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Summary

GOVERNMENT UNDERTAKING
A study on the influence of government bodies in Dutch public limited companies

Inspired by the ideal of privatization, the popularity of government bodies exercising influence in undertakings via Dutch company law instruments was waning. Aversion to government ownership led to the selling of shares owned by government bodies and the abolition of provisions that specifically facilitated government influence within private legal law bodies. However, the view on the role of government in private law bodies with a public interest is changing. This reflects upon the use by government bodies of Dutch company law to look after public interests. The use of Dutch company law instruments is no longer frowned upon and thus deservedly receives more attention as a viable and desirable option for government bodies to uphold public interests. However, Dutch company law could benefit from a study on how it can accommodate government influence to better ensure public interests.

The main question of this study is whether or not Dutch company law should have a specific legal form for government undertakings. I do think that such a legal form could be beneficial for reasons that will be set out hereafter. A subsequent question is how such a specific legal form for government undertakings should be organized. Recommendations are made on the organization of such a specific legal form for government undertakings to better suit the pursuit of the public interest attached to government undertakings.

An explanation of what is meant with the concept of 'government undertaking' (*overheidsonderneming*) is needed. This undertaking is part of the private sector because of its legal status as a private law body. Since an undertaking in a private law body has a legal personality separate from government bodies, government control is neither automatic nor complete. The government (or a government body) may want a certain level of influence in such an undertaking because they are politically responsible for the public interest attached

to the undertaking in question.[1] The government or government body for example may wish to be able to influence the actions of these undertakings to ensure the existing public interests. Some of these private law bodies that house undertakings with a public interest have a hybrid character:[2] They are not on the same footing as private law bodies without a public interest because government bodies have a dominant level of influence in these entities.[3] A dominant level of influence the level of influence necessary to be able to stipulate the outcome of decision-making in and by the undertaking when the public interest is at stake. In general this does not require complete control, but the ability to determine the outcome of decision-making in and by the private law body that operates an undertaking with a public interest. The influence has to be such that it allows the government bodies concerned to shape the policy of the undertaking.

This study focuses on the group of undertakings with a public interest that have the legal form of a Dutch public limited company (*naamloze vennootschap*) in which government bodies[4] have a continuous and permanent dominant

1 Government bodies are politically responsible for a particular private law body when the activities of its undertaking are deemed to be of public interest. Although in common parlance and even in general the terms 'general interest' and 'public interest' are used interchangeably, a more prudent use of these terms would seem desirable to me. The usage of the concepts 'general interest' as *genus* and 'public interest' as *species* complemented by a second *species* category namely 'social interest', could both signify and clarify the level of involvement of government bodies and/or private actors in accomplishing these interests. A division of collective interests according to these proposed categories would make the concepts more distinguishing than they are at the moment. The qualification 'general interest' indicates the importance of the relevant interest as a common or collective interest to society (as a whole or a specific group of people in society). Interests that are of importance to society as a whole (or a specific group of people in society) but for which (self-appointed) private actors hold prime responsibility are 'social interests'. The concept of a 'public interest' should be reserved for the interests for which the government has political responsibility. Classical government tasks are of public interest, as are the interests that the outcome of political decision-making indicates as interests for whose accomplishment the government or government bodies hold prime responsibility.

2 Not all private law bodies with a public interest have a hybrid character. In this research only entities in which government bodies have a dominant say are perceived as hybrid entities bordering both private and public law. Not the existence of a public interest but the level of influence by government bodies therefore determines the character of the entity concerned.

3 Private law bodies in which government bodies have a dominant influence may be regarded as semi-private entities following (European) case law on free movement rules in which actions of private law bodies that are perceived as being connected to government bodies can be forbidden by the free movement rules.

4 Although I will use the term government bodies, it may well be only one government body establishing a continuous dominant influence to guarantee the public interests concerned. Also, when referring to government undertakings in general, I mention public interest or public interests interchangeably. Participation of government bodies may either serve one

influence (partly) due to company law instruments to guarantee public interests.[5] These entities are called 'government undertakings'. 'Government undertakings' can be characterized as semi-private entities because of the dominant say of government bodies in these entities.[6] The dominant influence, however, is not the sole constituent element for qualifying an undertaking as a government undertaking as described in Chapter 1 but a very distinctive element nevertheless together with another cumulative constituent condition – apart from the requirement of being an undertaking in the sense that economic activities are being pursued – namely the existence of a certain public interest attached to the (activities of the) undertaking. The presence of a certain public interest is the reason for the link between the government undertaking and the government bodies concerned.

