The compatibility of awarding management incentives in the context of major corporate events in light of the corporate interest

Wolters Kluwer

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The compatibility of awarding management incentives in the context of major corporate events in light of the corporate interest

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door

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geboren op 8 februari 1991
te Utrecht

WOORD VOORAF

Op maandag 8 december 2025 promoveerde Naomi Reijn aan de Radboud Universiteit Nijmegen op haar studie getiteld 'The compatibility of awarding management incentives in the context of major corporate events in light of the corporate interest' ('de verenigbaarheid van de toekenning van management incentives in de context van major corporate events in het licht van het vennootschappelijk belang'). Prof. mr. dr. L.G. Verburg en prof. mr. dr. C.D.J. Bulten traden op als promotores. Met "major corporate events" doelt de auteur op openbare biedingen, fusies en overnames (inclusief private equity leveraged buy-out transacties) en beursgangen. In geval van een major corporate event, meer dan in een *business-as-usual*-scenario, kan het zo zijn dat het lange termijn vennootschappelijk belang wordt doorkruist door kortetermijnbelangen van aandeelhouders. Dit spanningsveld kan eveneens weerspiegeld zijn in de bezoldiging van het bestuur. Dergelijke vormen van bezoldiging duidt men aan als "management incentives". De auteur doelt daarmee op vormen van variabele bezoldiging die stijgen in waarde wanneer bestuurders handelen in het belang van aandeelhouders. In het licht van het gesignaleerde spanningsveld onderzoekt Reijn of, en in hoeverre, het verenigbaar is met het vennootschappelijk belang om management incentives toe te kennen aan bestuurders van Nederlandse NV's en BV's in het kader van major corporate events.

Het boek is uitgebreid van opzet. Reijn heeft een gedetailleerd en logisch opgezet proefschrift geschreven. Het gebruik van literatuur en jurisprudentie is gedegen en welhaast uitputtend. Zij behandelt het onderwerp praktijkgericht en integraal. Hoewel het boek gericht is op het vennootschapsrecht, bevat het ook tal van arbeidsrechtelijke, financieelrechtelijke en procesrechtelijke inzichten. Interessant zijn verder de referenties die in het boek worden gemaakt naar de wetgeving met betrekking tot management incentives in de VS, UK en Duitsland.

Reijn behandelt de begrippen vanuit de eerdergenoemde rechtsgebieden in hun onderlinge samenhang, in het licht van het door haar gesignaleerde spanningsveld. Dat maakt het boek verrassend en vernieuwend. De combinatie van theorie en praktijk leidt zo tot een grondige en dogmatische analyse van het onderwerp. Het onderzoek verschijnt als deel 197 in de Serie vanwege het Van der Heijden Instituut.

Na een analyse van het bezoldigingsbegrip en het begrip "management incentives", waarbij de auteur eveneens ingaat op de economische achtergrond van deze beloningsvormen, beschrijft Reijn welke vormen van management incentives in de praktijk voorkomen, en hoe deze vormen tot een incentive kunnen leiden. Vervolgens gaat zij in op het

vennootschappelijk belang-begrip. Specifiek behandelt het onderzoek hoe het vennootschappelijk belang dient te worden ingevuld in geval van een major corporate event.

Tegen deze achtergrond gaat het boek in op het toekenningsproces van management incentives, waarbij de brede vennootschapsrechtelijke regelingen ten aanzien van de toekenning van bezoldiging en het bezoldigingsbeleid voor zowel NV's, BV's als beursgenoteerde vennootschappen in algemene zin aan bod komen. Het onderzoek gaat vervolgens dieper in op de verhouding tussen management incentives en major corporate events. Eerst onderzoekt de auteur de verschillende belangen van aandeelhouders die de vormgeving van management incentives beïnvloeden en de positie van management incentives binnen het transactieproces. Daarna gaat zij in op de impact van major corporate events op management incentives, waarbij zij vanuit een uitgebreid civiel- en arbeidsrechtelijke perspectief in de praktijk gebruikte regelingen en change in control bepalingen analyseert.

Vervolgens verschuift het beeld naar de (mogelijke) impact van management incentives op de verschillende elementen van het vennootschapsbelang in de context van major corporate events, waarbij uitgebreid wordt ingegaan op jurisprudentie.

Het onderzoek eindigt met de verschillende waarborgen die het recht biedt om de eventuele negatieve impact van management incentives op het vennootschapsbelang te beperken. Daarbij behandelt zij uitgebreid het vereiste om een zorgvuldig proces te voeren ("due process"). Het boek bevat tot slot een samenvattende conclusie en aanbevelingen.

