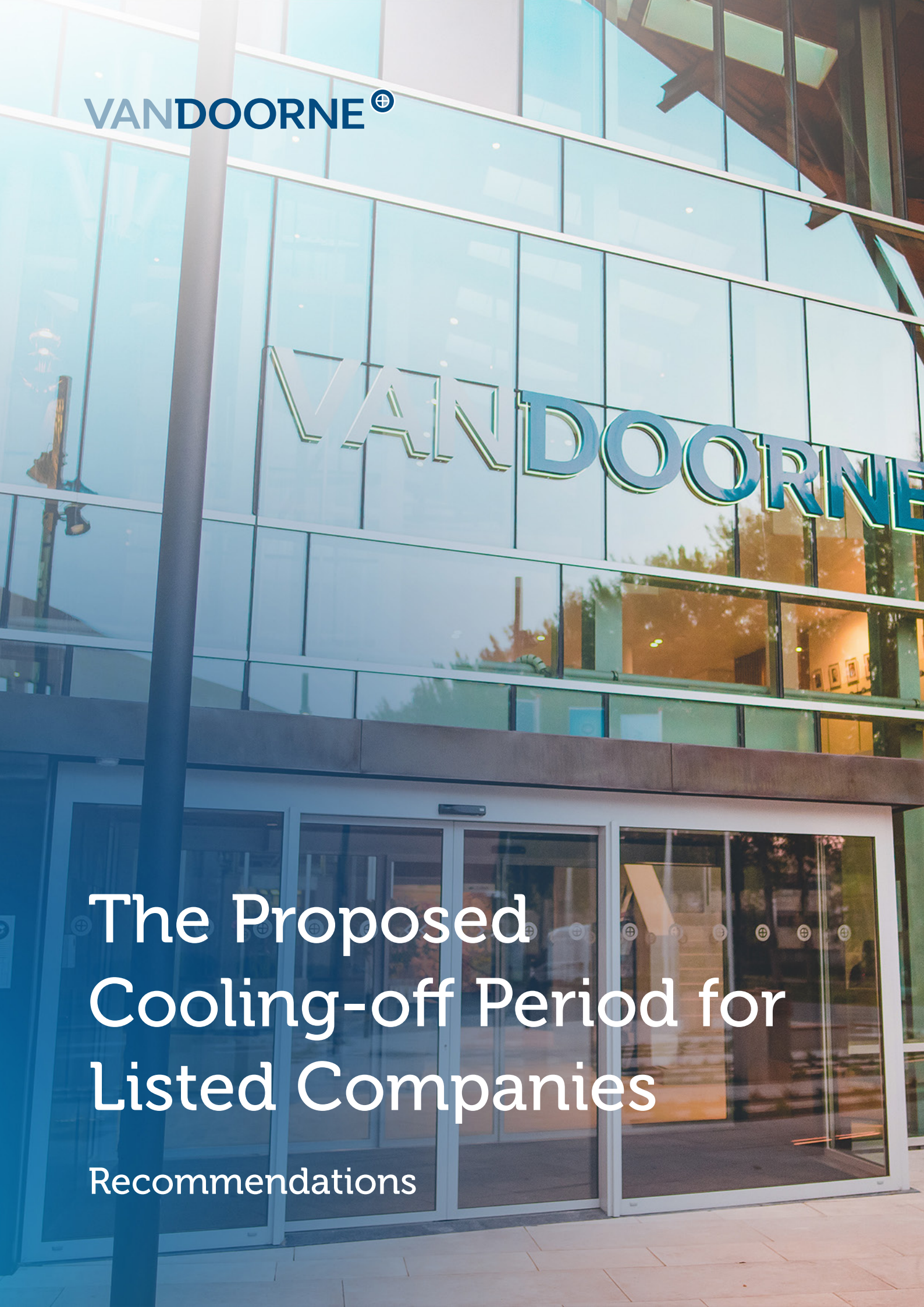
VANDOORNE



The Proposed Cooling-off Period for Listed Companies

Recommendations

PREFACE

On 7 December 2018, the Dutch Department of Justice launched a consultation on the Preliminary Draft of the Bill on a Cooling-off Period for Listed Companies. The proposed Bill is intended to allow the management board of a listed company more time and composure to draw up a statement of affairs and weigh up the interests of the company and its stakeholders. To that end, the preliminary draft provides for the possibility for the management board to invoke a cooling-off period whenever a shareholder proposes the dismissal of a member of the management board or supervisory board or if a (hostile) takeover bid is announced.

