilst company law is codified, it is the case law which gives substance to the statutory open norms. For instance, the Supreme Court (Hoge Raad) has established a firm body of case law concerning the lifting the veil doctrine. A parent company may be held liable in tort towards a third party for breach of contract by its subsidiary only under specific circumstances. Determining factors are the level of interference of the parent company, who must knowingly prejudice the creditor of the subsidiary, thereby violating a duty of care towards that creditor.11

A special feature of Dutch company law is the importance of the investigation procedure (enquêterecht), as set out in artt. 2:344-359 BW. The above-mentioned Enterprise Chamber may order an investigation into the affairs of a company if it finds well-grounded reasons to doubt the soundness of the company’s policy (art. 2:350 BW). A request hereto may be made by one or more shareholders representing at least ten percent of the issued share capital or a nominal value of Dfl. 500,000, by a trade union whose members are employed by the company or by the advocate-general at the Amsterdam Court of Appeal. One or more court-appointed

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investigators carry out the investigation. They have full access to the company’s books and premises and they are to receive full co-operation of the company’s directors and employees. The investigator’s report is sent to the applicants and to the company. If the report gives evidence of mismanagement, the Enterprise Chamber may take rather far-reaching measures, such as the annulment of a resolution of an organ of the company, the suspension or removal of directors, the appointment of interim directors, temporary transfer of shares, temporary deviation of the company’s articles, and the winding-up of the company. These and other measures may also be sought in preliminary relief.

The Enterprise Chamber and the Supreme Court have gradually expanded the notion of mismanagement. Mismanagement is described as ‘acting in breach of elementary principles of sound entrepreneurship’.12 Without actually establishing a principle, the Enterprise Chamber concentrates on the conduct not only of the executive board, but also of the supervisory board and the general meeting. Even the conduct of an individual shareholder may constitute mismanagement of the company. The investigation procedure has proven to be quite successful in deadlock situations. Trade unions have also had some success in establishing consultation and information rights e.g. in case of the closing down of a business.13 Although restoration is not an option for an insolvent company, an investigation may still be useful to establish responsibility. With an investigator’s report in hand it is easier to prove liability of a director for a bankruptcy. One of the latest fields of application of the investigation procedure is the take-over battle. Louis Vuitton Moët Hennessy attempting to take over Gucci has turned into a legal boxing match with six judgments.14 Because of its increasing popularity, the scope of the investigation procedure is much discussed.15

Not only does the works council have an influence on the appointment of members of the supervisory board in the structuurregime, it also has the right to give advice to the entrepreneur on a catalogue of important decisions which may effect the situation of the employees, e.g. merger or take-over decisions, the closing down or transfer of a business, a collective mass dismissal (art. 25 WOR). If the advice is not asked or followed, the works council may challenge the decision at the Enterprise Chamber on the grounds that the entrepreneur could not reasonably have come to this decision, considering all the interests (art 26 WOR). The Enterprise

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12 Cf. Hoge Raad 10 January 1990, Nederlandse Jurisprudentie 1990, 466 (Ogem), where it held that the aims of the investigation procedure are not only the reorganization of the company and the restoration of healthy relations, but also to give disclosure and to establish who was responsible for the mismanagement.
13 E.g. Ondernemingskamer 29 August 1985, Nederlandse Jurisprudentie 1986, 578 (Howsom Algraphy).
Chamber is particularly keen on ensuring that the works council is able to give its advice at a time where it may have a real influence on the outcome of the decision. Furthermore, the works council has to give its approval to - broadly put - all matters relating to the working conditions in the enterprise (art. 27 WOR). If the approval is denied, the entrepreneur needs to ask the magistrate's court (kantonrechter) for permission to implement the measure. A certain workers' influence is also derived from the fact that trade unions are authorized to instigate an investigation procedure.

4 Mandatory rules: the limit of public policy

As mentioned above, art. 2:25 BW states that the provisions of Book 2 BW may only be modified to the extent allowed by the specific provision. The enabling provisions are to be recognized by terms such as unless provided otherwise in the articles, or if the articles may state, etc. Although it is generally held that art. 2:25 BW is responsible for the mandatory nature of Dutch company law, its limits are not quite clear.