Dit proefschrift draagt bij aan het juridisch debat over bestuurdersbeloning en het vennootschappelijk belang. De uitgebreide praktische ervaring van Reijn als advocaat komt ruimschoots tot uiting in haar boek. De conclusies van Reijn zijn logisch en bruikbaar. Niet enkel de wetenschapper en praktijkjurist hebben baat bij deze studie. De wetgever heeft met dit boek voor een eventuele aanpassing van beloningswetgeving ten aanzien van bestuurders een gedegen handvat. Daarnaast kan het boek als inspiratiebron dienen voor de Monitoring Commissie Corporate Governance Code. Commissarissen en bestuurders beschikken met dit boek over een praktisch kader ter invulling van het proces rondom de toekenning en trigger van management incentives als onderdeel van de bestuurdersbezoldiging. Met veel plezier nemen wij dit proefschrift op in de Serie.

C.D.J. Bulten (vz.)
G. van Solinge
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M.P. Nieuwe Weme
J.B.S. Hijink
T. Salemink

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CHAPTER 1

Introduction

1.1 Context of research

1.1.1 Introduction

Remuneration[1] of the members of the management board (*raad van bestuur*)[2] of both a Dutch public limited company (*naamloze vennootschap* or **NV**) or a Dutch private limited company (*besloten vennootschap* or **BV**)[3] is a highly debated topic that has caught the

1 Paragraph 1.1.2 and Chapter 2 contain a further delineation of the definition of remuneration for the purpose of this dissertation.

2 Where this research speaks of "management board", the requirements apply *mutatis mutandis* to the executive members of a one tier board within the meaning of article 2:129a (1) DCC.

3 The legal concept of a company (*vennootschap*) differs from the social-economic phenomenon of an enterprise (*onderneming*). These notions influence each other in the way that they are connected. Where this dissertation refers to a company, both an NV as well as a BV is referred to, unless specifically indicated otherwise. In respect of the difference between the concept of company and enterprise, see: Timmerman, *Ondernemingsrecht* 2024, as included in Timmerman 2024, p. 470-471.

attention of all stakeholders[4] of a company, or in some cases even by broader society, causing public unrest and political debate.[5]

At the same time, more than ever, the Dutch stakeholder governance[6] model[7] or "Rijnland" model[8] (as it is also adopted in Germany) is at the center of attention. Central to the Dutch stakeholder governance model is the concept of the corporate interest (*vennootschappelijk belang*).[9] The content of the term corporate interest depends on the circumstance of a case.[10] The concept of the corporate interest consists of two elements as confirmed by the Supreme Court in the *Cancun*-case law.[11] First and foremost the notion that the management board, as supervised by the supervisory board (*raad van commissarissen*),[12]

4 Stakeholders are defined in paragraph 3.2.2.2. In Dutch, scholars use the terms stakeholders, "those involved" (*betrokkenen*) as well as "those who have an interest" (*belanghebbenden*). See: Kemp, *MvO* 2024, par. 1. For the purpose of this research, as it is written in English, the term "stakeholders" shall be used.

5 See: Van der Vos 2023, p. 15, in which she even refers to the Netherlands as "Nederland beloningscommotieland" (translation by the present author: "the Netherlands, country of remuneration commotion"). Van der Vos refers to an extensive amount of daily newspaper articles in which remuneration of top executives is the main topic of discussion. Unsurprisingly, also after publication of her dissertation, these articles continue to see light. See e.g. "Topman Live Nation verdient $139 mln, terwijl bedrijf kritiek krijgt vanwege hoge ticketprijzen," *Het Financieele Dagblad,* 28 April 2023, https://fd.nl/search?q=beloning; "Booking past bonussen aan na druk aandeelhouders", *Het Financieele Dagblad* 27 April 2023, https://fd.nl/tech-en-innovatie/1474544/booking-past-bonussen-aan-na-druk-aandeelhouders; "Beloningsbeleid is aan revisie toe", *Het Financieele Dagblad,* 7 April 2023, https://fd.nl/bedrijfsleven/1472953/beloningsbeleid-is-aan-revisie-toe; "Op zoek naar de ideale stok bij het beloningsbeleid," *Het Financieele Dagblad,* 15 March 2023, https://fd.nl/bedrijfsleven/1470549/op-zoek-naar-de-ideale-stok-bij-het-beloningsbeleid; "Oud-ceo van Beurden verdiende in zijn laatste jaar bij Shell de helft meer,", *Het Financieele Dagblad,* 9 March 2023, https://fd.nl/bedrijfsleven/1470109/oud-ceo-van-beurden-verdiende-in-zijn-laatste-jaar-bij-shell-de-helft-meer; "Bekritiseerd bonusvoorstel AkzoNobel toch niet op agenda aandeelhoudersvergadering," *Het Financieele Dagblad* 9 March 2023, https://fd.nl/bedrijfsleven/1470185/bekritiseerd-bonusvoorstel-akzonobel-toch-niet-op-agenda-aandeelhoudersvergadering; "Hogere beloning voor top van AholdDelhaize," *Het Financieele Dagblad,* 1 March 2023, https://fd.nl/bedrijfsleven/1469244/hogere-beloning-voor-top-van-ahold-delhaize; "Miljoenensalarissen en gestegen bonussen: dit zijn de best verdienende ceo's van de AEX", *De Telegraaf* 30 March 2024, https://www.telegraaf.nl/financieel/607189125/miljoenensalarissen-en-gestegen-bonussen-dit-zijn-de-best-verdienende-ceo-s-van-de-aex.

