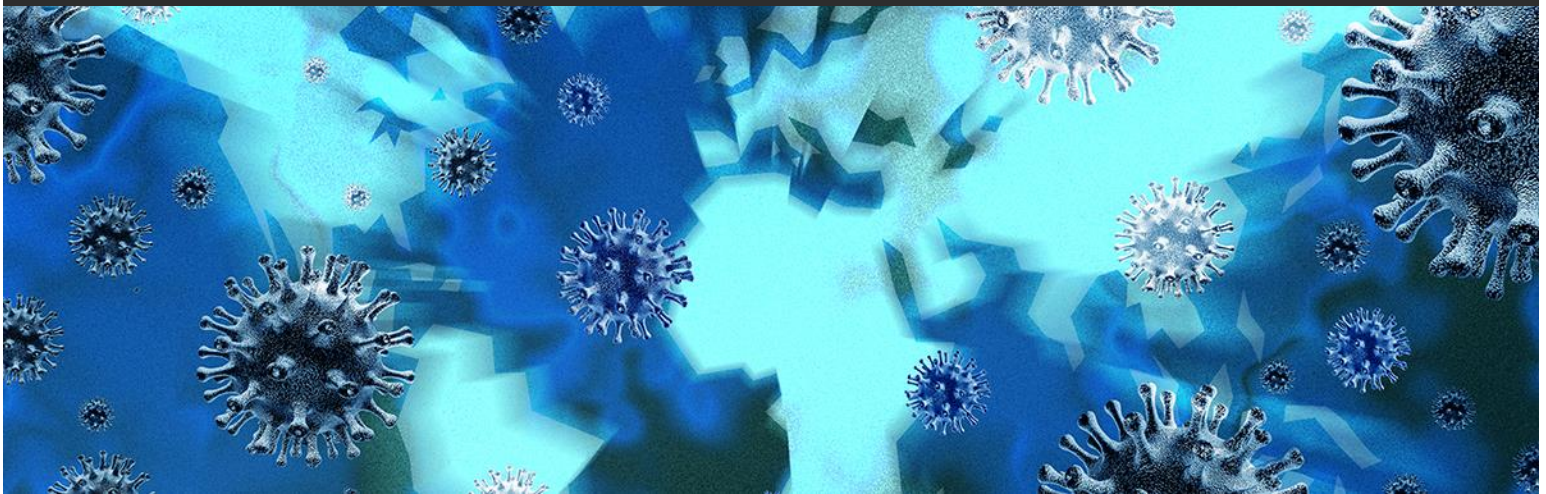


**Alert | Health Emergency Preparedness Task Force:  
Coronavirus Disease 2019 – Focus on The Netherlands**



April 2020

## **Dutch Law: Navigating Changes to General Meetings and Filings of Annual Accounts Due to Temporary Provisions in Connection with COVID-19**

*Interim arrangements in the field of the Ministry of Justice and Security in relation to the outbreak of COVID-19 (Emergency Act COVID-19 Justice and Security)*

### **Introduction**

On April 16, 2020, the House of Representatives of the Netherlands adopted several interim measures in relation to the outbreak of Coronavirus Disease 2019 (COVID-19) (Temporary COVID-19 Justice and Security Act)<sup>1</sup> (the **Emergency Act**). The Emergency Act was passed in the Senate on April 21, 2020 and entered into force on April 24, 2020.

The Emergency Act is a collective Act whereby different, primarily temporary, measures guarantee the continuity of the legal system during the COVID-19 outbreak. Given the necessity of legal certainty in these uncertain times, these measures have retroactive effect as of March 16, 2020<sup>2</sup> and apply until

<sup>1</sup> In Dutch: *Tijdelijke voorzieningen op het terrein van het Ministerie van Justitie en Veiligheid in verband met de uitbraak van COVID-19 (Tijdelijke wet COVID-19 Justitie en Veiligheid).*

<sup>2</sup> Save for the limitation of the presumption of proof in case of the late filing of the annual accounts.