Until recently, all articles of association were subject to prior government approval. The Ministry of Justice had to give a declaration of no objection before a company could incorporate and before an alteration of its articles could have effect. The Ministry had issued guidelines as to which provisions in the articles were allowed and which were not. Therefore, the limits were set by the Ministry and rarely questioned in case law.

Now the situation has changed. The ministerial approval of a company's articles has been abolished. The declaration of no objection nevertheless remains required for establishing whether the persons involved have no criminal antecedents nor an insolvency record. At the same time, some of the guidelines have been incorporated in book 2 BW. Whilst the ministerial approval of a company's articles is no longer required, each civil law notary - an official who is authorised by law to record legal transactions - has the sole responsibility to ensure that the articles are in compliance with the statutory provisions. As distinct to some other legal systems, the registration of the company under Dutch law is not subject to judicial (or other) control. The incorporation of a company takes place upon the execution of the formation document (akte van oprichting). Upon registration and payment pursuant to the minimum capital requirements the directors cease to be jointly and severally liable for acts of the company.

Once the articles of association are operative, they function as the constitution of the company. Thus, resolutions of the company's organs may be annulled when they are in breach of the articles or in breach of statutory provisions (artt. 2:14 and 15 BW). At their turn, provisions in articles of association which are in breach of mandatory statutory provisions, public policy and/or morality are null and void (art. 3:40 BW). Whilst art. 2:25 BW lays down a formal criterion for establishing the mandatory nature of statutory provisions, the ratio for mandatory

The different status of clauses in the articles and of shareholder agreements

A general statutory provision on shareholder agreements does not exist in Dutch corporate law. Just as the articles of association, shareholder agreements find their limits in art. 3:40 BW: mandatory law, public policy and morality. Shareholder agreements are subject to contract law provisions such as fraud, duress and mistake. Whereas the articles of association have to comply with mandatory corporate law, it is uncertain how far mandatory corporate law affects the validity of shareholder agreements. Thus, the notions of public policy and morality come into play.

In three judgments the Supreme Court has acknowledged the validity of voting agreements.

agreements in principle. The Supreme Court held that since a voting right is a right given to a shareholder to serve his own interest in the company, he is free to commit himself as to the exercise of his voting right, provided that this does not lead to socially improper consequences. The mere fact that the agreement may imply that a vote cast by a shareholder may differ from his actual intention does not make the agreement improper. A voting agreement between a shareholder and a third party is held to be valid in principle as well.

In the literature certain categories of improper agreements are identified. Most authors regard a voting agreement by which a shareholder commits himself to vote according to the instructions of the executive or supervisory board null and void. No more accepted are voting agreements with a consideration in cash or in kind. An indefinite contract with a general instruction clause is considered to be improper as well. A voting agreement is held to be contrary to public policy and morality when its aim or consequence is to evade the law. Since case law is scarce, a great deal of uncertainty as to the validity of shareholders agreements in concrete circumstances remains.

A valid shareholders agreement is not necessarily upheld in all circumstances. If the fulfilment of the obligation resulting from a voting agreement would be contrary to reasonableness and fairness, the shareholder cannot be held to vote in conformity with the agreement. In the Coster case, three of the four shareholders of a private company had an agreement to meet and vote prior to every general meeting, where they all would vote in conformity with the majority view of the pre-meeting.

The issue at stake was the company almost fulfilling the requirements of a large company, which meant they would have to institute an independent supervisory board. Two out of three shareholders in the pre-meeting tried to avoid that the equity threshold would be passed and decided a super dividend should be declared. In the subsequent general meeting Coster, the third shareholder, refused to vote in favour of the declaration of the dividend. He sought preliminary relief by asking the court to prohibit such a resolution to be taken and to prohibit the other shareholders

25. ASSER-MAEIJER, o.c., nr. 288.
26. VAN SCHILFGAARDE, o.c., nr. 67.
27. PITLO-RAADMakers, o.c., nr. 5/94.
30. See supra paragraph 2.
to hold him to the agreement. The court held that since the aim of the distribution was to evade mandatory corporate law, the pre-meeting resolution was contrary to mandatory law and morality and as a consequence null and void. According to the court, this implied that Coster could not reasonably be held to vote in conformity with the agreement.