It is expected that the Bill on a Cooling-off Period for Listed Companies, if enacted, will prove of decisive importance for the future development of the Dutch market with regard to takeovers and shareholder activism. The preliminary draft, along with the explanatory memorandum, therefore provided cause and opportunity for Van Doorne to make recommendations on a few points. These recommendations can be found in this document.

In a general sense, we note that the proposed legislative text offers less scope for customisation in terms of listed company organisation than was envisaged in the explanatory memorandum. We believe that a competitive company law is served by optimum flexibility. The envisaged objective of a statutory cooling-off period that is complementary in nature should therefore be expressed more explicitly in the bill. Moreover, we suggest solutions for certain technical issues which the current draft harbours.

Part A: General comments

1. The form of suppletive law

1.1 The Notes to the Draft state that it is possible "under the articles of association to rule out the possibility that the company can invoke the statutory cooling-off period" (Notes to the Draft, p. 14). It is therefore envisaged that the statutory cooling-off period will become suppletive in nature. We support this idea. However, the suppletive nature of the statutory cooling-off period is not reflected in the proposed legal text. The proposed Section 2:114b(1) provides, without further stipulations, that the statutory regulation applies to the companies named therein. In our view, this provision is incompatible with the envisaged flexibility that the regulation must offer companies. Against this background we would like to note the following regarding the suppletive nature of the proposed regulation and the way in which this could be reflected in law.

1.2 Paragraph 4.1.7 of the Dutch Corporate Governance Code regulates the so-called response time; this regulation is comparable to the proposed statutory cooling-off period. This certainly does not mean that a statutory regulation of the cooling-off period is unnecessary. The model in which the statutory cooling-off period has the intended suppletive nature would be preferable to a model in which the cooling-off period is not provided for in law at all and is left to the Code, for example. The mandatory nature of Book 2 of the Dutch Civil Code (DCC) means that the powers mentioned in the proposed Section 2:114b(6)

DCC cannot, under current law, be suspended under the articles of association. Sections 121(1), 132(1), 134(1), 142(1), 144(1) and 161a(1) do not offer the possibility of a different regulation under the articles of association. On this point the law is needlessly oppressive. With this in mind, a statutory facilitation of a derogation from these provisions under the articles of association, to allow for the implementation of a regulation of a cooling-off period for the management board, is advisable. A regulation of a suppletive nature is preferable to both the current mandatory framework and a regulation in the Code only.

1.3 Opting for the suppletive law model would give the legislator a choice of two alternative regulations. The first is the regulation whereby the statutory cooling-off period applies in principle, unless the articles of association provide otherwise. The second is the regulation whereby the statutory cooling-off period does not apply in principle, unless the articles of association provide otherwise. In our view, the second option is preferable to the first. If the company needs a cooling-off period the second option already provides sufficient scope. However, it is difficult to see why – beyond these options – the company should have a statutory cooling-off period forced upon it as a principle, as would be the case with the first option. There is no problem that would be solved by a statutory principle of this kind. A facilitating regulation, by virtue of which the company can provide for application of the statutory cooling-off period under the articles of association, will suffice. Furthermore, the second option would tie in with the statutory system better. There are other regulations in relation to corporate governance, such as setting up a supervisory board (Section 2:140(1) DCC), where Book 2 DCC also performs a purely facilitating function.

1.4 A purely facilitating regulation for the statutory cooling-off period can be developed so that the proposed Section 2:114b(1) could provide as follows: "The articles of association may stipulate that this article shall apply". However, the limitations of this solution are that derogation from the statutory provisions under the articles of association would therefore only be possible in the situations specifically provided for by law. We feel that, when it comes to company organisation, there is insufficient reason to limit the facilitating of customisation in this way. The intended aim of providing the possibility of derogation from the aforementioned mandatory provisions can, in our view, be better regulated in these provisions themselves. It can be added to the relevant provisions that derogation under the articles of association is possible. This kind of flexible regulation aligns with the oft-mentioned plea for greater organisational freedom in company law (Timmerman, NJV 2000, p. 162; De Kluiver & Meinema, WPNR 6503 (2002)). Introducing flexibility to the said provisions of the proposed Section 2:114b(6) would render a statutory facilitation of the cooling-off period in a separately drafted article of legislation superfluous.