An undertaking can be qualified as a government undertaking when government bodies have such an influence that they can exert a decisive influence on (strategic) decisions in and by the undertaking that affect the public interest attached to the undertaking. Government bodies have such an influence when they make up the majority of one of the company organs but other ways of influence are possible. What is crucial is that the 'regular' autonomy of the undertaking in question is limited because of the dominant influence of the government body on (strategic) decisions that to the basic statutory arrangement of a Dutch public limited company would belong to the autonomy of the undertaking itself. However, sheer ownership of shares does not turn an undertaking into a government undertaking when, for example, the government bodies concerned only hold these shares to receive dividends. The dominant influence that government bodies exert, must exist to uphold the public interest(s) concerned.

I am of the opinion that government undertakings hold a special position in comparison to other undertakings because of the dominant government influence and the existence of a public interest. Their hybrid character is reflected in the rules applicable to the government bodies participating in these entities as described in Chapters 2 and 3. When a government body establishes a private law body housing an undertaking with a public interest or participates in such a private law body, on the basis of Article 3:14 Dutch Civil Code (*BW*),

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public interest in particular or several public interests simultaneously. This differs per government undertaking *in concreto*.

5 The continuity of the dominant government influence distinguishes 'permanent' government undertakings from 'temporary' government undertakings. Point of departure for this distinction is the idea that adapting the organization of the legal form is only appropriate for government undertakings in which government bodies wish to have a dominant influence to ensure public interests *in the long term*.

6 They are rather semi-private than semi-public because of their legal form which is a private law body.

its actions are subject to both private law norms and public law norms. The applicability of public norms as the general principles of good governance (*algemene beginselen van behoorlijk bestuur*) for semi-private entities without public authority is not generally accepted. The applicability, however, would not be unbecoming for government undertakings since it suits the existence of a public interest. I feel that it is the special hybrid character of a government undertaking that – even in the absence of the undertaking holding (part of) public authority (*openbaar gezag*) – warrants the applicability of public norms as the general principles of good governance to the (actions of a) government undertaking. The applicability of some of the public norms could also take away some of the concerns on the use of private law by government bodies as it provides for a continuous additional hybrid framework of norms that incorporate the relevant public norms as well as the relevant private norms.

Dutch constitutional and administrative law allows government bodies to make use of private law and to participate in private law bodies to further public interests, albeit under certain conditions as discussed in Chapter 2. However, other rules are also relevant when determining what involvement of government bodies in government undertakings is allowed. As examined in Chapter 5, government involvement may also be restricted by the rules of free movement if they cannot be justified. There is a field of tension between the wish of governments to be involved in such entities and the rules relating to the functioning of the internal market. EU law leaves it to the discretion of the Member States to declare an interest to be of public interest. However, the concept of an undertaking in EU law is autonomous. If an entity with a public interest engages in economic activities, EU (competition) law marks this entity as an undertaking and thus government involvement in such an entity is also confined by the borders set out by the state aid rules. The use of statutory competences existing in the basic statutory arrangement of a legal form by government bodies that for example follow from the ownership of a majority of shares is allowed. But a departure from the basic statutory arrangement of a legal form in the general statutory framework of Dutch company law to create special rights and means of influence for government bodies within government undertakings is scarcely allowed. Instead of creating special competences for government bodies, a move in the right direction could be to give the public interest a more prominent place within the framework of the legal body of the public limited company. In Chapters 2, 4 and 8, I argue that the objective of public limited liability companies should be formulated in such a way to incorporate the public interest (better) and afford it a more prominent place amongst the existing interests in the company. This would make the whole company aimed more towards the protection of public interests and therefore make the whole governance framework more effective. Such a provision was lacking in the government undertakings examined in Chapter 6. Drawing inspiration from company law rules in Germany, Belgium,

France and the UK as discussed in Chapter 7, I make recommendations in Chapter 8 to add a specific legal form for government undertakings to the available legal forms set out in Dutch company law. The reasons for introducing a specific legal form for government undertakings can be summarized in the following three words: recognizability, legitimacy and effectivity.

Public limited companies can contribute to public interests, but could do so even more if their general framework as laid down by Dutch company law were directed more towards protecting public interests. The legal relationships between the actors in a government undertaking are primarily decided by the interest of the company. The insertion of the relevant public interests in the aim of the company as stated in the articles of association of a government undertaking would make government influence more *effective*, because public interests would weigh heavier when balancing out conflicting interests. The insertion would also *legitimize* the priority given to the public interest over other existing interests in the company. A specific legal form that prioritizes public interests in an undertaking would also emphasize that public law norms can be applicable because of the special character, objective of the undertaking and the involvement of government bodies in upholding public interests. Furthermore, the special character of the government undertaking concerned would be clearly discernible by looking at the articles of association and therefore knowable to interested parties. I do think that the special position the government holds in the government undertaking and the hybrid character should be even more easily *recognizable* for all. The legal form should be named the public limited company with public interest (*publieke naamloze vennootschap*).