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Memorandum: the shareholders' right to put items to the agenda and the risk for the Dutch state of being liable due to breaches of EU law

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I. INTRODUCTION

1. Every now and then shareholders request the board of a listed 'NV' (Dutch public limited company) to add a sticking point or other key issue to the agenda for a shareholders' meeting. On these occasions, one or more shareholders are of the opinion that a change in policy is indicated and they find that the management board and supervisory board members are opposed to such a change.

2. It's surprising that an item on the agenda can be a subject of dispute. The conventional view is that companies' decisions are the result of consultation[1] and that the shareholders' meeting is the appropriate forum for shareholders to use to call the management board to account in respect of the latter's responsibilities.[2] Looked at in this way, it actually seems desirable that differences of opinion between the board and shareholders can be discussed during the shareholders' meeting. If a change in policy desired by a shareholder is not in the company's interests then the board has to be deemed capable of persuading the shareholders' meeting of this.

3. The relevant literature argues that the shareholders' meeting should not be allowed to vote on the strategy but that the strategy can only be deliberated in these meetings.[3] As to the dreaded consequences if the 'highwaymen capitalists'[4] were to be allowed to use a vote to

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[1] HR (Netherlands Supreme Court) 15 July 1968, *NJ* (Dutch judgment, year and nr.) 1969/101 with commentary from Veegens and Scholten (*Wijsmuller*).

[2] Enterprise Section ('Ondernemingskamer') 21 March 2007, *JOR* (Dutch judgment magazine) 2007/179 (*Keltec*).

[3] R.A.F. Timmermans, 'The right to put an item on the agenda, preferential protective shares and oligarchic clauses', *Ondernemingsrecht* publication 2012, 121 p. 2 and B.F. Assink, 'Compendium of Company Law', Deventer: Kluwer 2013, p. 799 and *Dutch Parliamentary Papers (Kamerstukken) II* 2008/09, 31 746, nr. 7, p. 12.

[4] *Dutch Parliamentary Papers II* 2008/09, 31 083 (Corporate governance, hedge funds and private equity), nr. 27 (report of a general consultation), p. 7-8 [original quote is in Dutch]: "*There is an urgent need to curb the power of the private equity funds that buy up distressed assets. It is mainly the Anglo-Saxon funds that in practice are charging through our polders like elephants.* [...] *It is my party's belief that we have to put a stop to this type of*

express what they actually think of the strategy that the company's board is pursuing – this is unclear. What is beyond dispute[5] however is that shareholders cannot intervene in this regard, or at any rate cannot do so unless the articles of association permit this.[6] What's more, the threshold for attributing liability to directors is set so high that no director has to worry that his holiday home in France will have to be sold off if he gives vent to his well-justified point of view that happens to deviate from that held by the shareholders. Perhaps his concerns are simply prompted by insecurity - after all, we do not want to expose the fact - and who actually does? - that in some companies a poor financial policy is being pursued, and thus disrupt the serene 'onwards-and-upwards' career progress of some directors…

4. In thismemorandum, we will take a close look at the right held by shareholders to put an item on the agenda (the 'agenderingsrecht') for a listed 'NV' (Dutch public limited company), the degree to which the relevant Dutch legislation complies with EU law, and the scope that there still is for Dutch 'folklore' (i.e. Dutch cultural practices).

5. The Enterprise Section of the Amsterdam Court of Appeal, that deals with disputes between the shareholders and the board on this matter, naturally dispenses justice within the limits set by the Dutch legislature, but these limits also mean that national laws must be applied in a way that is in accordance with EU law. Should the Dutch legislative authority[7] or judiciary[8] fail to do so (in the last instance),the Dutch State can be held liable.

