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In this study I have tried to analyse the various provisions governing the judicial scrutiny of resolutions in Book 2 of the Dutch Civil Code. I have examined the problems caused by the various provisions in practice and whether an alternative approach is possible.

The study is based on four questions:

- a. What resolutions can be submitted to the court?
- b. Who may file a claim or a request for an investigation in this context?
- c. What criterion of assessment does the court apply in rendering its decision?
- d. What remedies may the court grant?

Based on these questions, I have discussed the various provisions in chronological order. I examined how these provisions work and have worked in practice. In this context I identified the bottlenecks that existed in the past, described how these were eliminated and listed the bottlenecks of the current provisions.

The Dutch Commercial Code, which was introduced in 1838, first regulated the *naamloze vennootschap* (public limited company under Dutch law) in a systematic manner, but it did not include any rules comparable to the current provisions governing the judicial scrutiny of resolutions. In line with the contractual approach to companies that was predominant at the time, conflicts arising from resolutions were not resolved on the basis of any company law provisions but on the basis of contract law. From about 1860, the Dutch Commercial Code increasingly drew criticism, which was related to important subjects such as government supervision over the incorporation of public limited companies and the protection of the minority of shareholders against the arbitrariness of the majority.

The Commercial Code revised in 1929 included one provision, Art. 46a, about the annulment of resolutions of the general meeting of shareholders. The wording of Article 46a of the Commercial Code gave rise to quite a few questions. The article made it possible to invoke the nullity of a resolution adopted by the general meeting. The text of the article was not clear about whether it also applied to resolutions adopted by other corporate organs. In addition, questions arose about the interpretation of the concepts of ‘interested

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party' and the 'standard of judicial scrutiny'. The article does not make it clear whether a resolution can also be assessed against the requirement of good faith. Even so, Article 46a of the Commercial Code has developed into the general instrument of the relevant case law for the scrutiny of resolutions. At the time it was implicitly assumed that a resolution is a 'juridical act' (*rechtshandeling*). It was not until the introduction of Book 2 of the Dutch Civil Code in 1976 and the subsequent revision of this book in 1992 that this latter notion was expressed in a more pregnant manner.

In retrospect, it is safe to conclude that the right to institute an investigation (*enquêterecht*), which has been included in the Dutch Commercial Code since 1929, did not prove to be very effective as a corrective mechanism for dealing with abuse of power by the majority of the shareholders. Between 1929 and 1971 only two actions requiring an investigation into the affairs of the company were filed. The most important cause of the ineffectiveness of this judicial procedure was that after an investigation into a company's policy had been performed, it was up to the general meeting to decide whether the results of the investigation were to have any consequences. Only since the right to institute an investigation was fundamentally revised in 1971 have employees been entitled to invoke this right. On this occasion the Enterprise Division of the Amsterdam Court of Appeal was designated as the competent court in actions requiring an investigation to be held. It was no longer left to the general meeting to decide whether the investigation results were to have any consequences. The Enterprise Division was granted jurisdiction to award one or more remedies, such as the suspension or annulment of a resolution.

For the purposes of the revision of the Dutch Civil Code, the jurist Meijers published a draft text for Book 2 of this code in 1954. The legislative text proposed by Meijers made it clear, more explicitly than the case law and literature had done before that date, that a resolution is a juridical act. This was in line with the developments at the time with respect to the interpretation of legal entities. The notion that a company is a contract was departed from and the 'institutional' notion gained ground. The interpretation of the concept of an enterprise (or undertaking) showed a parallel development. The enterprise developed into an organization that participates in economic activity by reason of decisions taken in the organization. Such decisions are defined not only by the interests of the providers of capital but also by the interests of the enterprise itself, as well as those of employees, creditors and other stakeholders.

In 1976 Book 2 of the Dutch Civil Code was enacted, in anticipation of Books 3, 5 and 6 of this code. Despite the improvements, the new provisions regarding the judicial scrutiny of resolutions as laid down in Articles 11–13 (old) of Book 2 of the Dutch Civil Code failed to remove all objections. The provisions were not

consistent with the system of nullities laid down in the New Civil Code. Under Articles 11–13 (old) of Book 2 of the Dutch Civil Code, some resolutions were voidable, but to be consistent with the system of the New Civil Code, these should in fact have been void.