September 1, 2020 (unless extended due to continuing effects of COVID-19). In short, the Emergency Act includes provisions relating to, inter alia, (i) holding a general meeting (**GM**), (ii) holding a meeting of the management board/supervisory board, and (iii) filing annual accounts of Dutch private and public limited liability companies (BV/NV), associations, cooperatives and foundations (as applicable).

Annual GMs are usually scheduled during this time of the financial year to resolve on key agenda items such as the adoption of annual accounts. The Emergency Act allows for alternatives to holding a physical (annual) GM and the extension of the period for preparing annual accounts. It also temporarily limits a presumption of proof for board member liability in the event of bankruptcy when filing of the annual accounts is delayed as a result of COVID-19.

Both the COVID-19 pandemic and the measures taken by Dutch government have led to some unprecedented legal questions that require immediate attention and solutions. This alert provides practical considerations for Dutch BV/NVs to navigate the changes resulting from the Emergency Act.

<b>Dutch BV / NV (not listed)<sup>3</sup></b>		
<b>Question</b>	<b>Consequences</b>	<b>Explanatory Notes</b>
What are the changes when holding a GM?	<p><b>Virtual GM</b></p> <p>The management board of the company (<b>Board</b>) may decide to hold a virtual GM in which valid resolutions can be taken,</p> <ol style="list-style-type: none"> <li>1. irrespective of whether this possibility has been included in the articles of association;</li> <li>2. provided that shareholders/attendees are able to follow the GM electronically; and</li> <li>3. provided that shareholders have been timely given the opportunity to timely submit questions on the voting and discussion items included in the agenda for this GM.</li> </ol>	<ul style="list-style-type: none"> <li>• The GM notice must clearly state that it will be held as a virtual meeting (if the GM has already been convened, it can still be changed to a virtual meeting as long as notification is provided at least 48 hours prior to the GM).</li> <li>• Shareholders must be able to submit their questions regarding voting and discussion items in writing in advance of the GM (e.g., through a special e-mail address/chat). The deadline for submitting these questions is 72 hours prior to the GM; a 36-hour period applies in the event the GM was changed to a virtual meeting. Timely submitted questions must be answered before or during the virtual GM. Answers are to be made available to the shareholders by posting them on the company website or via another electronic manner.</li> </ul>

<sup>3</sup> While the Emergency Act also provides for a physical meeting of a Dutch listed NV and the items included in this Alert also apply to a Dutch listed NV there are of course other requirements that apply to a Dutch listed NV based on other legislation not governed by the Emergency Act. E.g., companies with a listing on an EU stock exchange which are required to prepare their annual accounts within 4 months from the end of their financial year, will not be permitted to extend the deadline (a postponement of the preparation of these annual accounts was considered unnecessary, also considering the impact on capital markets). The publication obligations under the Dutch Financial Supervision Act in respect of the annual and 6-monthly results will also continue to apply and cannot be extended.

<b>Dutch BV / NV (not listed)<sup>3</sup></b>		
<b>Question</b>	<b>Consequences</b>	<b>Explanatory Notes</b>
		<ul style="list-style-type: none"> <li>• Speaking and exercising voting rights at the GM can be done electronically. The Board can also decide that votes are to be submitted in advance of the GM in writing/electronically, as long as this is clearly stated by the Board. This should be included in the notice convening the GM.</li> <li>• Depending on the number of expected participants, the Board may decide on either one-sided communication (allowing electronic communication following the GM only, e.g., by e-mail/video or audio stream) or two-sided communication (allow electronic interaction at the GM, e.g., by video or telephone/ audio-visual meeting application).</li> <li>• Occurrence of a poor/faltering connection during a virtual GM does not affect the legal validity of resolutions taken at such virtual GM.</li> </ul>
	<p><b>Physical GM or a combination of physical/electronic GM<sup>4</sup></b></p> <p>The Board may decide to hold a physical GM and simultaneously facilitate electronic participation to such physical GM, i.e. in which the shareholders may speak and cast their votes electronically.</p>	<ul style="list-style-type: none"> <li>• The Emergency Act allows for other meeting forms; a physical GM or a combination of a physical/electronic GM is possible provided that this is clearly communicated to the shareholders (at least 48 hours prior to such meeting).</li> </ul>
	<p><b>Postpone the GM</b></p> <p>The Board may decide to postpone the annual GM (to be held within 6 months after the end of the financial year, or any shorter period as included</p>	

<sup>4</sup> The rules relating to a written resolution adopted outside a meeting remain unchanged.

