Vertegenwoordiging bij NV en BV. Een rechtsvergelijkend onderzoek naar de uitvoering van art. 9 EG-richtlijn inzake het vennootschapsrecht.
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Subject of the study. The subject of this study is representation of companies in the light of the first EC-directive on company law. This directive was adopted as long ago as 1968 but it is still a current directive. Recently (September/October 1999) the SLIM (Simpler Legislation for the Internal Market) working group has presented recommendations for the simplification of the first and also the second EC-directive. The purpose of the SLIM initiative is not to harmonise regulation further, but to slim it down.

The starting point of this study is Article 9 of the first EC-directive. This Article covers the rules for the status of legal transactions performed by company organs with regard to third parties.

Article 9 clause 1 states that acts performed by company organs will be binding, even if those acts do not lie within the objectives of the company, unless such acts transgress the authority that the law confers or allows to be conferred on these organs. Thus, the main rule of this Article is that the company is bound through all the transactions of the company organs, unless such actions are contrary to legal provisions. The Dutch Supreme Court posed preliminary questions about Article 9 clause 1 to the European Court of Justice in the context of the Mediasafe case. At the end of 1997 the Court of Justice gave a preliminary ruling in this case. The Mediasafe case plays an important role in this study. I refer to this case in almost every chapter.

The topic of performing actions outside the objectives of a company is dealt with in the second part of Article 9 clause 1. Member states may determine that the company is not bound by these actions where such actions breach the objectives of the company in cases where the company can prove that the third party knew that the actions were in transgression of the company objectives or, in view of the circumstances, the third party could not have been unaware of this fact; disclosure of the articles of association shall not of itself be sufficient proof of this.

Article 9 clause 2 states that internal limits that have been placed on company organs, originating from the articles of association or as a result of a decision by the company authorities, cannot be invoked, even if they have been disclosed. In the case of the company organ exceeding the limitations placed on its power by the articles of association or by the general meeting, the company is still bound with respect to third parties. Every third party, both those acting in good faith and those acting in bad faith, will be protected by the text of this paragraph.

One exception is possible to the above described rule that internal provisions have no influence on the authority of company organs. This exception covers the situation where one person, or several people collectively, are given general representational authority. Article 9 clause 3 gives the national legislator the possibility to determine by law that in deviation from legal regulation via the articles of association, the authority to represent a company may be conferred by
to a single person or several persons acting jointly. National law may allow such a
provision in the articles to be invoked with respect to third parties on the condition
that it relates to the general power of representation. The question whether or not
such a provision in the articles can be relied upon with respect to third parties is
governed by Article 3 of the first EC-directive.

This study is of a comparative nature. The rules governing the representation of
public companies and private companies of five member states of the European
Union are examined, namely Germany, France, Belgium, the United Kingdom (of
which only the English law is dealt with) and the Netherlands. The reason why I
have chosen to compare the rules on representation of these five member states lies
in the fact that the societal vision and the socio-economic culture of these countries
are similar. In these member states, the rules of representation covered by the first
EC-directive have been implemented in national law for more than thirty years.
This makes it possible to compare the development of the national rules of
representation and the textual changes in national legislation on representation
down through the years.

2. Aims of the study. The aims of this study are threefold:

(1) To analyse the rules on representation applicable to public and private
companies, as laid down in Article 9 of the first EC-directive in Germany,
France, Belgium, England and the Netherlands. This analysis should furnish
material to solve legal questions concerning representation which arise in
the Netherlands.

(2) To judge whether or not Article 9 first EC-directive has been implemented
correctly in the various member states.

(3) Answering the question as to whether or not the implementation of the first
EC-directive in the member states that have been examined could lead to
the proposal of modifications to Dutch Article 2:130/240 BW.

3. Method of study. Chapter I gives a general introduction to the harmonisation of
EC-law. Subsequently the thesis of this study is described. The study is divided into
three parts. Part I (Chapter 2) deals with Article 9 of the first EC-directive. The
realisation, the contents and the purport of Article 9 first EC-directive are
discussed. I derive the genesis of Article 9 of the first EC-directive from the
textual modifications. For a good comprehension of Article 9, attention is paid to
the various opinions on the company representation that existed in the five member
states before the implementation of the first EC-directive.