Reversely, shareholder agreements may affect corporate decision-making. When establishing the validity of the voting agreement, the Supreme Court made a distinction between the commitment to the agreement and the exercised vote. It considered a vote to be valid even if it is in breach of the contract. Nevertheless, in recent case law the Court held that acting in breach of a shareholder’s agreement may lead to liability in tort. In the literature, it is contended that voting contrary to a shareholder’s agreement may cause a company’s resolution to be in breach of reasonableness and fairness. Thus, a distinction is made between agreements with all shareholders participating and other agreements. Voting contrary to a shareholder’s agreement may also imply mismanagement.

6 Freedom to complete or modify statutory rules - examples

6.1 Shareholders contributions of personal services or financing

Art. 2:81/192 BW states that no additional obligations may be imposed on a shareholder against his will, other than the payment of the nominal value of the share in full, not even by an alteration of the articles of association. A resolution imposing additional obligations would therefore necessarily have to be by unanimous vote. Additional obligations may be laid down in the articles at the time of incorporation, since all initial shareholders agree. New shareholders are bound by the additional obligations as well, since they voluntarily submit themselves to the articles by joining the company as a shareholder. To insert additional obligations by means of an alteration of the articles is only possible if all shareholders agree. The articles may even state that a company’s organ may decide to impose additional obligations to shareholders, which have to be specifically described in the articles. A

32. Hoge Raad 30 June 1944, Nederlandse Jurisprudentie 1944, 465. In practice, the commitment will be ensured by a penalty clause.
34. A.o. KOELEMEIJER, Redelijkheid en billijkheid in kapitaalvennootschappen, Deventer 2000, p. 140 ff.
36. The first number is the provision for the NV, the second for the BV. Materially both are equal.
37. ASSER-MAEIJER, o.c., nr. 98.
38. Handboek, o.c., nr. 172.
shareholders agree to a shareholders agreement containing additional contributions is in itself an expression of the will of the shareholder, and would therefore be in conformity with art. 2:81/192 BW.

The exact scope of art. 2:81/192 BW is not clear. Since an extensive interpretation of the obligations would subject virtually all alterations of the articles to a unanimity requirement, authors have sought to limit its scope to contributions made to the company, or by excluding obligations concerning the structure and organisation of the company. If a shareholder fails to fulfil his obligations, the articles may withdraw his voting rights (art. 2:118/228 BW).

6.2 Freedom to transfer shares

Mandatory rules restricting the transfer of shares apply only to the BV. Unless the articles state otherwise, a shareholder is free to transfer his shares to his spouse or registered partner, to his relatives up to the second degree and to his co-shareholders. All other transfers must be subject to a share transfer restriction clause (art. 2:195 BW). A shareholder who wants to transfer his shares is either obliged to obtain prior approval of a designated organ of the company, or has to offer the shares to his co-shareholders first. If the approval is denied or the co-shareholders do not accept his offer, the articles may state that he has to offer the shares to other parties appointed by the designated organ. The articles may contain a combination of the two options, e.g. for different classes of shares. On the request of the offering shareholder, the buyers must pay a price determined by an independent expert. The articles may give criteria for the valuation of the shares. A shareholder is always entitled to receive the price determined by the independent expert in cash. For NVs restrictions on share transfers are optional (art. 2:87 BW).

Another means of restricting the transfer of shares can be created by obliging the shareholders to meet certain requirements. For instance, the articles may allow a shareholder only to be a natural person, a government agency or a member of an independent profession. The articles may also require a shareholder to own no more than x % of the shares or to participate in a voting agreement. Requirements may not be imposed against the shareholder’s will. For if the requirements are set by an alteration of the articles, all shareholders not meeting the requirements are either exempted or have to have voted in favour of the alteration. The requirements for shareholders may not be too restrictive, as to make a share transfer impossible or

40. An organ of the company may be the shareholders meeting, a priority shareholders meeting (see infra paragraph 6.2), the executive board, the supervisory board and the joint meeting of the executive and supervisory board, art. 2:78a/189a BW.
42. ASSER-MAEIJER, o.c., nr. 219.
43. ASSER-MAEIJER, o.c., nr. 217.
extremely difficult.\textsuperscript{44}

If the shareholder does not meet the requirements, the articles may suspend the exercise of his voting rights, his right to participate in the general meeting and his right to receive dividend (art. 2:87b/195b). After three months, either his shares may be compulsorily transferred - when provided for in the articles\textsuperscript{45} - or the suspension is removed. A shareholder may, however, not be obliged to sell his shares on the resolution of a company’s organ, unless accompanied by a shareholders’ agreement.\textsuperscript{46}