Part B: Comments re legal technicalities

2. The change in the duties of the management board

2.1 The Preliminary Draft provides for an amendment to Section 2:129(1) DCC. This paragraph governs the duties of the management board in the public limited liability company (NV). The Preliminary Draft intends to expand this provision, for the public limited liability company only, by adding that "determining company policy and strategy" is part of the duties of the management board. The Notes to the Draft point out that this codifies the case law concerning the duties of the management board (Notes to the Draft, p. 20).

2.2 In our opinion it is incorrect that case law concerning the duties of the management board is codified by the proposed addition. Case law has held that not only in the public limited liability company are policy and strategy part of the duties of the management board. Thus, in this sense, the same has been held in respect of the private company with limited liability (Court of Appeal in Amsterdam [Enterprise Chamber] 28 August 2012 ECLI:NL:GHAMS:2012:BX9517, para. 3.6; Court of Appeal in Arnhem-Leeuwarden 11 August 2015, ECLI:NL:GHARL:2015:6002, para. 5.8; Court of Appeal in Amsterdam [Enterprise Chamber] 25 September 2015, ECLI:NL:GHAMS:2015:3983, para. 3.4). In legal doctrine, too, no distinction is drawn between the public limited liability company and the private limited liability company. See inter alia: Handboek 2013, no. 231; J.B. Huizink, Rechtspersonen (loose-leaf) [in Dutch], Section 2:239 DCC, note 2.3. That neither case law nor legal doctrine draws a distinction between the duties of the management board in the NV and in the BV is explained by the statutory text and the system of Book 2 DCC. The law uses a uniform wording of the regulation of the duties of the management board for all forms of legal entity (Section 2:44/129/239/291(1) DCC).

2.3 Against this background it is obvious that the duties of the management board must be interpreted uniformly for the different forms of legal entity, except where provided otherwise by statute or the articles of association. This means that if it is already assumed that policy and strategy are part of the duties of the management board, the same must also be assumed for the board of associations, cooperatives, mutual benefit companies and foundations. In this regard we would also point out that in the Act on Management and Supervision of Legal Entities, as originally sent to the Lower House, the duties of the board were defined uniformly for all forms of legal entity in a single provision (Parliamentary Papers II 2018-2019, 34 491, no. 2). In material respects, the recent Ministerial memorandum of amendments to this uniform approach did not change anything (Kamerstukken II 2018-2019, 24 491, no. 7). However, the proposed Section 2:129(1) differs from these earlier proposals.

2.4 The intended amendment to Section 2:129(1) DCC would mean that the law provided – solely for the NV – that management must include determining the legal entity's policy and strategy. If this change is implemented without an equivalent change being made for the other forms of legal entity, it will lead to legal uncertainty with regard to these other forms of legal entity. This therefore raises the issue of whether – if there is no equivalent legal amendment for the other forms of legal entity – policy and strategy are no longer part of the duties of the management board as far as those legal entities are concerned. We regard this legal uncertainty for the other forms of legal entity, when set against the relatively small number of listed public limited liability companies, as undesirable. For that reason alone, we would advise against the proposed expansion of Section 2:129(1) DCC.

2.5 However, even if we only look at the public limited liability company, this poses the question of whether the intended amendment to Section 2:129(1) DCC is required in the context of the proposed cooling-off period (mandatory or otherwise). It is not entirely clear why the Preliminary Draft proposes an amendment to this provision that applies to all public limited liability companies. According to the proposed Section 2:114b(1) the statutory cooling-off period only applies to those that are listed. This is a narrower category of companies than those that fall within the scope of Section 2:129(1) DCC, i.e. all public limited liability companies. Neither the Preliminary Draft nor the Notes to the Draft make it clear why the statutory duties of the management board should also be amended for public limited liability companies that are not listed. If a choice is made in favour of a change in the statutory duties of public limited liability companies only, we would recommend that this change be substantiated more specifically in relation to the public limited liability companies that are not listed.