6. Apart from an examination on possible State liability, we will take a closer look at the *Cryo-Save* ruling, given that this ruling clearly exposes additional issues[9] attached to the shareholders' right to put items to the agenda. However, we will begin to set out the regulatory framework relating to this matter.[10]

'highway robbery' capitalism. [...] *What some people don't realise is that the 'Rhineland model' (of the social market economy) needs to be fiercely defended against these Anglo-Saxon highwaymen. I'm also hearing these views to some extent from the CDA (Dutch Christian Democratic Appeal) and PvdA (Dutch Labour Party) parties, namely that we have to find means and methods to defend ourselves against this.* [...] *The scope that shareholders were granted in the past [...] is now being abused on a large scale."*

[5] HR 9 July 2010, *NJ* 2010/423, with commentary from Van Schilfgaarde, *JOR* 2010/228 with commentary from Van Ginneken (*ASMI*).

[6] Cf. 2:129 paragraph 4 NCC (Netherlands Civil Code).

[7] ECoJ (European Court of Justice) 19 November 1991, consolidated cases C-6/90 and C-9/90 (*Francovich*).

[8] ECoJ 30 September 2003, C-224/01, Jur. (EcoJ publication) 2003, p. I-10239 (*Köbler*) and ECoJ 19 November 2009, C-432/07 and C-402/07, Jur. 2009, p. I-5177 (*Traghetti del Mediterraneo*). See in this regard R. Meijer, 'The Köbler judgment in the polder', *MvV* publication 2014/10.

[9] Such as the 'response time'.

[10] Enterprise Section 6 September 2013, *JOR* 2013/272 with commentary from Josephus Jitta (*Cryo-Save Group/Amar*).

II. THE REGULATORY FRAMEWORK

A. SHAREHOLDERS' RIGHTS DIRECTIVE, ARTICLE 2:114A NCC (NETHERLANDS CIVIL CODE) AND ARTICLE 2:8 NCC

7. The preamble to the Shareholders' Rights Directive (hereinafter: the SRD) states that the exercising of effective control by shareholders is a prerequisite for proper corporate governance. Consequently, this control needs to be facilitated and encouraged. The SRD envisages achieving this in practice via such measures as ensuring that everywhere in the EU, shareholders can make effective use of their right to put an item on the agenda.

8. Art. 6 paragraph 1 SRD requires the member states to ensure that shareholders have the right to put an item on the agenda for the shareholders' meeting and to submit draft resolutions for it. Furthermore, Article 6 paragraph 3 SRD stipulates that the member states must set a single specific time-limit by which the right to put an item on the agenda can be exercised. In addition, Article 6 SRD contains a number of (optional) restrictions of these shareholders' rights that will be discussed below where relevant. There is no restriction on resolutions that solely advise on such matters as strategy.

9. Art. 6 SRD offers no view on the way in which member states are to implement the relevant shareholders' rights in practice. What is important is that the stipulated outcome is achieved. Should a member state fail to achieve this outcome then it is liable towards those that suffer disadvantage as a result (see in this regard under 5 above).

10. The Dutch legislature has elected to comply with this requirement by amending Article 2:114a NCC (Netherlands Civil Code). However, the implementation of this amendment has not ended the Netherlands' obligations under Article 6 SRD.[11] When applying Article 2:114a NCC or any other provision of Dutch law,[12] the Dutch judiciary must allow for this obligation too. This means that as far as possible Dutch law must be interpreted in the light of the phrasing and purpose of the directives in question, so that the directives' intended outcome is achieved.[13] In doing so, the courts must utilise the options offered by national law. These include interpretation, the effect of the principles of reasonableness and fairness[14] and the

[11] Cf. The *Cryo-Save* ruling, legal ground 3.9.

[12] A.S. Hartkamp, *Asser 3-I* 'European law and Dutch property law'*, Deventer: Kluwer 2008, nr. 181 and M.H. Wissink 'Interpretation of Private Law in conformity with EU directives', in *The influence of EU law on national private law*, Deventer; Kluwer 2014, SO&R publication nr. 81-1, nrs. 5.1 to 5.4 inclusive.

[13] See for example ECoJ 24 January 2012, C-282/10 (*Dominguez*).