6 The governance system of a company has been described as the overall of rules in respect of the management of companies, its supervision and the way these rules must be applied or complied with. Alternatively, it is referred to as they system through which a company is lead and monitored. See: Asser/Van Olffen & Rensen *2-IIa* 2019/32; see Garcia Nelen for an overview of the origin of the term "corporate governance: Garcia Nelen 2020/4.1.

7 See paragraph 1.1.4 for a definition of the Dutch stakeholder governance model. Throughout this research, both the term "stakeholder governance model" as well as the term "stakeholder model" shall be used, whilst referring to the same concept.

8 See: Kemp 2019; Goordijk 2009.

9 See paragraph 1.1.5 below and paragraph 3.2 for a definition of the corporate interest.

10 Supreme Court of 4 April 2014, ECLI:NL:HR:2014:797, *NJ* 2014/286, with note of Van Schilfgaarde (*Cancun*). See: Van Olffen 2020/11.1.2.

11 Supreme Court of 4 April 2014, ECLI:NL:HR:2014:797, *NJ* 2014/286, with note of Van Schilfgaarde (*Cancun*).

12 Where this research speaks of "supervisory board", the requirements apply *mutatis mutandis* to the non-executive members of a one tier board within the meaning of article 2:129a (1) DCC.

if established, should, when determining the strategy[13] of a company and its related enterprise (*de aan haar verbonden onderneming*)[14] aim by definition (*in de regel*) for its long-term success (*bestendig succes*).[15] A second element concerns the notion that the management board is held to weigh the interests of all of its stakeholders, as supervised by the supervisory board.[16]

In determining the strategy of the company, the management board has large discretionary authority, in which entrepreneurship and choosing between alternatives is key.[17] The strategy of a company covers regular, annual updates as well as material strategy changes. As part of the strategy determination of a company, it can be deemed necessary that a company accelerates or grows or rebounds its activities. Such could occur organically or by means of acquisitions or other transactions.[18] Such could also occur by means of entering new markets through an initial public offering of shares[19] and admission to trading of any of these shares on any regulated stock exchange or other authorised marketplace for public trading in shares (**IPO**). These developments mark a major corporate event.[20]

Especially in times of a major corporate event, the long-term interests of a company may be interfered by short-term interests of shareholders to achieve optimal economic value in respect of their shareholdings.[21] This creates a field of tension. Short-term shareholder interests may be reflected in the remuneration of the management board by means of remuneration that increases in value when the members of the management board act

13 Dutch law does not contain a definition of "strategy". According to Timmerman, strategy concerns the plan to promote the success of a company on the long-term. Timmerman, *TvOB* 2018/1, as included in Timmerman 2024, p. 332. The strategy of the company should contain the most opportune course of action, the required steps, conditions and timing. See: De Brauw 2017/5.1.8.1., p. 140. See also: Assink 2019 (2); Garcia Nelen 2020/5.1.3; Asser/Van Solinge & Nieuwe Weme *2-IIb* 2019/139; De Brauw, *Ondernemingsrecht* 2024.

14 Although Book 2 DCC does not contain a definition of enterprise, scholars agree that an enterprise is usually an independent organization of people that, through the use of assets which could be financial or could concern for instance know how, aims to foresee in changing societal and economical needs by production or distributions of goods and services. By doing so, an enterprise strives to obtain benefits. See: Timmerman, *MvO* 2023, as included in Timmerman 2024, p. 446. See also: Slagter/Assink 2013, p. 53.

15 See paragraph 3.2.1 for an examination of the concept of long-term success, as well as paragraph 1.5 below.

16 This concept is also referred to as the concept of "stakeholder pluralism" or "pluralistic stakeholderism". Throughout this research, the term "stakeholder pluralism" shall be used. See paragraph 3.2.2 for an examination of this concept, as well as paragraph 1.5 below.