2.6 Should the statutory duties of the management board be complemented, we would add the following editorial comment in addition to the foregoing. The proposed amendment to Section 2:129(1) DCC talks about "determining company policy and strategy". In the current Book 2 DCC policy and strategy are only referred to in Section 2:141/251(2) DCC. That section provides that at least once a year the management board shall inform the supervisory board of the broad outlines of "strategic policy", in writing. Because the Preliminary Draft does not provide for an amendment to this provision, the proposed amendment to Section 2:129(1) DCC gives rise to systematic questions. According to current law, strategy is part of policy. After all, the law talks about strategic policy. If the proposed amendment to Section 2:129(1) DCC becomes law, this poses the question of whether, for

public limited liability companies, policy and strategy are in fact separate quantities. Here, too, the previously identified problem arises: that the proposed amendment does not extend to the private company with limited liability. This would mean that management in the private company with limited liability does not, in principle, include determining policy and strategy. However, this runs counter to Section 2:251(2) DCC. Firstly, these questions militate against an amendment to Section 2:129(1) DCC. However, if an amendment is opted for, we suggest that it align with the terminology of Section 2:141/251(2) DCC. This would mean that Section 2:129(1) DCC – together with the statutory regulation of the duties of the management board for the other forms of legal entity – provides as follows: "The management board is tasked with managing the [legal entity], including determining strategic policy".

3. Publication of the views of consulted parties

3.1 The proposed Section 114b(7) stipulates that if the consulted shareholders, the supervisory board or the works council have made their views known to the management board, the management board shall immediately pass these views on to the other stakeholders. The provision does not reveal who the other stakeholders are, which brings legal uncertainty for the party to which the standard applies. We therefore recommend that the circle of persons to whom the information in question must be provided be clearly stated in the law. In the system of this paragraph, we feel it would be appropriate to make it more explicit by mentioning the shareholders (including those representing less than one three-hundredth of a share in the subscribed capital), the supervisory board and the works council. As an alternative, there could be obligatory publication of the views on the company's website. This option would align with the proposed paragraph 8.

4. The proposed maximum term

4.1 The Notes to the Draft correctly point out that as soon as a takeover process starts, tight deadlines apply, so that "the target company and the stakeholders are not left in a state of uncertainty for too long" (Notes to the Draft, p. 8). The proposed Section 114b(2)(b) would mean that the proposed regulation would become part of the Dutch law on takeovers of listed companies. Against this background a maximum deadline of 250 days does not seem to align with the other rules governing takeovers of listed companies. Compared to the tight deadlines of takeover law this deadline is unusually long and, moreover, not fixed. If, as proposed, the introduction of a mandatory cooling-off period is opted for, then we would feel that a shorter, fixed deadline would align better with the statutory system, especially where takeovers are concerned.

4.2 Furthermore, it is relevant that Section 6(3) of the Shareholders' Rights Directive (Directive 2007/36/EC, OJ L 184) obliges Member States to use "a single deadline" for the right to put items on the agenda[1]. The law as it stands assumes a deadline of sixty days (Section 2:114a(1) DCC). To avoid contrariety with the Shareholders' Rights Directive we would deem it appropriate to align the proposed statutory cooling-off period with the 60-day deadline already in place for putting items on the agenda, if a mandatory cooling-off period is chosen. A deadline of no more than sixty days would also be in line with the broad pursuit "of a competitive company law" (Parliamentary Papers II 2016-17, 29 752, no. 9, p. 5), more so than the proposal as it stands. The climate of establishment is not served by regulation that is stricter than that required by EU law.

4.3 **Suggestion:** The proposal could be amended so that the first sentence of the proposed Section 2:114b(5) provides as follows: "The cooling-off period shall apply for a period of no more than sixty days, which runs from the day after submission of a request within the meaning of Section 2(a) or from no later than the day after the day the public bid is issued within the meaning of Section 2(b)".

5. Offsetting against takeover defences

5.1 In the Notes to the Draft it was observed that the courts have recourse to offsetting the use of the cooling-off period against the use of other takeover defences aimed at the appointment, suspension, or dismissal of members of the management board or supervisory board or aimed at takeovers themselves (Notes to the Draft, p. 15). If a mandatory cooling-off period is opted for, we deem a regulation of this kind appropriate. However, the current proposal does not provide for the possibility of offset. For this reason it is recommended that the possibility of offset be reflected in the act. With this in mind, we would also mention that the response time from the Corporate Governance Code 2016 is irrelevant, as the Notes to the Draft appear to suggest. Due to the 'comply or explain' principle, the Code is not a reflection of existing law, but merely offers best practices. These best practices are not enforceable in law against the management board (De Roo, Ondernemingsrecht 2018 [in Dutch], p. 7).