Part II (Chapters 3-7) contains an analysis of the implementation of Article 9
first EC-directive in the national laws of Germany, France, Belgium, England and
the Netherlands. These chapters can be read separately. The same topics are
covered in each national law, referring to representation in the company, the restrictions imposed
by these restrictions include legal or general shareholders’ meetings prescribing the board of directors
organ before they may act or the incorporation of the company. I selected this legal action (representation) as well as by the rules governing the general shareholders’ meeting reference to every member state.
Subsequently, the rules governing the representation of the board of directors - those acting by proxy - are
examined. In these member states, the rules of representation covered by the first
EC-directive have been implemented in national law for more than thirty years.

Finally, I shall go into the limited authority of the board of directors - those acting by proxy - and the
Mediasafe conflict of interests rule (Article 3). On the other hand, the limited authority of the board of
directors - those acting by proxy - is not the implementation of Article 9 first EC-directive in the
Netherlands with respect to the conflict of interests rule. In the Mediasafe conflict of interests rule (Article 3).

The present text of Art. 2:130/240 BW provides that a director - those acting by proxy - may provide that a director - those acting by proxy - be unrestricted and unconditionally.
The question of the external significance of third parties in respect to representation covered by the first EC-directive has been implemented in the five member states selected for this analysis. The implementation of Article 9 of the first EC-directive in each national legal system is compared, and I assess whether or not the implementation in the various member states is in accordance with Article 9 of the first EC-directive. Special attention is paid to the Dutch rules of representation. A solution is provided for the current legal questions in the Netherlands with respect to the external significance of non-mandatory statutory limitations. On the basis of the results of the analysis of Article 9 of the first EC-directive and the representation systems in the member states examined, I propose modifications to Art. 2:130/240 BW.

The present text of Art. 2:130/240 BW is as follows:

1. - *The management represents the company to the extent that the contrary does not follow from the law.*

2. - *The representative authority shall also vest in every officer but, notwithstanding the foregoing, the articles may provide that it shall vest only in one or more managing directors concurrently with the management. In addition, the articles may provide that a director may represent the company only with the cooperation of one or more other persons.*

3. - *The representative authority vested in the management or in a director shall be unrestricted and unconditional to the extent that the contrary does not follow from the law.*
from the law. Any restrictions in or conditions on the representative authority permitted or prescribed by law may only be invoked by the company.

4. The articles may also vest representative authority in persons other than directors.

4. Proposals to modify Art. 2:130/240 BW. Part III of this study contains several proposals for modifications to Art. 2:130/240 BW. These have been inspired by English company law. English company law only provides a framework of mandatory legislation. A consequence of this is that companies have great freedom to divide power between the various company organs. Companies have the possibility to divide the authority in a way that suits them best. Dutch company law also gives companies such freedom. As a result of non-mandatory statutory provisions, companies can diverge from the legal division of powers.

A characteristic element of English company law is the protection of third parties that deal with a company in good faith. This is laid down in s. 35A(1) CA 1985. This provision determines that, with respect to a person dealing with a company in good faith, the power of the board of directors to bind the company or authorise others to do so, will be free of any limitations under the company's constitution. Furthermore, the Turquand-rule ensures that third parties acting in good faith may rely on the authority of the board of directors or of someone authorised by the board in cases where statutory law requires the permission or the co-operation of another company organ before the board of directors may enter into a transaction. A third party that has dealt with the company through its board of directors or with someone authorised by the board will be protected as long as he has acted in good faith. In none of the other member states examined has the good faith of third parties played such an important role in answering the question whether or not a company is bound to a transaction. A third party that has dealt with the company through its board of directors or with someone authorised by the board will be protected as long as he has acted in good faith. In none of the other member states examined has the good faith of third parties played such an important role in answering the question whether or not a company is bound to a transaction.

