

The importance of having proper minutes for the supervisory board

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Inhoudsopgave

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1. Introduction

There is no statutory obligation to keep minutes in the Netherlands. However, Article 2:120/230 paragraph 4 of the Dutch Civil Code does impose the obligation on the management board to keep minutes of resolutions of the general meeting of shareholders (AGM). This is, however, different from taking minutes by the supervisory board. Often however, the obligation to keep minutes is provided for in the articles of association.

As a minimum requirement, case law states with regard to the AGM that the minutes must state (i) who is present at the meeting, (ii) how many votes each person can cast, (iii) how the votes proceed and (iv) what decisions were taken.

Since, in practice, the minutes are an important source of evidence in liability proceedings against directors and supervisory directors (Art. 2:9 BW), inquiry proceedings and bankruptcy investigations by trustees (Art. 2:138/248 BW) and disciplinary cases and liability proceedings against accountants, it is important that minutes are drafted with proper care and are a fair and true reflection of the meeting.

This memorandum provides an overview of recent changes in the law and case law concerning the responsibility and liability of the supervisory board and the role that minutes play in this respect. It also contains recommendations, an agenda example and a checklist for taking minutes.

2. Relevant legislation

In the Netherlands, but also abroad, the role of internal supervision in (non-)profit organisations as well as (semi-)government institutions is subject to increasingly critical scrutiny. Social developments (ESG, diversity and inclusion) as well as the increasing demand for specific board expertise, the more active role of shareholders, more activist courts and the increase in inquiries and liability proceedings have de facto resulted in a heavier workload for the supervisory board. The Act on Management and Supervision of Legal Entities is also relevant in this context. More specifically, it concerns the following provisions:

I. Responsibility and liability of the management board and the supervisory board

Section 2:9 of the Civil Code underlines the collective responsibility and thus the principle that all managing directors are jointly and severally liable in case of improper management (hereafter we will also refer to supervisory directors, because the section applies by analogy to the supervisory board and when we refer to 'he' we of course also mean 'she'). For establishing liability, it is necessary that supervisory directors can be blamed for "serious misconduct". The law now explicitly stipulates that the division of tasks between the members of the supervisory board must be taken into account when assessing whether or not serious misconduct can be assumed. If - partly because of the division of tasks - no serious accusation can be made, this does not automatically mean that a supervisory director will not be liable. He must also prove that he has not been negligent in taking measures to avert the consequences of mismanagement.

From the relevant Governmental Memorandum it is clear how the legislator views the above-mentioned ground for exemption and in particular the question whether or not a managing director has not been negligent in taking measures to avert the consequences of improper management. The ministry gives the example of a situation in which a board member notices that another board member is not fulfilling his duties or is fulfilling these incorrectly and that this implies improper management. According to the ministry, that particular director must "intervene in order to avoid the risk of liability". In a concrete case, this can mean that a board

member takes on a task, contrary to what has been agreed earlier regarding the division of tasks. Furthermore, the ministry notes that a director is deemed to fall short "to avert improper management by a fellow director" if he never allows himself to be informed about essential aspects concerning the management of the company or refuses to take on board information." We can add to this that (what actually often happens in practice) merely expressing and having recorded a dissenting opinion as a supervisory board member will not lead to such supervisory board member being able to successfully invoke the ground for exemption in Article 2:9 of the Dutch Civil Code. As also follows from the examples given by the ministry, more concrete action is needed in order to achieve this. The ultimate remedy is the resignation of (members of) the supervisory board on its own initiative.

The above does not detract from the fact that minutes are important in the context of Article 2:9 of the Civil Code, since proper minutes should reflect the division of tasks and the considerations for whether or not to take a certain decision. As noted earlier, the division of tasks is not all-decisive in a possible liability proceedings, but it is certainly relevant.

In addition (see 4.2 below), a supervisory board member may also be liable vis-à-vis a/the shareholder(s) if he acts contrary to statutory provisions or provisions in the articles of association that intended to protect the shareholder.