5.2 With the envisaged possibility of offset against takeover defences we would also mention that not every takeover defence appears to lend itself to offsetting. In particular, we foresee a problematic alignment between the proposed cooling-off period and an anti-takeover foundation that has been set up, to which options on preference shares have been granted. A feature of the anti-takeover foundation is that this form of takeover defence cannot be used by the company's management board. In that context it is not clear why and how the takeover defence can be offset against the cooling-off period. Furthermore, in a case like this it is not clear which deadline ought to be offset against which invoked cooling-off period.

5.3 **Suggestion:** Add a paragraph to the current proposed provision, in which the offsetting of takeover defences is provided for. The paragraph will indicate which forms of takeover defences can be offset against the cooling-off period. The response time from the Code cannot count as a measure of this kind, since it is not a mandatory provision that can be legally enforced against the management board.

6. Scope

6.1 The proposed Section 114b(1) refers only to NVs. Since the introduction of the Flex-BV and the repeal of the obligatory share transfer restrictions, it has been possible to list shares (or depositary receipts for shares) in a BV. On 23 May 2016, depositary receipts for shares in Fastned BV ('Fastned')

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[1] *This does not alter the fact that Section 3 of the Shareholders' Rights Directive provides that Member States can impose further obligations or otherwise take further measures to facilitate the exercise by shareholders of the rights referred to in this Directive. The text of Section 6(3) of the Shareholders' Rights Directive means that there is maximum harmonisation in this case.*

were admitted to trading on the new regulated market of Nxchange BV ('Nxchange'). Fastned can therefore be considered to be the first listed BV whose shares or depositary receipts for shares have been admitted to trading on a regulated market. It may also be noted that the designation decree by which the Dutch Corporate Governance Code 2016 was designated the code of conduct within the meaning of Section 2:391(5) DCC no longer confers a scope that is restricted to public limited liability companies. The laws and regulations governing listed companies are increasingly neutral when it comes to legal form. In light of that, it is recommended that if a mandatory statutory cooling-off period is opted for, this regulation also apply to listed private limited liability companies.

7. Threshold for invoking cooling-off period

7.1 In short, Section 2:114b(2)(a) provides that if one or more shareholders (or holders of depositary receipts) pursuant to Section 2:114a makes or make a proposal for appointment, suspension or dismissal, the company can invoke a cooling-off period. The Explanatory Memorandum notes that this relates to the situation whereby one or more shareholders (or holders of depositary receipts) with a stake of 3% or more in the capital of the company ask the management board, pursuant to Section 114a, to put on the agenda for the general meeting a proposal for the appointment, suspension or dismissal of a member of the management board or supervisory board or a proposal for amendment to one or more articles of association relating to the appointment, suspension or dismissal of one or more members of the management board or supervisory board." Different listed companies have a different regulation under the articles of association, whereby one or more shareholders (or holders of depositary receipts) with a stake of 1% or more in the capital of the company can ask the management board to put items on the agenda.

7.2 It is unclear whether the cooling-off period can also be invoked if a request to put an item on the agenda is submitted by one or more shareholders (or holders of depositary receipts) with a stake of less than 3% in the capital of the company pursuant to a regulation under the articles of association. It seems to us that this is what the legislature intended.

7.3 **Suggestion:** Amend the proposed regulation in such a way as to align, in principle, with the statutory threshold of 3%, with this threshold becoming lower if and to the extent that the articles of association provide for a lower threshold (1% as a rule).

8. Threshold for request to Enterprise Chamber

8.1 If the company invokes a cooling-off period, one or more shareholders (or holders of depositary receipts) with a stake of 3% or more in the capital of the company are entitled, under Section 2:114b(4)(a), to ask the Enterprise Chamber to terminate the cooling-off period. If the legislator also intended to make the invoking of the cooling-off period possible for requests to put items on the agenda made by one or more shareholders (or holders of depositary receipts) with a stake of less than 3% in the capital of the company, then this lower threshold also needs to apply when it comes to the request for termination made to the Enterprise Chamber in the interests of legal protection. This group of shareholders and/or holders of depositary receipts would otherwise be obliged to make a request for inquiry to the Enterprise Chamber under Section 2:346 and thereby claim immediate termination of the cooling-off period as provisional relief.