[14] Hartkamp, loc. cit. nr. 18, 92 and 95, W. Snijders, 'Good faith as a Dutch and a European concept', in SO&R, nr. 81-1, loc. cit., pp. 547 to 549 inclusive and Wissink, loc. cit., para. 7. Wissink (loc. cit., nr. 7.10) notes that in practice the Netherlands Supreme Court (the 'Hoge Raad'/HR) is cautiously utilising the principle of reasonableness and fairness in order to arrive at an interpretation of the law that complies with the Directive, should it be the case that the legislature fails to implement the directive in question in time.

utilisation (or non-utilisation) of such discretionary powers as those provided by Article 2:349a paragraph 2 NCC.

11. One of the amendments to Article 2:114a NCC that the Netherlands felt it had to make was the removal of the ground for refusal that had previously been part of Article 2:114a NCC.[15] Previously, a company could refuse a request to put an item on the agenda because it had a major interest in this regard but Article 6 SRD does not provide for such an exception.

12. The Netherlands implemented the removal of this ground for refusal but its heart wasn't in it. This can already be seen by the replies that the Dutch Minister of Justice gave in the context of the amendment of Article 2:114a NCC when he was asked to clarify the occasions on which a request to put an item on an agenda could be refused. He replied as follows [in Dutch]:[16]

> *'The directive does not contain an explicit ground to refuse the request. The new regulation means that in principle a written request to put an item on an agenda must lead to the relevant matter being added to the agenda, provided that the obligation to provide grounds is fulfilled and the shareholder has a sufficiently large interest in the company. However, a shareholder must not abuse the right to put an item on the agenda. A shareholder must act in accordance with the requirements of reasonableness and fairness (see Article 2:8 NCC). If in a specific case the request to put an item on an agenda is contrary to the principle of reasonableness and fairness then the board does not have to honour the request to add a particular item to the agenda. This could include for instance relate to a matter that bears no relation at all to the enterprise's activities or to a series of topics that are likely to disrupt the order of the meeting.'*

13. This clarification is somewhat ambivalent when it comes to the question of the extent to which the right to put an item on the agenda can be restricted. On the one hand, it may be argued that a restriction of the right to put an item on the agenda is only permitted if it is being used (i.e. abused) for a purpose other than that for which it was intended. On the other hand, it may also be argued that the ground for refusal that was deleted from Article 2:114a NCC can simply continue to be applied by virtue of the 'back door' of the open standard of Article 2:8 NCC.[17]

14. It is our view that the scope to invoke Article 2:8 NCC in order to refuse a request to put an item on an agenda is determined by the Netherlands' obligations under Article 6 SRD.[18] The first and foremost consideration here is that Article 2:8 NCC too must be implemented in a way that is in accordance with the Directive (see above under 10). While it is true that the

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[15] *Dutch Parliamentary Papers* 31 746, nr. 3 (MvT), pp. 8 and 9.

[16] *Dutch Parliamentary Papers* 31 746, nr. 7 (NnavhV/Memorandum in connection with the Report), p. 5.

[17] Assink (loc. cit., p. 797) too feels that this is a possible interpretation of the clarification in question.

[18] See also F. Eikelboom 'Departing from mandatory law when providing immediate relief in accordance with Article 2:349a NCC in conjunction with Article 2:8 paragraph 2 NCC', *Ondernemingsrecht* 2011-99, especially para. 5.

derogatory effect of the principle of reasonableness and fairness is not excluded when it comes to regulations arising from EU directives, note that stricter requirements apply in this regard than would apply in a purely Dutch context.[19] This is logical too, because EU directives are a compromise between the different legal interpretations and other views within the EU.[20] This compromise would lose its value if each member state were then able to use its own legal interpretations and other views to render this compromise inoperative. The full effect and uniform application of the EU law has to be ensured. This is why the application of such national tenets as the derogatory effect of the principle of reasonableness and fairness is not allowed to affect the essence of Article 6 SRD and furthermore will not adversely affect its objectives.[21] The relevant judgments by the European Court of Justice (EcoJ) are very strict; only in extreme circumstances is there sufficient scope to exclude from application legislation implemented by virtue of EU directives.[22] This scope definitely exists, however, if there are sufficient serious indications that the EU law is being invoked in order to obtain wrongful advantages that appear to have nothing to do with the objectives of the provision in question.[23]

15. This last point is in line with a (very) narrow interpretation of the Minister's response quoted above under 12. If it were to be interpreted in this way then the ground for exception quoted by the Minister could not be applied in practice (or only to a very limited extent). After all, it is not very likely that someone would be able to obtain wrongful advantages by putting an item on the agenda of the shareholders' meeting (see above under 2 and 3) or that the advantages to be obtained in this way appear to be unrelated to the objectives of Article 6 SRD (which are set out above under 7).