17 De Brauw, *Ondernemingsrecht* 2024, par. 2.1.1., referring to Enterprise Chamber of 29 May 2017, ECLI:NL:GHAMS:2017:1965, *JOR* 2017/261, with note of Bulten (*AkzoNobel*), par. 3.10; Slagter/Assink 2013, par. 51.11.

18 De Brauw, *Ondernemingsrecht* 2024, par. 3.1.; De Brauw 2023/10.2.3 and 10.2.4.

19 Admission to trading of shares of a company without offering those shares to investors, is not regarded as an IPO for the purpose of this research.

20 See paragraph 1.1.3 below for a definition of major corporate events for the purpose of this research.

21 In this respect, it is important to acknowledge that shareholders can often not be seen as one party with one uniform interest. In reality, their interests may be widespread and may not all be focused on the short-term either, such as in case of certain family business, investment funds or institutional investors. See paragraph 5.2.2.1, 5.2.3.1, 5.2.4.1 and 5.2.5.1.

in the interest of such shareholders, effectively "pay for performance", which are called "management incentives" in modern economic organization theories.[22] The supervisory board, if established, has a central role in respect of management incentives if the articles of association of a company determine that it is authorized to award individual remuneration of the management board. The award[23] and trigger[24] of management incentives may contribute to this field of tension, where the corporate interest is most at stake. A field of tension could effectively be fuelled by management incentives, where they induce members of the management board to prevail their own interests or short-term interests of shareholders at the detriment of other stakeholders and the long-term interest of a company.

Lately, in a listed[25] company context, the risks of the award and trigger of management incentives have been acknowledged by the Expert Group on modernising Dutch NV laws (*Expertgroep modernisering NV-recht*), which investigated whether any additional rules of law should be created to prevent this.[26]

In this context, this dissertation aims to answer the following main research question:

> *Whether and to which extent are management incentives awarded to members of the management board of Dutch NVs and BVs compatible with the corporate interest, especially in the context of major corporate events?*

The relevant elements that are required to be investigated to answer the main research question, as well as their context, are illustrated further below.

1.1.2 Management incentives

Top incomes have caused commotion in the media, Dutch politics and amongst society.[27] Today, remuneration of the management board is often not seen as merely the result of

22 See paragraph 1.1.2 below and Chapter 2 for an extensive delineation of the definition of management incentives for the purpose of this research. See also: Vosselman 2014, par. 3.2 and his references to Jensen/Meckling, *Journal of Financial Economics* 1976, p. 305-360; Ross, *American Economic Review* 1973, p. 134-139; Stiglitz, *Review of Economic Studies* 1974, p. 219-255.

23 The term "award" (*toekenning*), could also be interpreted as the grant of management incentives. It means: to provide someone with a conditional or unconditional right to receive a payment or benefit.

24 The effectuation of a change of control arrangement is in practice referred to as a "trigger" of a change of control, which term shall be used throughout this dissertation. It covers the determination of the occurrence of a major corporate event, which is a ground for payment of the management incentive, or results in discretion for the supervisory board to decide on the consequences for such remuneration element.

25 By "listed", this research refers to companies of which the shares have been admitted to trading on any regulated stock exchange or other authorised marketplace for public trading in shares.

26 See the advice and additional advice of the Expert group on Modernization of NV-laws on mitigation of financial incentives for members of the management board of listed companies in mergers and acquisitions of 24 March 2023 and 29 January 2024: https://www.rijksoverheid.nl/ministeries/ministerie-van-justitie-en-veiligheid/organisatie/organogram/commissies-ministerie-van-jenv/expertgroep-modernisering-nv-recht.

27 See e.g.: Jansen & Verburg 2014/1.0.

negotiations between two parties, but has more and more become a topic that has caught the attention of all stakeholders of a company, or in some cases even the community as a whole, causing public debate.[28] In times of globalization of both the Dutch corporate sector as well as the recruitment market for management board members, Anglo-Saxon market practice, advocating that shareholder interests are reflected in the management board's remuneration, increasingly impacts management remuneration in the Netherlands. In this light, it is considered desirable by shareholders that members of the management board enlarge their shareholdings to increase "skin in the game"[29] as well as to enhance behaviour by the management board members to increase the economic value of a share by "pay for performance". From a governance perspective, under Dutch corporate law, shareholders, as the "owners" of a company, ultimately have a "say on pay" in respect of their agents, being the members of the management board.[30]