Since the purpose of the statutory restrictions of share transfers is to ensure an intuitu personae character of the company - a wider aim than merely restricting shareholders’ rights -, some authors contend that a shareholders’ agreement contrary to the statutory provisions would be null and void.\textsuperscript{47} Other authors express a more liberal view.\textsuperscript{48}

6.3 Shareholders’ rights

Under Dutch law, every shareholder has at least one vote (art. 2:118/228 BW), except for the company or its subsidiary which may not exercise the voting rights attached to the shares it owns itself. However, certain restrictions on voting rights are allowed. The articles may restrict the number of votes to be exercised by the same shareholder to a maximum of six (three in case of a share capital of less than a hundred shares) votes per shareholder, provided that it is proportionate and equally applied to all shareholders with the same amount of shares. As mentioned above, the exercise of the voting right may be suspended as long as a shareholder does not fulfil the obligations arising from statutory provisions or provisions in the articles, or he does not meet a requirement stipulated in the articles. Dutch law does not recognize shares without voting rights. The law practice has created "certificaten" instead.

A company which wants to limit its shareholders’ influence may decide to "certify" its shares. This means that the shares are being held by a trustee-like institution, the administration office (administratiekantoor), which usually is a foundation (stichting). The administration office issues "certificaten" which give the certificate holder a right to the economic benefit of the shares. The administration office, as the owner of the shares, exercises the voting rights, having regard to the interests of both the company and the certificate holders. This construction is often used as an anti take-over device for listed companies.\textsuperscript{49}

\textsuperscript{44} Handboek, o.c., nr. 181.4.
\textsuperscript{45} Pursuant to art. 2:87a/195a BW may the articles state that a shareholder is required to transfer his shares in circumstances clearly specified in the articles.
\textsuperscript{46} Handboek, o.c., nr. 181.5.
\textsuperscript{47} ASSER-MAEIJER, o.c., nr. 220. Handboek, o.c., nr. 181.6.
\textsuperscript{48} E.g. SCHWARZ, Blokkering van aandelen, Monografieën vanwege het Van der Heijden-instituut deel 27, Deventer 1986, p. 67. DORTMOND, Stemovereenkomsten rondom de eeuwwisseling, Deventer 2000, p. 21.
\textsuperscript{49} See further VOOGD, Statutaire beschermingsmiddelen bij beursvennootschappen, Monografieën vanwege het Van der Heijden Instituut, deel 32, p.21 ff. and VAN DEN INGH, Certificering en certificaat van aandeel bij de BV, Monografieën vanwege het Van der Heijden
Priority shares constitute another means to restrict the influence of the general meeting of the shareholders. Priority shares are a special type of shares, which give its holders certain powers in the decision-making of the company. For instance, the articles may confer a right to nominate the executive directors to the priority organ - the organ that consists of holders of priority shares - or a right of approval to an alteration of the articles. The rights attached to priority shares may, however, not alter the statutory division of powers between the company’s organs. Priority shares are usually held by the company’s founders, directors or a foundation (stichting).

The powers of the general meeting of the shareholders may thus be restricted quite effectively. Nevertheless, there are limits. To prevent the appointment procedure of executive directors from being a mere formality, the nomination of a director may always be set aside by a resolution taken by a two-third majority of the votes representing more than half of the share capital (art. 2:133/243 BW).

Unless the articles state otherwise, all profits are for the benefit of the shareholders. The distribution of profits occurs after the annual account has been adopted by the shareholders in general meeting, or, in case of a large company, by the supervisory board, subject to the approval of the general meeting. This competence may not be restricted by giving a right of approval or a right of initiative to another organ or a third party (art. 2:101/210 BW).

The executive and supervisory board must give the shareholders in general meeting all the information they ask for, unless it is of vital importance to the company to withhold the information. Information may be refused because it would prejudice the competitiveness of the company, or it would prejudice other legitimate interests of third parties. Generally, this provision is understood to oblige the boards to respond to questions of individual shareholders at a general meeting.