II. Conflict of interest rules

Furthermore, the current regulation on conflict of interest (Art. 2:129/239 subsection 6 Dutch Civil Code) stipulates that a managing board member may not participate in the deliberation and decision-making process on a certain subject if he has a direct or indirect interest that conflicts with the interest of the company and its business. If no management decision can be taken because of the conflict of interest, the supervisory board must take the decision, unless the members of the supervisory board are also "contaminated". The supervisory board must actively ensure that a strict division exists between the personal interests of management board members and supervisory board members on the one hand and the company's interests on the other hand. It is essential to clearly state in the minutes that a management board member or a supervisory board member has a conflict of interest and has abstained from the decision-making in order to prevent the decision from being later annulled by stakeholders.

III. Responsibility of SB and concrete instructions of AGM

Finally, the management board of a private company has a specific responsibility, and therefore indirectly also the supervisory board, to follow the instructions which the general meeting of shareholders can give to the management board (Article 2:239(4) of the Dutch Civil Code). When the management board does or does not follow specific instructions from the AGM (by virtue of the articles of association), it is important to record in the minutes the considerations that have played a role in this respect. After all, the board is obliged to follow these instructions, unless this is contrary to the interests of the company and its business.

3. Liability of the supervisory board and the role of minutes in case law

The liability of supervisory directors is in fact derived from that of management board members. In other words: without improper management, no improper supervision. The primary duty of the supervisory board is to supervise the policy of the management board and the general affairs of the company and its business. This is not just a matter of assessing the results achieved by the management board with the benefit of hindsight and intervening if these results prove to be unsatisfactory. On the contrary, it is

also the duty of the supervisory board to assess in advance whether the proposed management policy is desirable and feasible, as well as to monitor the results of that policy during its implementation.

Some concrete examples from practice.

In the Landis case, the Enterprise Chamber ruled that "supervisory directors should be able to critically analyse the considerations made by the management board (e.g. in decisions on acquisitions) and form their own opinion about these considerations". Based mainly on the summary content of the minutes, the investigators conclude that the supervisory directors lacked the required "supervisory discipline".

Also in the Van der Moolen case, the Enterprise Chamber underlines that responsible entrepreneurship requires that important matters concerning the company are recorded in minutes, reports or otherwise. Failure to do so constitutes 'mismanagement'.

In the Fortis case, it is noteworthy that the decision and the investigation report frequently refers to the inadequate recording - of what has been discussed - in the minutes of the relevant meetings .

In the Meavita decision too, the state of affairs described in the minutes played a major role: the Enterprise Chamber based this opinion partly on a series of minutes of supervisory meetings, from which it emerged that the supervisory board had been presented by the management board, with a factually incorrect presentation of the facts on several issues. This incorrect presentation of the facts was not corrected by the supervisory board "neither during the meeting nor after having receiving the minutes."

It follows from this and other case law of the Enterprise Chamber that, in the event of missing, incomplete or (very) brief minutes, the position of the directors and supervisory board members in proving mismanagement and liability becomes very difficult.

Incidentally, it is also important to note that the f those companies that fall under the supervision of the Dutch financial regulators, DNB or AFM can request the minutes at any time (and in practice this is frequently done).

4. Best practices for drafting sound minutes

The preceding paragraphs have set out the importance of carefully drafted minutes. In practice, the following general guidelines for the drafting of minutes can be distilled:

4.1 Timely and complete information

It is of great importance that the members of the supervisory board receive timely and in writing information about (the background of) the items on the agenda. In line with this, the members of the supervisory board are free to request additional information prior to or during the meeting. In recent years, it has become increasingly clear that the supervisory board has a "duty to actively request/collect relevant important information. So the supervisory board cannot 'hide' behind the fact that is has not received certain information whilst it was relatively obvious that this (additional) information was available. Requests for information, any conditions imposed on approved resolutions and the follow-up (or lack thereof) must be accurately recorded.

It is also the task of the supervisory board to look critically at the quality of the information. Endless spreadsheets with detailed financial information are often counterproductive. The board should only provide relevant information in a structured and consistent manner. The supervisory board should

continue to ask questions and if necessary, involve external specialists if the circumstances do so require.

The information and the minutes of previous meetings should be available in a timely manner, but should also remain available. These days, it is advisable to work with secure vaults or deal rooms that are always accessible to members of the supervisory board and all other relevant stakeholders at any given time.

The flow of information and, in particular, the lack of relevant information must always be explicitly mentioned in the minutes.