Usually, remuneration packages of management board members consist of a fixed component and a variable component, the latter being referred to as a "management incentive"[31] insofar as it pays for performance. For the purpose of this research, management incentives are only taken into account insofar as they are awarded in the context of a major corporate event in the lifecycle of a company.[32] Within the variable component, short term incentives (**STI**)[33] and long-term incentives (**LTI**)[34] can be distinguished. As to private equity[35] leveraged buy-out deals, management incentives are often structured through a leveraged investment of the management board by means of a management

28 In this respect, the Hamers-case, pursuant to which the CEO of ING Bank received an increase of his remuneration of 50% in 2018, received specific attention. See: "ING verhoogt beloning topman Hamers met 50%", *Het Financieele Dagblad*, 8 March 2018. See paragraph 6.3.5 and paragraph 7.2.3.2.5 in relation to the disciplinary law case that followed in light of breaches of the Dutch Banking Code (*Code Banken*).

29 See: *Kamerstukken II*, 2013-2014, 33 964, nr. 3. See furthermore: Bebchuk, L.A. & H. Spamann, *Georgetown Law Journal* 2010 and Fahlenbrach, R. & R. Stulz, *Journal of Financial Economics* 2011. See: Asser Van Solinge & Nieuwe Weme *2-IIb*, nr. 199.

30 See paragraph 2.3.3.2 in respect of the "agency theory", which, from an economic perspective, sets forth why shareholders are entitled to this "say on pay".

31 The scope of the management incentives referred to in this research is based on experience in practice, legal literature, available case law and available public information on remuneration of listed companies, such as remuneration policies and reports.

32 Management incentives are not taken into account on a broader basis, as this research purports to specifically examine the field of tension that is present in times of major corporate events in respect of the corporate interest, as further described in paragraph 1.6 and paragraph 3.3.

33 See paragraph 2.3.4.4 for a delineation of the definition of STIs.

34 See paragraph 2.3.4.3.1 for a delineation of the definition of LTIs.

35 Private equity means the structure whereby risk-bearing capital is brought in by private equity funds in an, eventually, non-listed environment. Private equity funds contain capital of the private equity business as a so called "general partner", which often does not exceed 1% of the total capital within a fund, and further capital by so called "limited partners", often institutional investors such as pension funds, and wealthy individuals. The two most important types of private equity investments that can be distinguished are buy-outs and venture capital. In case of venture capital, a private equity fund invests its risk-bearing capital in start-ups or scale up businesses, often in different financing rounds. For a general description, see: Boot a.o., *Ondernemingsrecht* 2020/146; Mol, *MvO* 2010; Kodde, *Ondernemingsrecht* 2005; Van Holthe tot Echten & Kaemingk 2023; Mutsaers, *Ondernemingsrecht* 2020/149.

incentive or management investment plan (**MIP**),[36] which may under circumstances qualify as remuneration.[37] In case of a major corporate event, deal-specific individual variable remuneration arrangements such as retention bonuses,[38] success fees[39] or deal-triggered contractual severance arrangements or leaver clauses[40] may be awarded as well. Also, deal-related performance criteria, change of control, corporate event or exit[41] clauses could be triggered. These contractual provisions may be included in the underlying contractual arrangements to STI and LTI incentive schemes. A trigger of these contractual provisions may result in pay-out of the incentive itself or an additional pay-out. As such, this mechanism could incentivise the members of the management board to act in the (short-term) interest of shareholders to achieve optimal economic value in respect of their shareholdings, taking into account the increase in share value that often takes place prior to or as a result of the major corporate event.

1.1.3 Major corporate events

As part of the strategy determination of a company, it can be deemed necessary that a company accelerates or grows, invoking a major corporate event. For the purpose of this book, I will examine major corporate events within the field of (i) public[42] and private[43] mergers and acquisitions (**M&A**),[44] (ii) private equity leveraged buy-out deals[45] and (iii) an IPO.[46]

36 See paragraph 2.3.4.5.1 for a delineation of the definition of MIPs.
37 See paragraph 2.2.3.
38 See paragraph 2.3.4.3.3 for a delineation of the definition of retention bonuses.
39 See paragraph 2.3.4.4.3for a delineation of the definition of success fees.
40 See paragraph 2.3.4.6 for a delineation of the definition of contractual severance arrangements and leaver clauses.
41 The term "exit" refers to the sale of shareholdings by a private equity house to a third party. An exit could also occur through an IPO, or in tranches. See paragraph 5.3.4.2.1.
42 With the term "public", this research refers to transactions involving companies of which the shares have been admitted to trading on any regulated stock exchange or other authorised marketplace for public trading in shares. Article 1:1 FSA defines a public offer as: an offer in respect of securities (*effecten*) by means of a public announcement as referred to in article 6:217 DCC, or an invitation to such offer, with the purpose of the bidder to acquire these securities. See paragraph 5.2.2 for an outline of these transactions.
43 See paragraph 5.2.3 for an outline of these transactions.
44 See: Asser/Van Solinge & Nieuwe Weme *2-IIb* 2019/604; Van Buuren & Koster 2023. See paragraph 5.2.3.
45 These transactions and the role of management incentives (through MIPs) are described in paragraph 2.2.3 and 5.2.4. In general, see: Van Holthe tot Echten & Kaemingk 2023.
46 See paragraph 5.2.5 for an outline of these transactions.