Due to the phased enactment of the New Civil Code and developments such as the introduction of the *besloten vennootschap* (private limited liability company under Dutch law) and the changes in the right to institute an investigation, Book 2 of the Dutch Civil Code was no longer in line with Books 3, 5 and 6 of this code, which were to be introduced later. The technical revision that was needed as a result offered the opportunity to revise the provisions regarding the judicial scrutiny of resolutions as well. In the legislator's opinion, Articles 13–16 of Book 2 of the Dutch Civil Code, which entered into force on 1 January 1992, contain renewed and more systematic provisions governing the judicial scrutiny of resolutions. Articles 14 and 15 of Book 2 contain the essential provisions. Resolutions contrary to the law or the articles of association are void, unless another consequence follows from the law (Art. 14 of Book 2). Article 15 of Book 2 specifies the situations in which a resolution is voidable. These provisions apply to resolutions within the meaning of Book 2 of the Dutch Civil Code, being a corporate organ's decisions with an intended legal effect. The only remedies to be awarded by courts are a judicial declaration that a resolution is void (Art. 14 of Book 2) or the annulment of a resolution pursuant to Article 15 of Book 2. Anyone who wants to annul a resolution must invoke these provisions. A person seeking provisional relief in an emergency has to institute preliminary relief proceedings (*kort geding*), which has practical objections. Those who want to challenge a decision that does not qualify as a resolution within the meaning of Book 2 of the Dutch Civil Code must rely on the potentially unlawful nature of this decision.

Since 1994, the right to institute an investigation has included the option to seek immediate relief. The Enterprise Division has developed its own fast-track proceedings for this purpose. The immediate relief granted often resolves the dispute. As this is usually sufficient for the parties involved, it is no longer necessary to continue the action requiring an investigation. If the proceedings are continued, these focus on the policies pursued and the general affairs of the enterprise. If it is established during the second stage of the proceedings that there has been mismanagement, the Enterprise Division may grant one or several remedies on request. If any resolution has been a factor in this mismanagement, the Enterprise Division may suspend or annul that resolution by way of relief pursuant to Article 356(a) of Book 2 of the Dutch Civil Code. For this purpose, it is sufficient that the resolution prevents the restoration of healthy relationships. It is not required that the resolution is defective within the meaning of Article 15 of Book 2 of the Dutch Civil Code.

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Besides the general provisions governing the judicial scrutiny of resolutions and the right to institute an investigation, I have discussed the judicial scrutiny of resolutions in the context of the Works Councils Act ('WCA') in this study. The revision of the WCA in 1979 meant that an appeal option was added to the works council's right to render advice, which was introduced as early as 1971. If a resolution of an enterprise is not in conformity with or deviates from the advice rendered or if no advice has been requested or if the interests guaranteed by the WCA are not heeded in any other way, the works council may appeal to the Enterprise Division. The sole ground for appeal was – and still is – that after balancing the interests involved, the enterprise could not reasonably have adopted its resolution. The WCA uses a broader definition of a resolution than that applied in Book 2. The WCA does not require that a resolution is intended to have a legal effect. More than other corporate laws, the system of the WCA focuses on the decision-making process that underlies the adoption of a resolution. The procedure prescribed by the WCA ensures that the enterprise does not pass a resolution on any of the subjects specified in Section 25(1) of the WCA until after it has balanced the interests of the entrepreneur, the enterprise and those it employs or engages. The Enterprise Division tests whether an enterprise reasonably could have arrived at its resolution. According to the legislator, this scrutiny should be limited. The relevant case law shows, however, that the Enterprise Division simultaneously scrutinizes both the procedural aspects (this is known as the 'full scrutiny aspect') and – should this still be necessary – the substantive aspects in a limited manner.

In Chapter 8 I have formulated my reservations about the current possibilities for the judicial scrutiny of resolutions. My first reservation concerns the approach to the concept of a resolution in Book 2 of the Dutch Civil Code. In Book 2, only a corporate organ's resolutions that are intended to have a legal effect are considered resolutions within the meaning of Book 2. This limits the scope of the provisions governing resolutions within the meaning of Book 2. If a resolution is not intended to have a legal effect, this does not mean that the resolution is irrelevant. Such resolutions can have major consequences for a legal entity and I believe that it should be possible to refer disputes relating to such decisions to a court of law. Book 2 of the Dutch Civil Code fails to create any possibilities for this. Anyone who wishes to challenge a decision other than a resolution cannot but rely on its potentially unlawful nature. Preliminary relief proceedings in which provisional relief against the resolution is demanded are often the only option. After the provisional relief has been granted, proceedings on the merits are not always instituted. The reason is twofold. On the one hand, such provisional relief is so effective that there is no longer any need for further proceedings. Second, although the criteria for determining unlawfulness have been developed by the relevant case law and literature, it is by no means equally

certain how those criteria should be translated to the scrutiny of resolutions. This uncertainty may deter the parties from continuing the proceedings.