16. If it must be concluded from the Minister's response cited above under 12 that the principle of reasonableness and fairness applies uncurtailed then the conclusion has to be that the Netherlands has failed to comply with its obligation that arises from Article 6 SRD. After all, Art. 6 SRD does not provide for an exception to the right to put an item on the agenda that is comparable to the exception set out in Article 2:8 NCC. It is not logical to assume that this was the legislature's intention. In practice, however, it appears that many are unable to resist

[19] See extensively across EU law and national tenets such as the abuse of rights and the derogatory effect of the principle of reasonableness and fairness, W. Snijders, 'Restrictive effect of reasonableness and fairness: the European dimension', *'European law and Dutch contract law',* SO&R nr. 42-I, Deventer: Kluwer 2007, and SO&R, nr. 81-1, loc. cit.

[20] What is reasonable in one member state – or 'folklore' i.e. cultural practice – does not have to be so in another. The fact that the 'Rhineland model' (of the social market economy) bears this name shows that even within Europe this model has a limited regional origin and ties that is/are not broadly supported in the UK for instance. After all, the Anglo-Saxon model gives the shareholder pre-eminence.

[21] ECoJ 12 March 1996, *NJ* 1997, 173 (*Pafitis*), ECoJ 12 May 1998, *NJ* 1999, 239 (*Kefalas*) and ECoJ 23 March 2000, C-373/97 (*Diamantis*). By the way, this case law also raises the question of whether the Enterprise Section's case law on emergency financing can actually be applied to Dutch public limited companies.

[22] Snijders SO&R, nr. 81-1, loc. cit., p. 551

[23] Ditto.

this temptation to oppose – whether or not by virtue of Article 2:8 NCC – a full implementation of the SRD.

B. OPPOSITION TO THE RIGHT TO PUT AN ITEM ON THE AGENDA, AND MORE ESPCIALLY REGARDING THE RESPONSE TIME

17. The germ of the idea that Article 2:8 paragraph 2 NCC could stand in the way of a request to put an item on an agenda appears to stem from the *Stork* inquiry.[24] Centaurus (an American hedge fund) initially put an item on the agenda that called for the disposal of part of Stork's activities. The motion was accepted in the EGM (Extraordinary General Meeting) but was disregarded by the management board. Centaurus then tried to get a motion of no confidence in the Supervisory Board (the SB) put on the agenda, something that would ultimately lead to the dismissal of the entire SB.[25] According to the Enterprise Section's interpretation, this vote against the SB was intended to force a change of strategy. The Enterprise Section then weighed up the existing strategy against the proposed alternative strategy and concluded that under the circumstances in question, it was too risky to force a change in strategy and that said coercion was unacceptable according to the criteria of reasonableness and fairness. Accordingly, the Enterprise Section prohibited the motion in question from being put to a vote.

18. However, applying Article 2:349a paragraph 2 NCC in this way is not in accordance with the Directive and accordingly must not (now) take place (see above under 10). After all, the purpose and essence of Article 6 SRD is to ensure that shareholders can have their draft resolutions put to the vote effectively. Cases such as Stork and ABN AMRO Bank – the latter where the hedge fund TCI showed itself to be an advocate of splitting up the bank – have led to alarm in certain sectors of society, which is why certain parties have been looking for a way to counteract the shareholders' right to put an item on the agenda.[26]

19. The legislature too put its oar in here by raising the threshold for the right to put an item on the agenda from 1% to 3%. However, the legislature did not go along with the proposal by the Corporate Governance Code Monitoring Committee to enshrine what is known as the 'response time' in law. This would have meant that the board could invoke a reasonable period of time of up to 180 days to respond to a shareholder's proposal if the latter wished to place an item on the agenda that related to a change to strategy or else wished to convene a shareholders' meeting.[27] The board is allowed to use this period for consultation and to explore alternatives. The legislature felt that this 'response time' mechanism was