I recognize that these major corporate events can be distinguished as main events for which management incentives are awarded, if awarded separately.[47] If not awarded separately, management incentives can evolve by a trigger of existing remuneration elements of the management board.

Mergers and acquisitions are referred to in a broad sense (*ruime zin*). Mergers and acquisitions mean the merging of enterprises in a way that economically, they form a new entirety (*geheel*). Acquisitions can take the form of share mergers (*aandelenfusie*), a merger of enterprises (*bedrijfsfusie*) by means of an asset deal (*activa-passiva transactie*) and a legal merger within the meaning of article 2:309 DCC.[48] In a private share deal, transfer of shares of a target company takes place by a purchasing company or newly established holding entity against payment of an amount in cash or against newly issued shares of the purchasing company.[49] The legal entities that existed prior to the share deal remain. A share deal could be followed by a legal merger.[50] In case of an asset deal, a company acquires an enterprise (or a part thereof) of another company, commonly against payment of cash or issuance of shares of the acquiror. Also, two enterprises of the involved companies could be transferred to a newly established company, in exchange for the shares of such company. Each of the assets involved should be transferred in accordance with the prescribed transfer method by law.[51] An asset deal is only taken into account for the purpose of this research insofar as it concerns the full enterprise (*gehele onderneming*), within the meaning of article 2:107a DCC.[52]

47 The scope of major corporate events selected for the purpose of this research differs from the scope of major corporate events as initially included in the so called "afroomregeling", which is defined and set out in paragraph 7.2.5. As this "afroomregeling" no longer applies, the definition of major corporate events as included therein was not chosen for the purpose of this research. The Expert Group on Modernization of NV-laws favoured a flexible definition of major corporate events, should new legislation in the field of management incentives in times of major corporate events be considered. This is set out in paragraph 7.2.7. As set forth in paragraph 7.2.8, I agree to this approach. For the purpose of this research, clear delineation of the term major corporate events is nevertheless necessary, to be able to effectively scope and restrict this research.

48 A legal merger concerns an act of law (*rechtshandeling*) between two or more legal persons (*rechtspersonen*) for which one of these legal persons obtains the assets (*vermogen*) of the other by universal title (*onder algemene titel*), or where a new legal persons, which is incorporated (*opgericht*) by those two legal persons, obtains their assets by universal title.

49 Asser/Van Solinge & Nieuwe Weme *2-IIb* 2019/605. Van Solinge and Nieuwe Weme state that in case of a merger of equals, often, a new holding company is established which holds the shares of two merging entities.

50 Asser/Van Solinge & Nieuwe Weme *2-IIb* 2019/605, 677.

51 Asser/Van Solinge & Nieuwe Weme *2-IIb* 2019/606.

52 Asser/Van Solinge & Nieuwe Weme *2-IIb* 2019/606, 323.

One can debate over the scope of the major corporate events selected. Including a factual change of control[53] only would not mirror actual practice, as commonly, change of control definitions not necessarily include an IPO as a way of exit. An IPO does not necessarily result in a change of control, as listings usually occur in different tranches. In times of an IPO, where development of the share price is determinative for the success of the company, alignment of interests between the management board and shareholders through management incentives is seen as key.[54] It therefore makes sense to include IPO's as major corporate events as well. At the same time, often, an IPO is not likely to result in the same field of tension between short- and long-term interests, and share- and stakeholder interests, as in times of a general change of control, where it is merely a way to access capital markets. This makes that throughout this research, findings may not always be applicable to an IPO, which shall be indicated where relevant.