I have shown in this study that earlier attempts to fit the concept of the resolution into the concept of the juridical act have been inconclusive. The question whether a resolution should be interpreted as a unilateral or a multilateral juridical act is not easy to answer and the concepts of the resolution and the multilateral juridical act do not match well. I would therefore advocate a weaker connection between the resolution within the meaning of Book 2 and the concept of a juridical act. If the current emphasis on the interpretation of the resolution as a juridical act is removed, it is no longer necessary to make any further attempts to fit the concept of a resolution into the conceptual framework developed for the purposes of the juridical act and, as a result, the scope of the provisions governing the judicial scrutiny of resolutions will no longer be as limited as it is today, given the fact that these provisions apply only to a corporate organ's resolutions with an intended legal effect.

Next, I looked at the mismatch between Book 2 and Book 3 of the Dutch Civil Code, in particular, Articles 13, 14 and 15 of Book 2 and Articles 40, 44, 45, 48 and 59 of Book 3 and within Book 2, the mismatch between the Articles 7, 14, 15, 16, 295 and the legislative proposal for Articles 129/236(6). In Chapter 8, I have analysed these bottlenecks and made proposals for improvement. Another objection to the current provisions is that the instruments of the court do not provide for a possibility to suspend a resolution or decision. Against the background of the current meaning of the concept of resolution, the measures included in Articles 14 and 15 of Book 2 are appropriate instruments. But those possibilities do not always sufficiently contribute to the settlement of disputes that have arisen from resolutions. Resolving a conflict does not always require annulment of a decision. Measures designed to change undesirable or unreasonable behaviour may sometimes be sufficient. The option to suspend a decision may contribute to that. I have included this option in my proposal for a different approach to judicial scrutiny. I have also considered the possibility of adding to my proposal the option of provisional relief, which must still be sought in separate preliminary relief proceedings at this juncture.

Finally, I discussed the improper use of the right to institute an investigation for the judicial scrutiny of resolutions. Not in all cases does the reason to initiate an action for an investigation lie in tackling alleged mismanagement, but it may sometimes lie in the possibility of seeking immediate relief. The fact that the investigation proceedings include the possibility of immediate relief, while an action under Article 15 of Book 2 provides only for the possibility of demanding provisional relief in separate preliminary relief proceedings, does not mean that in future the investigation proceedings are to be used to suspend or annul a

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resolution in this way. The action requiring an investigation is intended to obtain transparency and to identify mismanagement rather than to scrutinize resolutions. It is not unimportant in this context that, compared to actions under the general provisions, the action for an investigation lacks procedural guarantees. The assessment of a dispute following a resolution must be made in an action instituted under Article 14 or 15 of Book 2. The proceedings for demanding an investigation can then be reserved for identifying mismanagement and ending mismanagement by means of one or more remedies.

Based on the findings of the study, I have developed ideas to achieve a more coherent system of judicial scrutiny of the resolutions passed by corporate organs. In broad terms, my proposal comes down to the following: anyone who has a legally recognised interest in compliance with statutory provisions, case law or rules arising from articles of associations or other regulations regarding the manner of adoption or content of a corporate organ's decision should, if a dispute arises as a result of the foregoing, be able to submit a dispute based on this decision to the court. If a dispute based on a decision is submitted to the court, the latter's ruling should contribute to the proper settlement of the dispute arisen between the parties. In my proposal, the term resolution is no longer limited to resolutions within the meaning of Book 2 of the Dutch Civil Code. The court should be able to scrutinize both resolutions with an intended legal effect and decisions without an intended legal effect. The court's criterion for assessing the decision should leave room for the assessment of the manner in which the decision was adopted and its contents. In granting remedies, the court should have other possibilities than those available at present. In anticipation of its judgment, the court may grant provisional relief where necessary. All of this will be part of the provisions relating to the judicial scrutiny of resolutions included in the law of legal entities and it needs to be consistent with the patrimonial law of which the law of legal entities forms a part. In the final chapter I have elaborated on these ideas and made some suggestions for the way these could be implemented.