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1. LESSONS FROM THE NETHERLANDS ON STAKEHOLDER GOVERNANCE

In European Company law 2022, issue 3, I wrote an editorial on the developments in stakeholder governance and lessons from the Netherlands.[1] Amongst others, I noted (1) the 2014 Dutch Supreme Court judgment[2] in which a central position was given to the 'continued success of the enterprise' as part of the interests that the directors should serve and (2) the broadly formulated preamble of the Dutch Corporate Governance Code 2016,[3] which in essence dictates that directors should weigh the interests of the various stakeholders of the company (i.e., not just shareholders). As a result, it could be argued that the Netherlands is squarely in the 'pluralistic stakeholderism'-corner.[4]

Since publishing that editorial, there have been a number of developments that reconfirm that Dutch company law takes a progressive stakeholder-approach to corporate governance. Below, I set out three of these developments, being (1) the restatement of the Dutch Corporate Governance Code in 2022, (2) the 2023 Dutch Supreme Court judgment referred to as 'Cordial III', and (3) the 2023 Enterprise Chamber judgment referred to as 'Estro'.

1.1. Dutch Corporate Governance Code 2022

In December 2022, the restated Dutch Corporate Governance Code was published by the Corporate Governance Code Monitoring Committee. As for the fundamental principles of recognizing and considering the interests of stakeholders, the restatement holds no fundamental change. Both under the 2016 and 2022 version, the Code states that its starting point is that the company is a long-term collaboration between stakeholders, with stakeholders being groups or individuals that directly or indirectly influence the company's objectives, explicitly referencing employees, shareholders and other lenders, suppliers and customers.[5] The directors have the duty to create long-term value for the company and weigh the relevant stakeholder interests. There are also several new provisions that further build on this principle in the restated Code, such as that an ESG-strategy needs to be part of the company's overall strategy, shareholders should 'recognize' the importance of long-term value creation and the company should formulate a policy on how to establish a dialogue with stakeholders.[6] As a result, the general principles on the responsibility of directors towards the broader stakeholders have been further strengthened in the restated Code.

1.2. Cordial III

In 2014, the Supreme Court set out that the company's interest must be determined in view of all circumstances. If the company engages in business activities, the company's interest is in particular determined by promoting the continued success of those business activities. In addition, the directors need to act diligently towards the interests of all those involved in the company and its connected enterprise. In its recent Cordial III-judgment,[7] the Supreme Court reconfirmed and expanded this rule. The case revolved around a 15% minority shareholder that was heavily diluted as a result of an issuance of shares to the 85% majority shareholder. The sole director, a professional service provider, resolved to issue the shares, but failed to review the necessity of the share issuance, which was proposed by the majority shareholder, and also failed to verify the specifics of the share issuance, such as the issuance price, with the help of an independent expert. The Joint Court of Justice of Aruba, Curaçao, Sint Maarten, and of Bonaire, Sint Eustatius and Saba[8] concluded that mismanagement had taken place, but refused to nullify the board resolution to issue the shares because this would not necessarily serve the interest of the parties involved. In

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1 B. Kemp, *Editorial ECL 2022/3: Developments in Stakeholder Governance: Lessons from the Netherlands*, ECL 2022/3.
2 Supreme Court 4 Apr. 2014, *NJ* 2014/286 (*Cancun*).
3 Dutch Corporate Governance Code 2016, Preamble.
4 *See* for this term: L. A. Bebchuk & R. Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 Cornell L. Rev. 9 et seq. (2020), doi: 10.2139/ssrn.3544978.
5 Dutch Corporate Governance Code 2022, Preamble.
6 Dutch Corporate Governance Code 2022, Best Practice 1.1.1., Best Practice 4.2.2., Best Practice 1.1.5.
7 Supreme Court 10 Feb. 2023, *NJ* 2023/166 (*Cordial III*).
8 Which was the competent court since the company was incorporated under the laws of Curaçao. Cases concerning such companies are generally also considered relevant for other companies incorporated under laws of the Kingdom of the Netherlands, including the laws of the Netherlands, based on the so-called *concordantie principe*. This principle provides an instruction to the governments of the countries that are part of the Kingdom of the Netherlands to regulate certain of their laws, including, amongst others, private law, in a corresponding manner (Charter for the Kingdom of the Netherlands, Art. 39).