Moreover, including a change of control would only factor in management incentives on a target company level, where in reality, management incentives could also be awarded to the managing board of purchasing or sell-side companies.[55]

I acknowledge that one could also think of a broader definition of major corporate events, which also includes other events, such as decisions within the meaning of article 2:107a (2) DCC, the incorporation of a company, a major reorganization, large financings, the issuance of shares,[56] technological innovation or bankruptcy. Commonly, these events are referred to as "major corporate events". However, since generally, these events do not result in the award of management incentives nor trigger a change of control as part of contractual arrangements in light of management incentives, these events are left out of scope of the term "major corporate events" for the purpose of this research.[57]

Mobilizing capital outside public markets gained popularity over the past decades, with an annual growth twice as large as on public markets.[58] Within a private market context, particularly in respect of management incentives, private equity leveraged buy-out deals are addressed separately throughout this research. Private equity transactions contain

53 Which is often defined as follows: "control" means, in relation to any person, that it, whether directly or indirectly, de jure or de facto (i) holds more than 50% (fifty percent) of the shares in the capital of a legal entity, or (ii) whether by the ownership of share capital, the possession of voting rights, contract or otherwise, has the power to appoint or remove the majority of the members of the management board, supervisory board or other governing body of such legal entity, or (iii) otherwise has the power to control the management and policies of such legal entity. See paragraph 5.3.4.2.

54 As set forth in paragraph 5.2.5.

55 Such management incentives could e.g. consist of STI awards being linked to deal-related performance criteria, or that separate transaction bonuses or retention bonuses are awarded. See paragraph 2.3.4.

56 Except for the situation where an issuance of shares results in a change of control insofar as it results in the situation that an existing or new shareholder acquires a controlling interest.

57 Nevertheless, companies could link part of the general variable remuneration to these events, by linking performance targets to the success of such event. Such falls outside the scope of this study.

58 Boot a.o., *Ondernemingsrecht* 2020/146, see also: McKinsey, 'Private markets come of age', McKinsey Global Private Markets Review 2019, February 2019.

specific forms of management incentives, such as MIPs. Also, consequences for the long-term interest of a company may be more far-reaching, as acknowledged in case law.[59]

1.1.4 The Dutch stakeholder governance model

Timmerman states that corporate law in particular, more than general civil law, is fuelled by economic life.[60] Corporate law is characterized by both a facilitating as well as a regulating[61] nature.[62] The facilitating nature of Dutch company law is reflected in its aim to contribute to a sound and competitive climate for settlement of business in the Netherlands.[63] This is why Dutch entrepreneurs enjoy the freedom to set up the internal governance of a company, within the boundaries of the law[64] the articles of association,[65] which was confirmed in the *ASMI*-case.[66] This allows a company to adapt a governance system that fits its' circumstances and needs, including the possibility to take anti-takeover measures. The freedom to set up the internal governance of a company implies that companies are free to structure the remuneration of the management board, as confirmed in the *Ahold*- and *Getronics*-cases[67] including the award of management incentives, within such boundaries. The legislator reaffirmed in parliamentary history that with respect to remuneration,

59 Court of Appeal of Amsterdam (Enterprise Chamber), 27 May 2010, ECLI:NL:GHAMS:2010:BM5928, *JOR* 2010/189 (*PCM*), par. 3.13. For private equity leveraged buy-out deals, this requirement was further established in the *Estro*-case. See: Enterprise Chamber of 10 December 2019, ECLI:NL:GHAMS:2019:4359, *JOR* 2020/144 (*Estro*); Enterprise Chamber of 17 May 2023, ECLI:NL:GHAMS:2023:1119, *JOR* 2023/207 (*Estro*).

60 Timmerman, *TVVS* 1992, as included in Timmerman 2024, p. 1-2.

61 This regulating nature is sometimes also referred to as a restrictive nature. See e.g.: Kemp, *MvO* 2024.

62 As put by Eisenberg, who stated that "corporate law serves both to facilitate and to regulate the conduct of the corporate enterprise." See: Eisenberg, *Columbia Law Review* 99, 1999. See: Timmerman, *TVVS* 1995, as included in Timmerman 2024, p. 49; Timmerman 2024, p. 115.

63 See: Timmerman, *TVVS* 1995, as included in Timmerman 2024, p. 49. Timmerman states that this phenomenon is found in the enabling character of Dutch corporate law, which means that the legislator aims to provide optimal facilities to those who use it. In other words, Timmerman puts: it means that corporate law should be flexible. See also: De Brauw 2017/5.1.3., p. 91.

64 See e.g. article 2:107a DCC. Furthermore, it follows from article 2:25 DCC that it is only allowed to deviate from the provisions of the DCC, insofar as this deviation possibility follows explicitly from the DCC itself.