8.2 **Suggestion:** Amend the proposed regulation in such a way as to align, in principle, with the statutory threshold of 3%, with this threshold becoming lower if and to the extent that the articles of association provide for a lower threshold (1% as a rule).

9. Fundamental conflict with the interest of the company

9.1 The last sentence of the proposed Section 114b(2) provides that the cooling-off period can only be invoked if, in the management board's opinion, the request or offer "is in fundamental conflict with the interest of the company and its related undertaking". It is not evident from the provision when conflict with the company interest is "fundamental". It is not clear whether, materially, this 'fundamental conflict' means something other than the wording that "this is contrary to an overriding interest on the part of the company", as set out in Section 2:107/217(2), 2:220(1), 2:221(1) and 2:224a(1) DCC. If an equivalent substance of the law is intended, we suggest that the wording of these provisions and the proposed provision be brought into closer alignment.

10. Concurrence with conflict of interest regulation

10.1 To invoke the cooling-off period a decision of the management board is needed, and this decision is subject to the approval of the supervisory board. The subjects within the scope of the proposed regulation are, in short, the appointment, suspension and dismissal of members of the management board and supervisory board. If a shareholder asks to put the dismissal of one or more members of the management board (under the articles of association) on the agenda, the management board will need to take a management decision on whether or not to invoke the cooling-off period. The members of the management board concerned are likely to have a personal conflict of interest in respect of this matter and therefore cannot take part in the deliberations and decision-making process. If these are unable to produce a management decision, the supervisory board is authorised by law to take the management decision. It is not inconceivable that an authorised shareholder (or holder of depositary receipts) may also ask the management board to put the suspension or dismissal of one or more members of the supervisory board or a motion of no confidence on the agenda. This will mean that the supervisory board is also unable to make a decision, so the resolution on invoking the cooling-off period will fall to the general meeting.

10.2 **Suggestion:** Provide for the possibility of derogating from the conflict of interest regulation, under the articles of association, in the statutory regulation when it comes to the resolution on invoking the statutory cooling-off period.

11. Establishing and giving reasons for the duration of the cooling-off period

11.1 It is not clear whether the management board needs to establish the duration of the cooling-off period in advance, and if so when. We would think that the management board has this obligation. The Explanatory Memorandum and the recommendation from the Council of State emphasize that the cooling-off period is maximised at 250 days. It is hereby noted that, partly in view of the requirements of necessity and proportionality, the cooling-off period shall only be invoked when strictly necessary and shall not last any longer than required for the purpose of careful decision-making. Also relevant is its relation to other takeover defences. Therefore, when considering

whether to invoke the cooling-off period, the management board will have to make a judgement on how long it should last, and include all relevant circumstances. The requesting shareholder(s) and/or holder(s) of depositary receipts will need to be informed in advance of the deadline the management board has set in the circumstances. This is information relevant to the requesting shareholder(s) and/or holder(s) of depositary receipts when considering whether or not to start legal proceedings in the Enterprise Chamber, seeking termination of the cooling-off period. An ex-post review in law will not have any added value for petitioning shareholder(s) and/or holder(s) of depositary receipts: the momentum will have gone. It is preferable to make it clear in law or in the Explanatory Memorandum that, when invoking the cooling-off period, the management board is also invoking the duration thereof. If this clarification is not forthcoming we foresee that in practice the decision will be taken, as a rule, to invoke the cooling-off period referred to in Section 2:114b(2), whereby the maximum duration of 250 days shall therefore apply.

11.2 In addition to this, in the light of the intended proportionality of the invocation of the statutory cooling-off period, it is important for the management board to give proper reasons for its invocation decision. In our view, these reasons should explain at the very least how the deadline chosen by the management board relates to other anti-takeover constructions that have already been put in place by the company.

11.3 **Suggestion:** make it clear that, when invoking the cooling-off period, the management board also needs to announce the duration of the cooling-off period, giving reasons, and give details of how the chosen duration relates to the company's other takeover defences.