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cassation, the Supreme Court amongst others ruled that the company has an independent interest that statutory norms or norms following from the reasonableness and fairness, including procedural norms that are relevant for proper decision making, are correctly observed. Such an autonomous interest of the company fits well with the view that the company's interest is an independent interest, related to but separate from the interests of the individual stakeholders. In addition, although the judgment can be interpreted in various ways, the Supreme Court seemed to rule that the interest of the minority shareholder is part of the company's interest and, therefore, there is a duty on the directors to duly consider the interests of the minority shareholder as part of the company's interest itself. This consideration seems to imply that – as was already hinted at in previous judgments[9] – the Supreme Court views the company's interest as a dual concept:

1. if the company engages in business activities, the company's interest is in particular determined by promoting the continued success of those business activities; and
2. directors should, when serving the company's interest, act diligently towards the interests of all those involved with the company and its business activities.

This view is not without criticism. Some authors argue that a duty to act diligently cannot be derived from the obligation to serve the company's interest, but should be derived from other legal norms that are more focused on safeguarding the interests of particular parties involved, such as the duty to act reasonable and fair, the prohibition on abuse of power and general tort law.[10] However, keeping aside this criticism, the company's interest as a dual concept does – again – further underscore the view that the company's interest is an autonomous interest that should be considered separately from the interests of the individual stakeholders in the company.

1.3. Estro

Lastly, on 22 May 2023 the Enterprise Chamber of the Amsterdam Court of Appeals published its judgment in the case concerning childcare company Estro.[11] This company was acquired by private equity firm Providence in 2010. As part of the takeover, the company took on debt obligations amounting to EUR 450 million. In 2014, Estro ultimately went bankrupt, and it was argued that taking on these debt obligations was at least part of the cause for the bankruptcy. In inquiry proceedings initiated by the bankruptcy trustee to establish mismanagement at Estro, the Enterprise Chamber amongst others ruled on what interests were part of Estro's interest, stating that:

> *The peculiarity of this case is that* [Estro] *was the largest childcare company in the Netherlands, a sector that was highly dependent on public funds through childcare allowance.*
>
> *The company's revenue model was therefore largely based on the money provided by the government to guarantee an adequate supply of high-quality and affordable childcare. This circumstance means that the company's interest in the continued success of its business after the takeover was also influenced by the public interest in the continuity and accessibility of high-quality and affordable childcare in the childcare locations operated by* [Estro].[12]

This creates far-reaching obligations for directors that are active in semi-public sectors, arguably including companies active in healthcare and education,[13] to consider public interests as part of the company's interest. It, in any case, also demonstrates that in the Netherlands, the company interest can encompass a variety of relevant interests next to the interests of 'traditional' (Dutch) stakeholder, such as shareholders and employees. In addition, the Enterprise Chambers builds on the aforementioned Supreme Court case law and the autonomous role of the directors compared to the interests of the shareholders. As part of this, it amongst others rules:

> *If, as in this case, the sole shareholder intends to sell his shares, the company's interest will generally be determined not so much by the amount of the takeover price, but mainly by the continued success of the company's affiliated company after the takeover. If the buyer wishes to finance the purchase through an LBO, that success may depend to a large extent on the impact of the LBO on the target company.*[14]

Based on the above, it can be concluded that while the Netherlands was already firmly in the 'pluralistic stakeholderism'-corner, this trend seems to be developing further. It will be interesting to see whether the public interest considerations of the Enterprise Chamber will expand beyond sectors that are largely dependent on the government. For instance, it does not feel as a major stretch to conclude at this stage that companies with a significant impact on local environment also have a duty – as part of the company's interest – to consider that local environment, potentially also beyond what is (strictly) required under public law.

9 Supreme Court 18 Apr. 2003, *NJ* 2003/286 (*RNA*); Supreme Court 9 Jul. 2010, *NJ* 2010/544 (*ASMI*). *See also* L. Timmerman, *De rol van vennootschappelijk belang en strategie bij het beschermen van beursvennootschappen,* TvOB 2018, afl. 1, at 15.

10 *See* the case annotations of De Kluiver (*NJ* 2023/166) and Kemp *(JOR* 2023/119).

11 Amsterdam Court of Appeals (Enterprise Chamber), 17 May 2023, ECLI:NL:GHAMS:2023:1119.

12 Amsterdam Court of Appeals (Enterprise Chamber), *supra* n. 11, para. 3.13.3. The translations of the court's judgment are informal translations by the author.

13 Specifically for universities, the Enterprise Chamber had in 2019 already ruled that public interests are a relevant consideration when determining how corporate bodies and their members should exercise their control rights within the legal entity Amsterdam Court of Appeals 21 Jul. 2020, *JOR* 2020/281 (Stichting Katholieke Universiteit).

14 Amsterdam Court of Appeals (Enterprise Chamber), *supra* n. 11, para. 3.13.1.