Vertegenwoordiging bij NV en BV. Een rechtsvergelijkend onderzoek naar de uitvoering van art. 9 EG-richtlijn inzake het vennootschapsrecht.

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1. 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 each state, the restrictions imposed by these restrictions include legal requirements of the general shareholders' meeting prescribing the board of directors before they may act or incorporate the company. Subsequently, the rules governing reference to every member state come up for discussion in Justice. In the Mediasafe-case, the conflict of interests rule (Article 9 of the first EC-directive) is at issue. All of the member states' restrictions in the articles on representation may not be invoked with respect to the general power of representation. On the other hand, the limited authority of the board of directors is protected. The chapters reviewed are examined.

Finally, I shall go into the role of representatives - those acting by proxy. Part III (Chapter 8) contains: Article 9 of the first EC-directive in Germany, or not the implementation in France, or not the implementation in Belgium, or not the implementation in England and the Netherlands with respect to the limitations. On the basis of the first EC-directive and the representation, the modifications to Art. 2:130/240 BW are examined.

The present text of Art. 2:130/240 BW reads:
1. - The management representatives do not follow from the law.
2. - The representative at the foregoing, or more managing directors of the articles may provide that a director or managing directors of a company may provide that a director or managing director of another company shall be unrestricted and unconditioned...
The question of the representation of the company with respect to third parties is a threefold: any applicable to public and private representation which arise in the Netherlands. The reason why I selected this legal action because it is covered by the first EC-directive (representation) as well as by the second EC-directive (Article 25).

Subsequently, the rules governing conflict of interests rules are reviewed with reference to every member state examined. The subject of conflict of interests has come up for discussion in a preliminary procedure by the European Court of Justice. In the Mediasafe-case the Dutch Supreme Court asked if the national conflict of interests rule (Art. 2:130/256 BW) has external significance.

All of the member states examined have endorsed an exception to the rule that restrictions in the articles or limits arising from a decision of a competent organ may not be invoked with respect to third parties (Article 9 clause 2, first EC-directive). On the other hand, if the third party acted in bad faith with respect to the limited authority of the board of directors or of individual directors, it will not be protected. The chapters review what is meant by good faith in the member states examined.

Finally, I shall go into the topic of company representation by others than the directors - those acting by proxy.

Part III (Chapter 8) contains a comparative synthesis. The implementation of Article 9 first EC-directive in the five member states is compared. 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. 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'.

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. In addition, the third party does not have to do research on the company's constitution.

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.

Finally I propose modifications of the present text of this provision. According to Art. 2:130/240 BW, the text of these stipulations may be different from the law, but this provision in the articles that confers on the management the power to represent the company, with the exception of the power the law stipulates, implies limited authority. This opinion is contrary to the directive, these criteria should be established by law. According to the directive, these criteria should be protected. Therefore the third party acting in good faith may rely on the authority of the management. By stipulating in Art. 2:130/240 BW, the text of these stipulations may be different from the law, but this provision in the articles that confers on the management the power to represent the company, with the exception of the power the law stipulates, implies limited authority.
III of this study contains several W. These have been inspired by only provides a framework of at companies have great freedoms organs. Companies have them tests best. Dutch company law result of non-mandatory statutory division of powers.

Authority in persons other than the management is the protection of third parties. This is laid down in s. 35A(1) aspect to a person dealing with a directors to bind the company or limitations under the company’s sure that third parties acting in board 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 of or of these acting in good faith are not forced co-operation has been given, research on the company’s.

Before I make the following proposals:

That the management has the power the law confers on the so-called ‘absolute lack where the board of directors authority.

Any is bound with respect to individual functionary has a mandatory statutory provisions acting in good faith may rely on the authority of the management or of an individual functionary. As a point of departure, they may take the fact that the legally required permission or co-operation of another company organ has been given. This provision also means that, in cases of non-mandatory statutory limitations, third parties acting in good faith do not have to consult the articles of association or decisions of the general shareholders’ meeting to find out whether or not the company has deviated from the statutory division of powers.

I also propose the endorsement of the rule of representation that, in cases of limitations issuing from the articles of association or decisions of company organs third parties acting in bad faith will not be protected. In such a case, the company is not legally bound. It is unnecessary to reverse these legal actions by means of, for example, unlawful act proceedings.

By stipulating in Art. 2:130/240 BW that only third parties acting in good faith are protected, legal security should be ensured. The criteria for good faith should be established by law. According to the system of representation of the first EC-directive, these criteria should lead to the result that only in exceptional cases third parties are not protected. This occurs, for example, in cases of conspiracy between the director and the third party or in cases where the third party takes unfair advantage of the lack of authority of the director to the cost of the company, while being fully aware of the situation.

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:

1. 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.