[24] Enterprise Section 17 January 2007, *JOR* 2007/42 (*Stork*).
[25] Art. 2:161a paragraph 3 NCC.
[26] See for example Timmermans, loc. cit.
[27] J.J. Prinsen, 'Relationships between the management board, supervisory board members and shareholders of the listed company', *O&F* 2011/19, p. 7.

incompatible with the SRD.[28] This is because the SRD stipulates that the member states can only set a single deadline by which the right to put an item on the agenda can be exercised. Article 2:114a NCC sets this deadline at 60 days.[29] In other words, the envisaged 'response time' measure would have added a second, much longer deadline.

20. In the meantime, the Monitoring Committee had already made the response time part of the Corporate Governance Code. This is regrettable, for two reasons. First of all, this apparent attempt to evade EU law undermines the Code's moral authority. In addition, provisions of the Corporate Governance Code that are in conflict with EU law can only lead to confusion, costs and conflicts. After all, the Code works via the link with Article 2:8 NCC. The Code is an expression of the general juridical view that prevails in the Netherlands[30] that implements in practice the requirements of reasonableness and fairness (*as do other measures)*.[31] However, such juridical views that specifically prevail in the Netherlands cannot be decisive if an interpretation is required that is in accordance with the Directive. After all, in that case the juridical views laid down in the directive prevail. Or at any rate, they do if Article 6 SRD is implemented in Dutch law in full. If Article 2:8 NCC creates greater scope to exclude application of the right to put an item on the agenda than is permitted by Article 6 SRD (see above under IIA) then the Code may indeed prevail, but as we said at the outset of this article: the bottom line is that the State is liable.

21. By the way, it must be doubted whether the Code does indeed reflect the prevailing juridical view in the Netherlands regarding the response time, as solid support amongst shareholders for this measure is lacking.[32]

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[28] *Dutch Parliamentary Papers* 32 014, nr. 8 (NnavhV/Memorandum in connection with the Report), p. 26, which refers to an identical advice issued by the Combined Committee on Company Law set up by the NOvA (the Netherlands Bar Association) and the KNB (the (Dutch) Royal Notarial Association).

[29] In the relevant literature, the response time is deemed to conflict with or at any rate to be at odds with Article 2:114a NCC. See M.J. Kroeze, 'Chronicle of company law', *NJB* 2008/1736, nr. 2c, R.G.J. Nowak, 'Adjusted corporate governance code adopted', *Ondernemingsrecht* 2009/9, J.M.M. Maeijer, G. Van Solinge and M.P. Nieuwe Weme, *Asser 2:II* The public limited and private limited company*, Deventer, Kluwer 2009, nr. 351, P.J. Dortmond, *Handbook on the public limited and private limited company*, Deventer: Kluwer 2013, p. 180 and Assink, loc. cit., p. 135. For the relationship between mandatory law and Article 2:8 paragraph 2 NCC, see A.S. Hartkamp and C.H. Sieburgh, see *Asser 6-III* The law of obligations: General contract law*, Deventer: Kluwer 2009, nr. 417 and HR 28 January 2011, *JOR* 2011/70 (*Staalbankiers*).

[30] HR 9 July 2010, *NJ* 2010/423 with commentary from Van Schilfgaarde, *JOR* 2010/228 with commentary from Van Ginneken (*ASMI*).

[31] Art. 3:12 NCC.

[32] Corporate Governance Code Monitoring Committee, *'Third report on compliance with the Dutch corporate governance code'*, December 2011, p. 41. Nowak, loc. cit., nr. 8.