4.2 Form requirements

Many supervisory directors have insufficient knowledge of the articles of association (or regulations) of the company. Also quorums, filing obligations, 403-declarations, (supervisory-) board regulations, certain rights of the works council or other bodies within the company, conflict of interest regulations etc. are relevant and need to be adhered to. It is absolutely essential to check whether the decision-making process has always taken place with due observance of the above.

The minutes should in any event reflect the formal side of the decision-making process in accordance with the articles of association or regulations if applicable, and explicitly refer to these.

4.3 Scenario analysis

When making important decisions or considerations, it is important to always look at the situations that could occur if the management's assumptions turn out to be (significantly) incorrect (so f.e. ask for a worst case analysis). Even supervisory directors cannot see into a crystal ball, but it bears witness to good supervision if one always takes a critical look at the most sombre scenarios. The CFO and possibly the control department play an important role in this. The same applies to the audit committee within the supervisory board.

These scenarios may, for example, be worked out in more detail (by the management board) and discussed at a subsequent meeting, after the supervisory board has been able to take note of the different scenarios. The pros and cons discussed during the meeting will then have to form part of the minutes. Therefore, always describe the assessment of interests that has been discussed (certainly in the case of important decisions, it is essential to always highlight "the other side" of the issue).

4.4 The auditor

The accountant plays an increasingly important role in the functioning of the supervisory board. For example, it is common practice for the supervisory board to meet with the accountant at least once a year without the management board being present. That very meeting - in combination with the so-called management letter - is eminently suitable for obtaining an overall picture of any improvement points/issues. The accountant also has to deal with an increasingly critical environment (and is scrutinised by its supervisor, the AFM) and will therefore also be prepared to enter into a discussion about the functioning of the management board in an independent manner. The accountant will also - in case of compliance issues - want to have direct – interim - consultations with the (chairman of the) supervisory board.

Formally, the minutes are not audited by the accountant, but within the framework of the activities relating to the annual accounts, the accountant will always require access to the minutes. In particular, the accountant will have to form an opinion on whether or not adequate control mechanisms are in

place and will study the minutes in that context as well, assessing the role and the functioning of the supervisory board.

4.5 Consultants

If the supervisory board does not have certain expertise within its own group of people, it is important that expert assistance is obtained (in good time). If expert advice is obtained and the supervisory board takes this into account in its decision-making, this should be referred to in the minutes.

4.6 Style

For each agenda item, give a brief, factual account of what was discussed at the meeting. Refrain from long quotes from individual members, but it is possible to indicate which member took which position as regards a certain item. Conclude with clear conclusions and, in the case of decisions, refer to the relevant basis (e.g. approval regulation in the articles of association regulations).

4.7 Distinction between individual members and the supervisory board as a college

It is not necessary to state who made which proposal or took what position or filed which motion. It only has to be formally stated whether a decision has been taken or not.

4.8 Dissenting opinion

It is up to the individual management board member or supervisory board member to have a dissenting opinion or vote recorded in the minutes, which will, however, only play a limited role in the possibility of dispensation of liability under Article 2:9 of the Civil Code (see section 2 above).

4.9 Conflict of interest

If a management board member or supervisory board member did not participate in a deliberation and decision-making process because of a (direct or indirect) conflict of interest (without describing the conflict of interest in detail), this must be explicitly stated.

4.10 Other guidelines

- All decisions or action points taken at the meeting should be noted and a concrete action list (responsible persons and end date) should be attached.
- Do not circulate too many (different) draft minutes. This increases the chance of subsequent discussions on the interpretation of the decisions taken.
- One should refrain from omitting important matters from the minutes.

5. Example of an agenda

The importance of proper minutes is the theme of this memorandum. However, we would also like to briefly address the actual agenda of a supervisory board meeting in this section, as the agenda determines the content of the minutes for the most part.

The agenda items for a supervisory board meeting naturally differ from case to case and depend on various factors (e.g. the nature and size of the company). A good starting point is the Dutch Corporate Governance Code (although it only applies to listed companies). The Code provides clear guidelines on the topics to be discussed by supervisory boards and the frequency.

We have included a model agenda below that can serve as a guideline for supervisory board meetings. Below is list of subjects that can (or in some cases must) be submitted to the supervisory board for approval or discussion from time to time.

