Vraagstukken rond (terug)storting op NV/BV aandelen en van coöperatierrecht.
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Summary

Issues related to payments or repayment of NV/BV shares and law on co-operatives

In the first three chapters I examine three subjects related to the accumulation and reduction of capital in public and private limited liability companies under Dutch law (in Dutch NV and BV respectively) against the background of the concepts of ‘shareholders' equity’ and ‘allotted capital’.

a. Payments made on NV/BV shares by the company or by the shareholders? (Chapter 1)
b. Conversion of a claim (without monetary value) into capital: an adequate payment, a quasi-contribution or neither? (Chapter 2)
c. What is the legal construction of the purchase for valuable consideration by a company of fully paid-up shares owned by the company itself? (Chapter 3)

In the fourth chapter I discuss four subjects pertaining to the co-operative as a legal entity:

d. Is it not a consequence of the legal objective of a co-operative that its members should actually be entitled to profits? (Chapter 4.3.1)
e. Is an investment co-operative as a kind of co-operative legally feasible? (Chapter 4.3.2)
f. Is a co-operative of persons as a kind of co-operative admissible by law? (Chapter 4.3.3)
g. Are payments made by a co-operative out of its annual profits on stock dividend certificates allotted to members who are natural persons not dividends as defined in the extension profits regulation? (Chapter 4.3.4)

2. Conclusions

I have drawn the following conclusions:

a. Payments made on NV/BV shares by the company or by the shareholders (Chapter 1)

The NV/BV makes a payment on an already issued but not yet fully paid-up share out of profits, reserve or premium, and a payment on a stock dividend, a bonus share or a bonus against share premium reserve by paying the values of assets available to it out of its profits, reserves or share premium account respectively,
as share premium or capital respectively. (Chapter 1.2.2.h.2.) This kind of payment can be traced back to the private law concept of ‘fulfilment by a party other than the debtor’, regulated in Article 6:30 para 1 of the Dutch Civil Code. (Chapter 1.2.2.f.1.) In these cases the NV/BV fulfils the obligation of payment on behalf of the holder of a share which is not fully paid up, or for the recipient of a stock dividend, bonus share or bonus against share premium reserve. The obligation to pay is thus, as intended, discharged by fulfilment and not by exemption. (Chapter 1.2.2.f.1./1.2.2.h.2.)

These payments are in fact dividends in the proper sense. They can be seen as non-monetary dividends or even as monetary dividends, since the holders of the not yet fully paid-up shares or the recipients of the bonus shares, the stock dividends or the bonuses against share premium reserve respectively do not have to pay the nominal or higher value of these shares themselves but can keep the money in their bank accounts. (Chapter 1.2.3.g.3.) In answering the question whether payments are being made as defined by law, the crucial factor is whether the amounts corresponding to the nominal or higher values of the shares to be allotted are deposited as capital. The important question is not whether the shareholders’ equity is increased by these amounts but whether the paid-up capital is increased by these amounts. (Chapter 1.2.2.h.1.)

Because the amount of annual profit, the reserves or the share premium is not determined by the value of one or more assets but by the relevant difference between assets and liabilities, it is not sufficient to pay the value of one or more assets belonging to the NV/BV as capital or share premium respectively. There is no question of a payment in cash or of payment of cash value as defined by law. In consequence, if a ‘non-cash contribution’ as defined by Article 2.94b and Article 2.204 of the Dutch Civil Code respectively is made in these cases, the company is required to provide a description of what is paid and a declaration from a registered accountant or an accounting consultant about what is paid in order to establish that the annual profit, the reserve or the share premium amounts to at least the sum of what is paid on the not fully paid-up shares and the stock dividends, bonus shares or bonuses against share premium reserve respectively. (Chapter 1.2.2.h.4.)

b. Conversion of a claim (without monetary value) into capital: an adequate payment, a quasi-contribution or neither? (Chapter 2)

Two methods of ‘conversion of a claim into capital’ can be distinguished: ‘conversion of a claim into capital’ by means of ‘contribution of a claim’ and ‘conversion of a claim into capital’ by ‘offsetting a debt against a claim’. (Chapter 2.1.4/2.3.2) Contribution or payment on a share means making the actual value of an item of property available to the NV/BV in order to fulfil the obligation of payment by paying this value on shares in the NV/BV. The value concerned is the value the item of property actually has on or within five months prior to the date
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of payment. This value is placed at the disposal of the company as capital and is also regarded as capital. (Chapter 2.3.3)

‘Conversion of a claim into capital’ is a transfer whereby the creditor contributes his claim against the NV/BV to the NV/BV in his capacity as a recipient of shares. A transfer of this kind is possible by law and may lead to the payment of capital. (Chapter 2.3.4.a.)