III. THE JUDGMENT: CRYO-SAVE

22. The issue outlined above – namely that of whether the Netherlands has fully implemented Article 6 SRD - has been implicitly answered by the Enterprise Section's ruling in the *Cryo-Save* case.[33]

23. A brief discussion of the relevant circumstances of this case is called for here. Cryo-Save is a listed company whose shares, in so far as relevant, are held by its two founders, Frederic Amar and Amar's personal holding company Salveo Holding.[34] Disagreement arose between Cryo-Save and Amar et al. about the strategy to be pursued by the public limited company, the result of this being that Amar et al. called an EGM (Extraordinary General Meeting) and put a motion on the agenda calling for the dismissal of the CEO and the appointment of a new CEO, namely himself. Cryo-Save then invoked the response time, because it believed that the agenda motion could lead to a change in the company's strategy. After Amar et al. let it be known that he would be ignoring the response time, Cryo-Save tried to delay an inquiry into its own policy and state of affairs and also tried to delay the EGM.

24. In line with the Minister's response (see above under 12), the Enterprise Section ruled that the right to put an item on the agenda is restricted by Article 2:8 NCC. In legal ground 3.9, the Enterprise Section finds that [original quote is in Dutch]:

> *'By no means do the Code's 'best practice' provisions have the effect of preventing a shareholder from exercising his legal right to attend meetings or put an item on the agenda; they only constitute an implementation of the principle that a shareholder will conduct himself in accordance with the criteria of reasonableness and fairness towards the company, its bodies and his co-shareholders, including the willingness to enter into a dialogue with the company's board if he intends to put an item on the agenda in the AGM that could lead to a change in the company's strategy*.'

25. The Enterprise Section deems the failure to respect the response time to be contrary to Article 2:8 NCC. In its opinion, a strict enforcement of this deadline is not inconsistent with the right to put an item on the agenda, and the Enterprise Section accepts the 'best practice' provision on the response time as an expression of a general juridical view that prevails in the Netherlands and that implements the requirements of Article 2:8 NCC. According to the Enterprise Section, this is only otherwise if the shareholder can make a plausible case that "important circumstances" are to be taken into consideration.[35]

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[33] Enterprise Section 6 September 2013, *JOR* 2013/272 with commentary from Josephus Jitta (*Cryo-Save Group/Amar*).

[34] Hereinafter referred to as 'Amar et al.'

[35] Evidently, the fact that Cryo-Save's performance was under pressure, that for some considerable time the CEO position had been filled on an interim basis, and that the response time had been invoked on the initiative of a shareholder in order that this position be filled as quickly as possible, was not important enough.

26. This application of Article 2:8 NCC is not in accordance with the Directive. If a shareholder wishes to exercise his right to put an item on the agenda, Art. 6 SRD offers the member states no scope to require him to have an important reason for so doing. Instead, it is sufficient that the agenda item is justified or that it is accompanied by a draft resolution. What's more, the Enterprise Section's view that the shareholder must comply with the response time is irreconcilable with the SRD (see above under 19). Furthermore, it also impairs the uniform application of the SRD, if – by virtue of purely Dutch interpretations of the law (namely the Code) - additional requirements are set for the exercising of the right to put an item on the agenda. In addition, such an approach would seriously compromise the SRD's objectives (cf. under 7 and 14 above).

27. In its *Cryo-Save* ruling, the Enterprise Section does not discuss European law at all, possibly because this issue was not raised by the parties in question. It may be inferred from this that the Enterprise Section is of the opinion that when implementing the SRD the legislature did not wish to impose any restrictions on the application of the principle of reasonableness and fairness. Given the clarification given by the Minister in respect of this amendment, this implicit view on the part of the Enterprise Section is not inexplicable.

28. However, this does not alter the fact that we feel that this view is mistaken, for the above-mentioned reasons. Note that Josephus Jitta and Abma[36] too in their annotations deem the criteria set by the Enterprise Section to be too lax and are of the opinion that it should only be possible to invoke the response time if the right to put an item on the agenda has been abused. However, we also deem this criterion to be too lax, given that which we noted above under 14. However, De Kluiver is indeed in agreement with the Enterprise Section.[37] He believes that a request to put an item on an agenda can be rejected on the grounds of special circumstances such as an invoked response time.[38] Unfortunately, he has not explained how this relates to the judgment by the European Court of Justice.

