

ENACTMENT OF THE TEMPORARY TRANSPARENCY TURBOLIQUIDATION ACT

As of November 15, 2023, the Temporary Transparency Turbolidation Act will come into effect. The Temporary Transparency Turbolidation Act will expire two years after its effective date, however it includes the possibility of extending if is the intention to introduce measures from this act permanently

TEMPORARY TRANSPARENCY TURBOLIQUIDATION ACT

The following measures are introduced: (i) the (former) management board will be obliged to disclose a number of financial documents and inform any creditors of this in writing, (ii) the Netherlands Public Prosecution Service will be enabled to implement a director disqualification on the (former) management board and to include the dissolution without benefits in the assessment of recidivism, and (iii) creditors will be given a right to inspect the retained records of the dissolved legal entity if the management board has not fulfilled the accountability obligation.

THE CURRENT REGULATION

The current regulation that legal persons without assets cease to exist at the time of dissolution was introduced in 1994 in article 2:19 paragraph 4 of the Dutch Civil Code, together with the introduction of the ex officio power to dissolve of Dutch Chamber of Commerce in article 2:19a of the Dutch Civil Code. The background of both regulations is that it was considered desirable that empty, inactive legal entities could be terminated in a simple manner, on the one hand to prevent from being abused, on the other hand to relieve the registers in which these legal entities were registered. The fact that a legal entity has been registered with the Dutch Chamber of Commerce for several years may be attractive to a fraudster, as it may give the appearance of being a bona fide company. There is a risk that these legal entities will be acquired to act as a cover for malpractices. Article 2:19 paragraph 4 of the Dutch Civil Code aims to prevent such abuse.

However, a legal entity can be quickly and easily dissolved (by realization of the assets and therewith paying off the debts as much as possible) and thus can be easily removed from the sight of creditors without providing further information to creditors. After the so called turbolidation, it is difficult for creditors, both legally and practically, to contact the legal entity because it no longer exists. A creditor can only request the re-opening of the liquidation by proving that the creditor has sufficient interest

in the re-opening and that there is an unsettled asset or that a liquidation balance has been paid to an entitled party that can be reclaimed.

NEW REGULATION: DISCLOSURE OF FINANCIAL DOCUMENTS: ARTICLE 2:19B OF THE DUTCH CIVIL CODE

A new article 2:19b of the Dutch Civil Code is added, which reads as follows:

If the legal entity has been dissolved in accordance with article 19 paragraph 1 under a and simultaneously ceased to exist as referred to in article 19 paragraph 4, the board shall, within fourteen days after the dissolution, file with the trade register of the Chamber of Commerce:

- a. a balance sheet and statement of assets and expenses relating to the financial year in which the legal entity is dissolved (and a balance sheet and statement of assets and expenses relating to the financial year in which the legal entity is dissolved);*
- b. a written statement of reasons for the absence of assets at the time of dissolution and, if applicable, the non-payment of creditors;*
- c. a final distribution list, if, prior to the dissolution of the legal entity, creditors have been satisfied as part of the liquidation of the legal entity's assets. The list includes the total preferential creditors, claims secured by pledge, mortgage or lien, concurrent claims, as well as distributions received thereon and what remains of the assets after satisfaction of the creditors; and*
- d. the annual accounts for the financial years preceding the financial year in which the legal entity is dissolved, if there is an obligation pursuant to Book 2 DCC that has not yet been*

fulfilled, including, where applicable, the auditor's report as referred to in article 2:393, paragraph 5, DCC.¹

Immediately after filing the aforementioned documents, the management board must inform the creditors regarding the filing (article 2:19b, paragraph 2 of the Dutch Civil Code). The aforementioned information enables creditors to take action against the turboliquidation in case of detriment. Creditors can then request reopening of the liquidation, hold the management board liable or file for bankruptcy. Failure to comply with accountability constitutes an economic crime. The former director can get a fine of maximum €22,500 (or 6 months' imprisonment), or a director disqualification (maximum 5 years).

NEW REGULATION: EXPANSION OF CIVIL-LAW DIRECTOR DISQUALIFICATION

The civil-law director disqualification is extended by article 2:19c of the Dutch Civil Code. At the request of the Netherlands Public Prosecution Service, the court may impose a director disqualification on former directors if they:

- failed to comply with the accountability obligation of article 2:19b of the Dutch Civil Code; or
- deliberately caused significant harm to one or more creditors towards the dissolution; or
- have been involved repeatedly (recidivism) in a dissolution without liquidation leaving debts behind or in a bankruptcy and are personally blamed for this.

The second paragraph of article 2:19c of the Dutch Civil Code contains a link to the articles 106b, 106c and 106d of the Bankruptcy Act, which regulate the consequences of a director disqualification. Some important consequences of the director disqualification are:

- the director on whom a director disqualification has been imposed cannot be appointed as a director or supervisory director of a legal entity during the period for which the director disqualification has been imposed (maximum 5 years);

- an appointment as a director or supervisory director contrary to an irrevocably imposed director disqualification is null and void; and
- in addition, in principle, the director disqualification constitutes an impediment in performing his duties as a director or supervisory director at all other legal entities.

NEW REGULATION: RIGHT TO INSPECT RETAINED ADMINISTRATION OF DISSOLVED LEGAL ENTITY

If the board has not or not fully complied with the accountability obligation under article 2:19b paragraph 1 of the Dutch Civil Code, creditors are granted a right to inspect the retained administration of the legal entity, which may be exercised with the authorization of the subdistrict court judge (article 2:24 paragraph 4 of the Dutch Civil Code). The right of inspection relates to the books, records and data carriers of the dissolved legal entity. In this way, despite the fact that the management board has not fulfilled its accountability obligation, creditors can still verify whether the legal entity has been terminated correctly and whether its assets have been settled correctly.

CONCLUSION

The Temporary Transparency Act introduces three measures. On the one hand, these measures are important for creditors in a turboliquidation, among other things because their legal protection is increased. On the other hand, it is important for directors of legal entities to be aware of the expansion of the civil-law director disqualification and the addition of art. 2:19b BW.



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¹ Please note this is an unofficial translation of article 2:19b of the Dutch Civil Code in the English language. The original text of article 2:19b of the Dutch Civil Code is in the Dutch language.