<b>Dutch BV / NV (not listed)<sup>3</sup></b>		
<b>Question</b>	<b>Consequences</b>	<b>Explanatory Notes</b>
	in the articles of association) with a maximum period of 4 months.	
What are the changes when holding a meeting of the Board or supervisory board of the company ( <b>Supervisory Board</b> )?	<p><b>Virtual or physical meeting</b></p> <p>Subject to the consent of all members of the Board/Supervisory Board, a meeting can be held electronically or physically, also if this is in deviation from the provisions on such meetings included in the articles of association of the company.</p>	<ul style="list-style-type: none"> <li>• Prior approval rights of the Supervisory Board on Board decisions may be set aside according to the explanatory memorandum to the Emergency Act<sup>5</sup>.</li> <li>• While holding a virtual meeting is possible, the holding of a physical meeting can be of importance from a tax perspective (e.g., ‘substance requirements’).</li> <li>• To date, no guidelines have been issued by the Ministry of Finance on how to deal with these substance requirements during this time of travel limitations/social distancing.</li> </ul>
What are the changes when preparing the annual accounts?	<p><b>Deadline extension for preparing the annual accounts</b></p> <p>The Board may extend the deadline for preparing the annual accounts by 5 months up to a maximum of 10 months in total.</p>	<ul style="list-style-type: none"> <li>• Dutch BV/NVs are required to timely prepare the annual accounts within 5 months of the end of the financial year.</li> <li>• The Board may now extend this by an additional 5 months (in which case the GM may not use the extension option), resulting in a total period of 10 months after the end of the financial year.</li> <li>• Despite the extension for the preparation of the annual accounts, the annual accounts still need to be published with the Chamber of Commerce within 12 months after the end of the financial year. If, as a result of COVID-19 circumstances, the annual accounts are not</li> </ul>

<sup>5</sup> The explanatory memorandum stipulates that as a result of COVID-19 circumstances, the prior approval rights included in the articles of association may prevent the Board from prompt decision-making. For this reason, such prior approval rights may be declared inapplicable. We assume this is not intended as a general non-compliance with the prior approval rights or the governance of the company.

Dutch BV / NV (not listed) <sup>3</sup>		
Question	Consequences	Explanatory Notes
		<p>published in time, the Emergency Act temporarily limits the burden of proof for Board members' liability in event of bankruptcy<sup>6</sup>.</p> <ul style="list-style-type: none"> <li>• However, the Board must still comply with its general (financial) administration tasks despite COVID-19. In this respect the evidentiary presumption continues to apply.</li> </ul>
7		

\* This GT Alert is limited to Dutch law matters.

For more information and updates on the developing COVID-19 situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#).

## Authors

This GT Alert was prepared by:

- [Linda Thonen](#) | +31 (0) 20.301.7372 | [thonenl@gtlaw.com](mailto:thonenl@gtlaw.com)
- [Alette Kroese](#) | +31 (0) 20.301.7335 | [kroesea@gtlaw.com](mailto:kroesea@gtlaw.com)

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.† Houston. Las Vegas. London.\* Los Angeles. Mexico City.+ Miami. Milan.‡ Minneapolis. Nashville. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.‡ Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. †Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. \*Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ‡Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ‡Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2020 Greenberg Traurig, LLP. All rights reserved.*

<sup>6</sup> E.g., if the Board has not been able to timely publish its annual accounts for financial year 2019 due to COVID-19, the Board can apply for this exemption on the burden of proof rule included in Article 15 and 22 of the Emergency Act until September 1, 2023 (three years after September 1, 2020).

<sup>7</sup> The Emergency Act provides for similar provisions for Dutch-listed NVs, associations, cooperatives and foundations.