‘Conversion of a claim into capital’ by ‘offsetting a debt against a claim’ consists of offsetting a debt owed by an NV/BV to a shareholder against a claim the NV/BV has for payment from that shareholder. This setoff takes place through discharge of the shareholder’s obligation to pay and of the NV/BV’s claim for payment in the same amount. The discharge of the obligation and claim is not a consequence of fulfilment but of a declaration by the NV/BV that it is offsetting its debt to the shareholder against its claim on the shareholder. This kind of setoff can also be agreed between the NV/BV and the shareholder. In view of the effect of the setoff in the case of ‘conversion of a claim into capital’, without a legal fiction the increase in shareholders’ equity as a result of the discharge of the debt, the value which becomes available on the asset side of the balance sheet, is neither capital contribution, payment in cash nor payment in kind. The value which becomes available is part of the shareholders’ equity on the grounds of ‘discharge of a debt’ and not on the grounds of ‘capital contribution’. The question is whether this legal fiction cannot be implicitly read in the authority of an NV/BV to avail itself of setoff, an authority which is not prohibited or ruled out by law. (Chapter 2.3.4.b./1.2.3.o.l.)

Because Article 2.94c para 1 of the Dutch Civil Code has been deleted, the question remains whether ‘conversion of a claim into capital’ by means of contribution of the claim and ‘conversion of a claim into capital’ by offsetting a debt against a claim constitute payment in cash or non-cash contributions. Payment in cash is a natural consequence of the law and therefore no agreements need to be made about it. From the fact that agreements must be made about payment by contributing a claim, it can be inferred that in the eyes of the law the contribution of a claim is not payment in cash but payment in kind. Under the legislation currently in force contribution of a claim is therefore subject to capital contribution audit. If ‘conversion of a claim into capital’ by offsetting a debt against a claim is a capital contribution by virtue of a fiction laid down in the law, it can be regarded as a non-cash contribution which is subject to audit because debts are being discharged against the discharge of claims and these debts and claims are not being discharged by means of cash payments. (Chapter 2.3.5.a.-b.)

The ‘conversion of a claim into capital’ by the ‘conversion of a claim’ and ‘conversion of a claim into capital’ by ‘offsetting a debt against a claim’ by virtue of a legal fiction do not result in contributions of capital if the claims to be ‘converted’ are valueless. If this is the case, then the nominal, true values of the claims contributed or offset are not actually available for the payment at the time of conversion. (Chapter 2.3.6)
c. What is the legal construction of the purchase for valuable consideration by a company of fully paid-up shares owned by the company itself? (Chapter 3)

Under the legislation in force from 1 April 1929 to 1 September 1981, and also under the preceding legislation, 'purchase by a company of its own shares', as an agreement of withdrawal, as a termination of participation in the capital and also the rest of the shareholders' equity, automatically led to a reduction in capital, and withdrawal of the 'purchased' shares, i.e. to the extinguishment of those shares, and in addition it resulted in a reduction of shareholders' equity. (Chapter 3.3.1-3.3.2) The legal concept of 'confusion' does not enter into this view of the purchase by a company of its own shares. (Chapter 3.3.18) In purchasing its own shares the company is not investing. (Chapter 3.3.14) In law 'purchase by a company of its own shares' does not actually constitute a 'purchase' because the company does not receive any goods, any 'merchandise'. (Chapter 3.3.16) After purchasing its own shares the company regains the capital value or other shareholders' equity amounting to the 'purchase sum' paid only if some other party participates in the company by receiving shares against payment. (Chapter 3.3.19) If, under the legislation currently in force, Dutch lawmakers were to see 'purchase by a company of its own shares' as legally constituting a 'termination of participation in the capital and the rest of the shareholders' equity' which automatically leads to a reduction of capital and to withdrawal of the shares, they could do so merely by referring to Subsection a of Article 15, heading, Second E.E.C.-Directive op company law, without applying the conditions referred to in Article 19 of the same Directive, nor would it be necessary to meet the restrictive conditions referred to in Article 15, Second E.E.C.-Directive op company law and Article 19 of the same Directive. The reason is simply that it would not be a matter of permitting the acquisition of shares by the company as defined by Article 19 of the Second E.E.C.-Directive op company law but of reduction of capital as referred to in Article 15 of the same Directive. Because it constitutes the termination of participation, a company's purchase of its own shares might result in the net assets dropping below the amount of allotted capital. Whether in this case it would be permissible for the 'purchase' to paid out of reserves which by virtue of law or of the articles of association may not be distributed, would depend on the reason why these reserves may not be distributed. (Chapter 3.5.4.a.) If 'purchase by a company of its own shares' is construed in this way, Dutch legislation should be changed in such a way that the provisions pertaining to capital reduction apply to 'purchase by a company of its own shares'. (Chapter 3.6) In para 2a of Article 2.98 of the Dutch Civil Code the intention of the Dutch lawmakers is to express that if a company 'purchases' its own shares the 'purchase price' should in fact be paid out of a 'free' section of the shareholders' equity, meaning free reserves, because when a company performs the juristic act of purchasing its own shares the law sees the 'purchase price' as a distribution. (Chapter 3.7.a.1.) However, in my opinion the answer to the question from which components of the shareholders' equity the purchase price should derive should
not be based on the interpretation of one component of the juristic act of purchasing the shares, namely ‘distribution’. ‘Purchase by a company of its own shares’ consists of other elements as well: termination of participation in a proportionate amount of the equity and in the rest of the capital by the ‘selling’ shareholder, and the absence of receipt of merchandise in the form of shares by the company. (Chapter 3.7.a.1.)