65 See *Kamerstukken II* 1973/74, 11 005, 10, p.4, 9 and 11. The wording "according to the articles of association" implies that limitations may only be included in the articles of association itself and may not be included in eg. board regulations. It covers all acts that fall within the scope of the objects clause (*doelomschrijving*) within the meaning of article 2:7 DCC of the articles of association as well as any secondary acts (*secundaire handelingen*). See Asser/Van Solinge & Nieuwe Weme *2-IIb* 2019/135 for an overview of the relevant duties of a management board. See also: Dortmond, Van der Heijden 2013/231, Slagter/Assink, Compendium 2013, p. 902 e.v. Asser/Maeijer & Kroeze *2-I** 2015/189 and Asser/Van Solinge & Nieuwe Weme *2-IIb* 2019/110, 137; De Brauw 2017/5.1.3., p. 91.

66 Supreme Court of 9 July 2010, *JOR* 2010/228, with note of Van Ginneken (*ASMI*).

67 See: Court of Appeal of Amsterdam (Enterprise Chamber) of 6 January 2005, *JOR* 2005/6 with note of Josephus Jitta (*Ahold*); Court of Appeal of Amsterdam (Enterprise Chamber) of 2 September 2004, *ARO* 2004/107 (*Getronics*).

the amount, nature and composition of individual remuneration in accordance with the remuneration policy, concern a matter of the company and its related enterprise.[68]

The term "stakeholder governance model" is used by economists as well as in a legal context. The definition of the stakeholder governance model is not set in stone.[69] Developments of Dutch corporate law generally reflect economic and societal developments.[70] The law depends on its context.[71] The term "stakeholder model" was first mentioned in the United States by scholars at the Stanford Research Institute in 1963.[72] Freeman described the theory in his book *Strategic Management: A Stakeholder Approach*.[73] Scholars describe the Dutch stakeholder model as the perception of a company and its related businesses as a community of interests (*belangengemeenschap*) in which factors such as capital and labour cooperate as much as possible in a certain harmony.[74] In its essence, the common perception of the stakeholder governance model is that the management board of a company should take into account the interests of all stakeholders of a company in its decision-making process.[75] This perception is widespread throughout continental Europe. The elaboration and rigour of this idea vary throughout continental Europe, as well as in the Netherlands, among legal scholars.[76]

Although the concept of the stakeholder governance model is not explicitly defined in the Dutch Civil Code (*Burgerlijk Wetboek* or **DCC**), the legislator acknowledged in multiple

68 *Kamerstukken II*, 2008-2009, 31 877, nr. 3, p. 2.

69 Freeman 2004, p. 44. This research takes a positive law approach: it examines the law as it currently applies and does not purport to provide for a historic overview. Where relevant for the understanding and use of certain definitions that currently apply, historic developments will be cited, albeit it on a high-level basis, without the purpose of being all-encompassing, as inevitably, the scope of this research needs to be limited in some respects. It is not the intention to provide for an exhaustive overview of all developments affecting NVs or BVs over time. A comprehensive analysis of these developments falls outside the scope of this study. For an overview of developments and the views of scholars, see: Timmerman 2024, p. 339 – 381; Overkleeft 2017. See also: Van Solinge 2020, p. 12; Kroeze, *RMThemis* 2019, p. 177-178; Timmerman, *MvO* 2020.

70 See: Supreme Court of 4 February 2005, *JOR* 2005/58 (*Landis*). On the role of the economic reality in Dutch corporate law, see: Supreme Court of 22 September 2023, *NJ* 2024/22, with note of. De Kluiver; *JOR* 2024/1, with note of Lokin (*Funda*), par. 3.4; Supreme Court of 6 June 2003, *NJ* 2003/486, with note of Maeijer (*Scheipar*), par. 3.5.2; Katan 2024/18.2.

71 Timmerman, *Ondernemingsrecht* 2009, as included in Timmerman 2024, p. 173.

72 Sturdivant 1979, p. 53-59.

73 Freeman, 1984.

74 See: Asser/Van Solinge & Nieuwe Weme *2-IIb* 2019/127 and Boschma a.o. 2018/2.2.6.1.

75 See: Timmerman, *Ondernemingsrecht* 2009(2); Kemp 2015/3.6.; Schoenmaker a.o., *ELR* 2023/1, p. 30; Kemp, *MvO* 2024.

76 See: Kemp, *MvO* 2022, p. 27. In his inaugural lecture, Kemp assumes that it is the purpose of a company to create social welfare for those involved in it, and that thus, the stakeholder model can be defined as the assumption that a company, and therewith, its management, should focus on the interests of all stakeholders of a company to create such social welfare, thus creating a sense of stakeholder pluralism. Kemp states that the attractiveness of the stakeholder model can be found in the idea that a company exists in order to promote social welfare and the interests of all of its stakeholders, and that the promotion of these interests is seen as righteous. See: Kemp, *MvO* 2022.