IV. DEALING WITH EU LAW IN URGENT CASES

29. We have already discussed the fact that there are differing opinions in the relevant literature as to whether Article 6 SRD stands in the way of the application of the response time set out in the Code. Furthermore, it may be safely assumed that company directors who wish to defend themselves against responsible shareholders will continue to invoke the response time and the *Stork* and *Cryo-Save* rulings.

30. The Enterprise Section can refer questions to the European Court of Justice for a preliminary ruling in order to clarify the above, although unlike the Netherlands Supreme Court it is not

[36] *JOR* 2013/272 and *Ondernemingsrecht* 2013/117 respectively. See also R. Abma, 'Postscript to response Harm-Jan de Kluiver', *Ondernemingsrecht* 2013/128.
[37] H.-J. De Kluiver, 'Response to comments to the judgment Cryo-Save Group/Salveo Holding', *Ondernemingsrecht* 2013/127.
[38] With reference to *Dutch Parliamentary Papers II* 2008/09, 31 746, nr. 7, p. 11/12.

obliged to take this step to do so.[39] After all, it can take eighteen months to two years to ask for and obtain a response to questions that require preliminary rulings. When such queries relate to the right to put an item on the agenda, this is too long a time. Depending on the interests of the parties and the situation in practice, an agenda item must be dealt with in the short term – or perhaps the opposite is actually true. In urgent cases, it may be tempting to start by maintaining the status quo in the company and accordingly to prevent the handling of the agenda item in question from going ahead for the time being. However, in our opinion the weighing up of interests that the Enterprise Section has to perform before granting immediate relief must also take into consideration the answer to the question of which form(s) of redress is/are available to the shareholder in question, should it be subsequently established that the EU law has to be interpreted in the sense pleaded above and that accordingly there is no reason to prevent this shareholder from exercising his right to put an item on the agenda.

31. If a shareholder wishes to put a motion on the agenda for the shareholders' meeting but this cannot be done due to the Enterprise Section's intervention (or lack of it), and should it prove after two years that he should have been permitted to do so after all then it is not possible to restore the situation that existed two years previously, or at any rate it is not possible to do this completely. The period of time that has elapsed cannot be reclaimed, and the advantages that the motion could have generated at the time may have disappeared in the meantime. It is also conceivable that the shareholders wished to protect a major investment by intervening in respect of a board that is performing averagely to poorly but (slightly) better than the standard needed to claim mismanagement or invoke liability. The company could have been sold although potentially at a loss, and - if a very large interest is being held - not without a loss of value that would have had to have been borne by the other shareholders. The question is then whether it is possible to claim compensation.

32. This proverbial 'elephant in the (court)room' receives remarkably little attention in either the relevant literature or in case law. In comparison, in the case of proceedings commenced by a summons, the person who enforces a ruling that is subsequently annulled would be liable for the losses incurred as a result;[40] however, rulings made by the Enterprise Section do not appear to designate such a party to be liable under civil law. The State's liability for the Enterprise Section's mistaken application of EU law does not appear to provide a remedy either in the event that this mistake is remedied on appeal.[41] However, this does not satisfy one's sense of justice if a shareholder would not be entitled to claim compensation if his rights (including his right to put an item on the agenda) has/have been infringed without there being any legal basis for this.

[39] Article 267 Treaty on the Functioning of the European Union, and Hartkamp loc. cit. Nr. 179.
[40] HR 13 January 1995, *NJ* 1997/366, with commentary from Brunner. See in respect of liability due to threatened enforcement of a ruling HR 19 May 2000, *NJ* 2000/603, with commentary from Snijders.
[41] See Meijer, loc. cit.

CONCLUSION

33. It appears that the Dutch State is running a risk of liability by virtue of the fact that restrictions on the right to put an item on the agenda are being imposed that go beyond what is permitted by EU law. The question of what the limits to the participation by shareholders are is no longer just a matter for domestic political discussion but is now primarily a question of European law. If ‘we’ do not like the answer to this question then the government must take action to try to get the European legislature to amend the Shareholders’ Rights Directive. The question is whether the Enterprise Section, will now be given – and will take – the opportunity to have the limits of the right to put an item on the agenda reviewed by way of a preliminary ruling by the European Court of Justice.

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