I prefer a similar representation system. Therefore I make the following proposals.

Art. 2:130/240 should explicitly include the stipulation that the management has the power to represent the company, with the exception of the power the law confers by mandate to another company organ. This concerns the so-called 'absolute lack of authority'. The company is not bound in cases where the board of directors transgresses this type of mandatory statutory lack of authority.

Art. 2:130/240 should also prescribe that the company is bound with respect to third parties in cases where the management or an individual functionary has a relative lack of authority. This provision covers both mandatory statutory provisions and non-mandatory statutory provisions. Third parties acting in good faith may rely on the authority of the management. If the departure, they may take operation of another company. That, in cases of non mandatory limitations, the director and the third party may act in good faith do not have to consult shareholders' meeting to file the statutory division of power or interest.

I also propose the ending of the limitations issuing from the fact that third parties acting in good faith is not legally bound. It is unexample, unlawful act proceed.

By stipulating in Art. 2:1 there are protected, legal security be established by law. Acco directive, these criteria should parties are not protected. This is an example, unlawful act proceed.

Finally I propose modification of the present text of this provision in the articles that companies are bound to a transaction. This opinion is contrary to the directive, these criteria should parties. Therefore the representative authority is not legally bound. It is not example, unlawful act proceed.

The conferment of such a proxy is no unusual phenomenon. According to the Prokurist has unexample, unlawful act proceed. The company with respect to third parties. For example, unlawful act proceed.

With the purpose of establishing Art. 2:130/240 BW, the text of these stipulation is: '1. The management represent...
III of this study contains several W. These have been inspired by only provides a framework of at companies have great freedomy organs. Companies have the best. Dutch company law result of non-mandatory statutory division of powers.

...is the protection of third... This is laid down in s. 35A(1) upon dealing with directors to bind the company or limitations under the company's sures that third parties acting in... of directors or of someone law requires the permission or the board of directors may enter into the company through its board of... will be protected as long as her states examined has the good people in answering the question. This basic principle brings the... of the board of directors or of being in good faith are not forced her co-operation has been given. Her research on the company's... before I make the following

Finally I propose modification to Art. 2:130/240 clause 4 BW. On the basis of the present text of this provision in the Netherlands, it is generally assumed that the provision in the articles that confers representative authority to persons other than directors implies limited authority.

This opinion is contrary to Article 9 clause 3 of the First EC-directive. This stipulates that the articles may confer representative authority on a single person or on several persons acting jointly, on the condition that the conferment refers to general power of representation. Article 9 clause 3 is not limited to directors. In my view, the representative authority conferred by Art. 2:130/240 clause 4 BW also refers to general power of representation.

The conferment of such comprehensive power to represent the company by proxy is no unusual phenomenon. Germany upholds the Prokura-system. In principle, a Prokurist has unlimited and unconditional power to represent the company with respect to third parties. The only restrictions on this powers are a few mandatory limitations. A consequence of such a system is that third parties are widely protected. Only in a few mandatory exceptional cases is the company not bound by legal actions of the Prokurist. In France (Art. L. 117 clause 2) and in England (section 35A(1) CA) mandates conferred by the board of directors also bestow general representative authority.

With the purpose of establishing the above-mentioned proposals in Art. 2:130/240 BW, the text of these stipulations should be changed to the following:

I. The management represents the company. The representative authority does not
refer to the powers the law has assigned by mandate to another company organ.

2. The representative authority conferred in clause 1 shall also vest in every officer but, notwithstanding the foregoing, the articles may determine that it shall vest only in one or more managing directors concurrently with the management. In addition, the articles may determine that a director may represent the company only with the co-operation of one or more other persons.

3. The representative authority shall be unrestricted and unconditional with respect to third parties acting in good faith. Only the company may appeal in cases of transgressing representative authority.

4. Third parties shall be deemed to have acted in good faith, unless the contrary is proved by the company. A person shall not be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the management or of an individual officer.

5. The articles may also vest representative authority in persons other than directors. Paragraphs 1 up to 4 of this article also apply to such representative authority.