12. Consultation of shareholders

12.1 Paragraph 7 of Section 2:114b provides that, during the cooling-off period, the management board shall gather all the information needed for a careful determining of policy. To that end, the management board shall in any event consult the shareholders who represent at least one three-hundredth of the issued capital and, if present, the supervisory board and the works council. If, under the articles of association of the company concerned, shareholders (or holders of depositary receipts) can submit a request to put an item on the agenda, the management board will obviously also consult the author of the proposal when establishing its position.

12.2 **Suggestion:** Amend the proposed regulation in such a way as to align, in principle, with the statutory threshold of 3%, with this threshold becoming lower if and to the extent that the articles of association provide for a lower threshold (1% as a rule).

13. Discussion of management report – voting on items on the agenda

13.1 Section 2:114b(8) provides that the management board shall draft a report during the cooling-off period. Paragraph 9 subsequently provides that this report shall be put on the agenda, to be discussed at the next general meeting convened after the cooling-off period has expired. It is not clear whether the resolution on appointment, suspension or dismissal (in respect of which the cooling-off period was invoked) is to be voted on during this next general meeting. In the absence of any further explanation, a company could adopt the view that putting the discussion of the report

and the proposal for appointment, suspension or dismissal on the agenda during the same meeting is not compatible with the interest of the company. This is because, in practice, shareholders and holders of depositary receipts often issue proxies ahead of the meeting. The outcome of the discussion and further explanation by the management board in respect of the report mentioned in paragraph 8 cannot, therefore, be included in the granting of proxy by those entitled to vote. It is not inconceivable that as a result, the management board of the company will take the view that the requested agenda item on appointment, suspension or dismissal can only be voted on during the next general meeting following the meeting in which the report is discussed. The situation must be prevented whereby shareholders are kept from exercising their shareholders' rights after the cooling-off period has expired.

13.2 **Suggestion:** Spell it out that where there has been a request for an item be put on the agenda, in respect of which the cooling-off period has been invoked, the company must put this item on the agenda for the meeting as referred to in paragraph 9.

Part C: In relation to European law

14. The treaty freedoms of movement of capital and establishment

14.1 To conclude, we would like to present a few observations regarding the relationship between EU internal market law and the intended regulation. The Notes to the Draft stipulate that the introduction of the proposed statutory cooling-off period would not be incompatible with internal market law, more precisely the freedom of establishment (Article 49 TFEU) and the free movement of capital (Article 63 TFEU) (Notes to the Draft, p. 24). The question is whether this is correct.

14.2 On the one hand, one can argue that there is no infringement because the proposed statutory cooling-off period is 'non-specific', i.e. the cooling-off period stems from the normal application of company law. Furthermore one may argue that the introduction of a statutory cooling-off period would enable companies and not the government to act – although there is a fine dividing line when it comes to government-controlled undertakings. Given both the aforementioned factors, the proposed system differs from golden shares, whereby the state is awarded shares with special rights in strategic companies or sectors. Those golden shares seldom survive the test of EU law in terms of free movement of capital and freedom of establishment. On the other hand one can argue, as the Council of State did in its recommendation, that a statutory cooling-off period as proposed makes investment in a Dutch listed company less attractive (Council of State recommendation, p. 10).

14.3 We cannot therefore rule out beforehand that the proposed statutory cooling-off period breaches the freedom of establishment and/or the free movement of capital. If there is a restriction to the free movement of capital and/or the freedom of establishment, then such a restriction will only be permitted when, because the express derogations in the treaty do not offer a solution to this, it is justified for overriding reasons in the public interest (ECJ 8 July 2010, Case C-171/08, para. 49) and

suitable and proportional to the objective pursued by the regulation (ECJ 14 December 1995, Case C-163/94, para. 23; ECJ 1 October 2009, Case C-567/07, para. 25).

14.4 In our view, if an infringement can be established, it is questionable whether a mandatory statutory cooling-off period is justified for overriding reasons in the public interest. Different authors have already noted that, at present, Dutch law already provides plenty of opportunities for the introduction of anti-takeover constructions and that, for this reason, a statutory cooling-off period has no added value (Timmerman, Ondernemingsrecht 2018 [in Dutch]; Abma, Ondernemingsrecht 2018; Van Solinge, FD 2018 [in Dutch]). Hence, it should not be taken for granted that there is any reason in the public interest. On the contrary: the fact that existing law offers sufficient scope to set up anti-takeover constructions to block shareholder activism or hostile takeover bids was recently underlined in case law in the matter of AkzoNobel (Court of Appeal in Amsterdam [Enterprise Chamber] 29 May 2017, ECLI:NL:GHAMS:2017:1965; District Court [Rb.] 10 August 2017, ECLI:NL:RBAMS:2017:5845). Mention should also be made of the successful use of anti-takeover measures in the case of KPN, Mylan and Fugro. The foregoing implies that the creation of a mandatory statutory cooling-off period is not necessarily justified for overriding reasons in the public interest.

