

Trend report

Developments in the recognition of stakeholder's interests in Dutch corporate governance

The recent Estro and Funda cases highlighted the broad scope of stakeholder interests and clarified that these may also include public interests and the interests of affiliated entities and those involved in their organisation. These judgments fit in with a wider global trend towards an increasing emphasis on broader stakeholder interests within corporate governance. How will these developments shape company management in the Netherlands, and what can we expect for the future?

Recent developments in Dutch case law

The Netherlands has traditionally applied stakeholder-oriented corporate governance. Directors have a duty to act solely in the best interests of the company, which in principle is determined by the continued success of the company with a view to sustainable long-term value creation. It is generally accepted that, in discharging this duty, directors must take into account the reasonable interests of all the company's stakeholders, including its shareholders, employees and creditors. There will generally not be one prevailing stakeholder interest and so directors will often have discretion in balancing those interests. This results in a broad and sometimes unclear scope of directors' fiduciary duties under Dutch law.

Two recent landmark judgments have further clarified and highlighted the broad scope of stakeholder interests that directors of Dutch companies must take into account.

Estro: Public interests as part of the board's fiduciary duties

Estro was the largest childcare company in the Netherlands. In 2010, Estro was sold by its sole shareholder in a leveraged buyout, leaving much of the debt associated with the purchase price on Estro's balance sheet. In 2014, Estro was declared bankrupt. In inquiry proceedings before the Enterprise Chamber of the Amsterdam Court of Appeal, initiated by Estro's bankruptcy trustee, the question was

raised as to whether Estro's directors had acted in Estro's best interests during the negotiation and approval of the leveraged buyout.

In answering this question, the Enterprise Chamber held, *inter alia*, that Estro's directors had to take into account, as part of their fiduciary duties, the public interest in the continuity and accessibility of high-quality and affordable childcare. The basis for this ruling was that Estro operated in a sector that relied heavily on government funding through the childcare allowance. The Estro judgment will be particularly relevant to companies operating in sectors that are (partly) dependent on government funding, such as healthcare, education, housing and culture.

Funda: affiliated legal entities' interests as part of the board's fiduciary duties

The Funda case concerned a dispute between a company and its minority shareholder, on the one hand, and its direct and indirect majority shareholder, on the other. The company and its minority shareholder accused the company's direct and indirect majority shareholder for neglecting, over a period of several years, to take a decision on the company's share structure, its (independent) position and the exit possibilities for its depositary receipt holders. In inquiry proceedings before the Enterprise Chamber, the court ruled that the company's direct and indirect majority shareholder had a duty towards the company and its minority shareholder to take a decision on the above matters. The Enterprise Chamber based its

ruling on a duty of care under Section 2:8 of the Dutch Civil Code, which provides that a legal entity and those involved in its organisation by virtue of the law and its articles of association must behave towards each other in accordance with the principles of reasonableness and fairness.

The company's indirect majority shareholder appealed to the Supreme Court on the question of whether, as an indirect shareholder, it also had to take into account the interests of the company and its minority shareholder and those involved in their organisation. The Supreme Court answered this question in the affirmative by ruling that, although Section 2:8 of the Dutch Civil Code is formulated from the perspective of a single legal entity, the circumstances may entail that the relevant duty of care also applies between legal entities that are organisationally affiliated with each other. This means that the directors of a company may also need to take into account the interests of affiliated legal entities and those involved in their organisation. The Funda judgment will therefore be particularly relevant to group structures, especially those involving minority shareholders.

Towards stronger stakeholder representation: Estro and Funda as part of a wider global trend

The Estro and Funda judgments demonstrate and further clarify the broad scope of stakeholder interests that are recognised and represented in Dutch corporate governance. This is in line with global trends where the significance of broader stakeholder interests is gaining momentum.

Within the European Union, a notable example of this trend is Section 25 of the draft Corporate Sustainability Due Diligence Directive (the **CSDDD**). This Section requires directors of certain large companies, in discharging their duty to act in the best interests of the company, to *“take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term.”* If adopted, this provision will require directors to take into account interests that they are currently not required to take into account. The final CSDDD is currently

being negotiated and it is uncertain whether Section 25 will be included therein, as the European Council has raised objections to it. For further background on the CSDDD in general, please see our [blog on this directive](#).

The trend towards recognition of stakeholder interests is not confined to the European Union, but is also visible in more shareholder-oriented jurisdictions such as the United Kingdom and the United States. In the UK, the British Academy's 'Future of the Corporation' project stands out. This project focuses on the corporate purpose and a renewed contract between companies and society. In the United States, (i) the Business Round Table, an association of CEOs of leading US companies, issued a statement in 2019 stating that companies should be managed in the best interests of all stakeholders, (ii) some senators have introduced bills to strengthen the position of stakeholders within companies to varying degrees and (iii) the 'Restatement of Corporate Governance Law' project, initiated by the leading American Law Institute, also raised the question of whether more stakeholder elements should be introduced in the board's duty.

Expectations for the future

Stakeholder interests are becoming an increasingly important part of the board's duties. This appears to be driven primarily by changing perspectives on the role and purpose of companies in society, driven by challenges such as the climate crisis as well as human rights and environmental issues. We expect further developments in the recognition of stakeholder interests within the board's duty, with stakeholder interests likely to gain in weight compared to shareholder interests.

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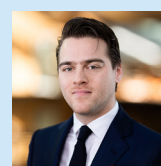
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