Based on the above, I suggest that the existing legislation should be adapted to meet my construction of ‘purchase by a company of its own shares’ and that in view of common practice with respect to ‘purchase by a company of its own shares’ recognition of the previous existence of the ‘purchased’ shares should be included in the law; this should be done by laying down in Book 2 of the Civil Code that the Board is independently authorized to issue and allot shares which take the place of the ‘purchased’ shares within a certain period. (Chapter 3.8)

d. Is it not a consequence of the legal objective of a co-operative that its members should actually be entitled to profits? (Chapter 4.3.1)
A consequence of the legal objective that the co-operative must provide for the economic needs of its members by virtue of the agreements entered into with them in the business which it runs on their behalf for that purpose is that the members must actually be entitled to the profits. (Chapter 4.3.1)

e. Is an investment co-operative as a kind of co-operative legally feasible? (Chapter 4.3.2)
The ‘equity interest agreements’ entered into produce an investment co-operative which makes it its objective to satisfy the members’ need for profit as providers of capital. A co-operative of this kind meets the legal definition of a co-operative given in Article 2.53 of the Civil Code and is therefore legally feasible. (Chapter 4.3.2.1-2/4.3.2.5)

f. Is a co-operative of persons as a kind of co-operative admissible by law? (4.3.3)
A co-operative of persons in which the members agree with the co-operative to contribute labour in exchange for an entitlement to profit from carrying out the co-operative’s business activities for it fulfils the legal definition of a co-operative in Article 2.53 of the Dutch Civil Code and is admissible by law. (Chapter 4.3.3.1-3)

g. Are payments made by a co-operative out of its annual profits on stock dividend certificates allotted to members who are natural persons not dividends as defined in the extension profits regulation? (4.3.4)
A co-operative which needs permanent capital equity can use one of the two following basic forms of equity formation. (1) The members commit themselves to provide the capital required in the form of capital equity for the term of their
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membership, either in a lump sum or in instalments. The co-operative distributes its profits in a lump sum among the members annually. If the members have not yet paid in the capital which they are obliged to contribute, the portion of the profit concerned is distributed to the members in the form of stock dividend certificates similar to those of limited liability companies, after deduction of a dividend over the capital equity on market terms. (2) The members commit themselves to provide the capital required in the form of subordinated permanent interest-bearing negotiable loans, either in lump sums or in instalments. The co-operative distributes the profits in a lump sum among the members annually. So long as the members have not yet provided the capital which they are obliged to provide, the portion of the profits concerned is distributed to the members in the form of subordinated, permanent interest-bearing negotiable loans. (Chapter 4.2.8.d.) Distributions in this form are distributions within the meaning of the extension profits regulation if and as far as the other conditions of this regulation are met. Unlike the Supreme Court, I am of the opinion that this also applies to the stock dividend certificates referred to under (1), if and as far as the other conditions of the extension profits regulation are met. (Chapter 4.3.4.1-4.3.4.3.a.-c.)