14.5 If the above objection is overlooked, the question arises as to whether the measure is suitable and proportionate in pursuit of the envisaged objective. The objective of the proposed statutory cooling-off period is "to allow the management board of a listed company more time and composure to draw up a statement of affairs and weigh up the interests of the company and its stakeholders" (Notes to the Draft, p. 1). In our view, the proposed regulation is suitable for the stated objective. However, proportionality is less evident. As we have said, the existing law already offers enough instruments to organise the company in such a way that the management board can come up with an informed substantive response without interference from shareholders. For that, the only requirement is that anti-takeover measures be put in place.

Yours sincerely,

Van Doorne N.V.
Hugo Reumkens, Jasper Leedekerken, Sjoerd Kamerbeek, Maarten Appels, Pim Jansen, Koen de Roo

MEMORANDUM

To	Ministry of Justice and Security FAO the Minister for Legal Protection Postbus 20301 2500 EH The Hague
From	Hugo Reumkens, Jasper Leedekerken, Sjoerd Kamerbeek, Maarten Appels, Pim Jansen, Koen de Roo
Subject	Cover Sheet for Response from Van Doorne N.V. to consultation on preliminary draft of Bill on a Cooling-off Period for Listed Companies
Date	6 February 2019

The preliminary draft

The consultation on the Preliminary Draft of the Bill on a Cooling-off Period for Listed Companies was launched on 7 December 2018. The preliminary draft is intended to allow the management board of a listed company more time and composure to draw up a statement of affairs and weigh up the interests of the company and its stakeholders. To that end, the preliminary draft provides for the possibility for the management board to invoke a cooling-off period whenever a shareholder proposes the dismissal of a member of the management board or supervisory board or if a (hostile) takeover bid is announced.

Envisaged flexibility

The preliminary draft, along with the attached notes, provide an opportunity to make recommendations on a few points. In a general sense, we note that the proposed legislative text offers less scope for customisation in terms of listed company organisation than was envisaged in the Explanatory Memorandum. A competitive company law is served by optimum flexibility. The envisaged objective of a statutory cooling-off period that is complementary in nature could therefore be expressed more explicitly in the bill.

Comments re legal technicalities

1. **The change in the duties of the management board**
   The proposed change in the duties of the management board does not align well with the regulation of the other forms of legal entity.
2. **The proposed maximum term**
   The proposed maximum term does not align well with the statutory deadline for the right to put items on the agenda.
3. **Offsetting against anti-takeover measures**
   The proposal is not sufficiently clear on the offsetting of the cooling-off period against other anti-takeover measures.
4. **Scope**
   It is recommended that the private limited liability company (BV) be brought within the scope.
5. **Equating the thresholds used with the threshold for the right to put items on the agenda**
   The application of the cooling-off period, the threshold for the proposed judicial process through the Enterprise Chamber and the percentage used to determine which shareholders need to be consulted during the
   cooling-off period, do not align sufficiently with the statutory hurdle for the right to put items on the agenda.
6. **Concurrence with conflict of interest regulation**
   The preliminary draft aligns poorly with the conflict of interest regulation, so it is virtually impossible for the management board to invoke the cooling-off period. This complication needs to be dealt with.
7. **Establishing and giving reasons for the duration of the cooling-off period**
   The management ought to be obliged to give reasons for invoking the cooling-off period. These reasons should include both the chosen deadline and the relation to takeover defences.
8. **Discussion of management report and voting on agenda items**
   Once the cooling-off period has expired, the management report will be discussed in the general meeting. It is recommended that, in this general meeting, it is made mandatory for a vote to be put on the agenda for those agenda items for which the cooling-off period has been invoked.

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BIJLAGE A:

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Notes to the Draft
Explanatory Memorandum to the proposed Bill for Amendment to Book 2 of the Dutch Civil Code in connection with the invocation of a cooling-off period by the management board of a public limited liability company

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