5.1 Agenda template

1. Appointment of those present and absent and a formal opening of the meeting.
2. Approval of Minutes of the previous meeting and a designation of the Chairman (of the supervisory board and the secretary (who takes the minutes)
3. Financial key figures relating to the most recent period
4. State of affairs in general, progress of management/company objectives etc.
5. [Specific subjects: e.g. acquisitions and (dis)investments, projects, claims]
6. Functioning of control systems (including fraud and corruption policy), any whistle-blower reports, etc.
7. New additional functions of executive and supervisory directors (possible conflicts of interest)
8. Management reports of consultations works council
9. Information requests to the management board
10. Action list

The agenda may be supplemented, if appropriate, by the items listed in paragraphs 5.2 and 5.3.

5.2 Topics for approval

- The governance structure and its change during the year under review
- The strategy and the preconditions in relation to the strategy as well as the public housing, social, financial and operational objectives
- The annual report and accounts
- The budget
- Exercising voting rights on certain approval items listed in the articles or regulations (if applicable). For example :
 - Entering into and breaking off long-term cooperation with another legal entity, provided it is of major significance (if applicable)
 - Amendment of the Statutes (if applicable)
 - Termination of the employment contract with a significant number of employees (if applicable)
 - Major change in the working conditions of a significant number of employees (if any)
 - Commissioning the external auditor to carry out non-audit work (after consultation with the Board) (if applicable)

5.3 Topics for discussion

- Discussion of the performance of the managing directors (without the presence of the management board)
- Discussion of remuneration report
- Report of the supervisory board
- Discussion of the realisation of the objectives/strategy
- Strategy and the risks associated with the activities
- Design and operation of internal risk management and control systems
- The quality policy

- The quality of social accountability
- The financial reporting process
- Compliance with applicable laws and regulations
- The self-evaluation of the functioning of the supervisory board
- Determination of the independence of each supervisory director in relation to the company
- The introduction and regular training programme for the Supervisory Board and the regular self-assessment
- Appointment/reappointment of supervisory board members
- Contact of the supervisory board with works council
- Reports of the audit committee and the selection and remuneration committee containing deliberations and findings
- Annual consultation of the audit committee with the external auditor (outside the presence of the management board)
- Assessing external auditor involvement in the publication of financial reports other than the annual accounts
- Discussing the report of the management board and the audit committee regarding the relationship with the external auditor
- Discussing the in-depth evaluation of the external auditor's performance put together by the board and the audit committee
- Discussion of the external auditor's report following the audit of the annual accounts at the same time as the discussion on the adoption of the annual accounts

6. Checklist

We have drawn up a checklist for the secretary of the supervisory board, which mainly contains some practical tips for taking minutes. The checklist is intended only as an example and is not meant to be exhaustive.

		Yes	No
1.	Is the time, date and place of the meeting mentioned?	<input type="checkbox"/>	<input type="checkbox"/>
2.	Does it say who was present/absent (with or without notice)?	<input type="checkbox"/>	<input type="checkbox"/>
3.	Do the minutes follow the agenda items?	<input type="checkbox"/>	<input type="checkbox"/>
4.	Has the regular or any additional (written) information timely been sent / received?	<input type="checkbox"/>	<input type="checkbox"/>
5.	Were the minutes of the previous sitting approved?	<input type="checkbox"/>	<input type="checkbox"/>
6.	Have the announcements been recorded?	<input type="checkbox"/>	<input type="checkbox"/>
7.	Are the decisions that have been taken properly recorded in the minutes?	<input type="checkbox"/>	<input type="checkbox"/>
8.	Does the decision making process refers the discussion on balancing of interests?	<input type="checkbox"/>	<input type="checkbox"/>
9.	Is the voting process properly described?	<input type="checkbox"/>	<input type="checkbox"/>
10.	If there is a personal conflict of interest, this is stated and has it been handled adequately?	<input type="checkbox"/>	<input type="checkbox"/>
11.	Are all the agenda items included in the minutes?	<input type="checkbox"/>	<input type="checkbox"/>
12.	Any other business?	<input type="checkbox"/>	<input type="checkbox"/>

Contact

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