As mentioned above, a shareholder may request the district court to be bought out at a fair price, if his interests are damaged by the conduct of one or more other shareholders in such a way that he can no longer reasonably be required to continue being a shareholder. The conduct causing the buy-out is not limited to the conduct of shareholders in that capacity, but may as well be the conduct in the capacity of a director. The articles may provide for an alternative dispute settlement procedure, which prevails. Nevertheless, the mandatory nature of the provision prohibits the shareholder to waive his right. No stipulation in the articles may oblige a shareholder to buy other shares, but a contractual arrangement in that respect is held to be valid.
6.4 Procedural rules

Each year at least one general meeting has to be held (art. 2:108/218 BW). At this meeting the annual account is to be adopted. An extraordinary general meeting is required if the assets of an NV have dropped below an amount of half of the issued share capital or less (art. 2:108a BW). Both the executive and the supervisory board are entitled and obliged to convene a general meeting. The articles of association may also confer this competence on others (art. 2:109/219 BW). If a stipulated general meeting is not convoked, any shareholder may request the president of the district court to be authorized to convene one (art. 2:112/222 BW). Furthermore, one or more shareholders representing together more than one tenth of the issued share capital, or a lesser percentage stipulated in the articles, may request the president of the district court to be authorized to convene a special general meeting, art. 2:110/220 BW. They must demonstrate a legitimate interest.  

All holders of registered shares must get a 15 days notice of the meeting sent to their addresses. Holders of bearer shares and certificates must be given notice by placing an announcement in a nation-wide distributed newspaper. Voting by proxy is allowed, but a general indefinite proxy is held to be contrary to the separation of powers within the company. In order to establish a succesful system of proxy solicitation art 2:119 BW provides for a record date.  

All resolutions must be taken by a majority of the votes cast, unless the articles require a qualified majority. This also applies to a resolution to alterate the articles. If the voting concerning the election of persons comes to a draw, the decision is made by a drawing of lots. When other votings result in a draw, the articles may confer the decision to a third party (art. 2:120/230 BW). This might be the executive or supervisory board, the chairman of the general meeting or the company’s external accountant. It is disputed whether a shareholder in that capacity might be such a third party, since that would be contrary to the principle of majority voting. Unless the company has its shares, the articles may provide for a written procedure instead of a meeting. In that case, unanimity is required (art. 2:128/238 BW). Even in case of a written procedure, the directors have a consultative vote (art. 2:117/227).  

There are no statutory provisions on the meeting of the executive and supervisory board. The executive and the supervisory board are collectively responsible for the exercise of their powers. Thus, being a director implies being able to participate in the decision-making of the respective board. The articles may

57. ASSEMAEDIER, o.c., nr. 280.  
59. ASSEMAEDIER, o.c., nr. 275.  
61. Handboek, o.c., nr. 233. ASSEMAEDIER, o.c., nr. 303. DUMOULIN, o.c., p. 231 ff. See also Hoge Raad 15 July 1968, Nederlandse Jurisprudentie 1969, 101 (Wijsmuller).
allocate more than one vote to a director indicated by name or function, provided that his votes do not exceed the joint votes of the other directors (art. 2:129/239 BW). Furthermore, the supervisory board may have one or more delegated members, whose special assignments must appear from the articles, e.g. increased supervision and consultation tasks. The supervisory board nevertheless remains responsible as a collective.62

Dutch corporate law does not recognize an accounting organ within the company. A company has to submit its annual account for investigation to an external accountant. The accountant submits the outcome of his investigation to the organ which is to adopt the account.

7 Conclusion

There is a sharp contrast between the perceived mandatory nature of Dutch corporate law and its de facto permissive effect. This seems to be caused by art. 2:25 BW, which merely provides for a formal criterion to distinguish mandatory from enabling provisions. Until recently, the prior ministerial approval set the limits as to the compatibility of the articles of association with the statutory provisions. Now the approval is no longer necessary, it is uncertain in which way this will affect the mandatory nature of Dutch corporate law. In my view, more freedom in stipulating the articles of association on the one hand must be counterweighted by more emphasis on the ratio of the mandatory rules on the other hand.

Shareholder agreements have become an useful tool for completing the structure and organization of private companies. Although the limits placed by mandatory corporate law remain unclear, shareholder agreements are gradually gaining legal status in corporate law, lately in the form of tortuous liability. This increasing influence of shareholder agreements on the company’s organisation must, in my opinion, almost inevitably lead to the submission of the agreements in content and effect to the ratio of mandatory corporate law provisions.

62. Cf. ASSER-MAEIJER, a.c., nr 345. VAN SCHILFGAARDE, a.c., nr 70.