

THE CHAIRMAN MAKES OR BREAKS THE BOARD_

De rol van de Chairman van
Nederlandse beursgenoteerde
ondernemingen



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WITH SO MANY GOOD BOARD MEMBERS, THE RESULT SHOULD BE BETTER

Corporate governance features prominently on the agenda of Dutch corporates. The Dutch Corporate Governance Code is by and large similar to the UK Corporate Governance Code, albeit that the Dutch code has more details and best practice rules and is less principle-based. The traditional governance structure in the Netherlands is two-tier, i.e. consists of a board of management (the Executives) and a supervisory board. This structure leaves its traces in the code. A separate code, the Dutch Banking Code, is in force for banks and financial institutions, in addition to the Dutch Corporate Governance Code. The author of this publication, an experienced legal adviser to CEOs and Chairmen and currently a member of the board of several public and private companies, has become increasingly convinced that the role of the Chairman in the Netherlands needs to be widened. This publication serves to initiate a broad discussion of this view.

In over thirty interviews with prominent Chairmen, CEOs and other experts, the author has made a reality check on his own experience as well as on previous studies concerning the actual function of the Chairman in other countries. The interviews confirmed to him that for the most part supervisory boards in the Netherlands consist of outstanding individuals but that the interaction within the board (the 'boardroom dynamics') needs improvement. The Chairman can make a significant contribution to facilitate this improvement. Any discussion about the Chairman can easily trigger a discussion about the pros and cons of the one-tier or the two-tier system. The role of the Chairman, however, is much more important than the discussion about pros and cons. Can he create a countervailing balance against the CEO? Can he be the leader of the board consisting of often very strong personalities? Can he create added value?

The author makes the proposition that the duties and responsibilities of the Chairman in the Netherlands should be reviewed and discussed and that the duties of the 'strong' Chairman will become more involved and prominent. Consequently, the 'strong' Chairman will to some extent show similarity to the duties of the Chairman in the UK pursuant to the UK Corporate Governance Code. This expanded role for the Chairman is possible under existing law, irrespective of whether the company is listed in the Netherlands or has a two-tier board. Even though it may be an important quality, a 'strong' Chairman does not refer to a Chairman who has a prominent position in business or political circles or has a strong personality. In this publication the emphasis is on the duties and responsibilities.

Traditionally, the Chairman of a supervisory board in the Netherlands is the *primus inter pares*, the first among equals, the person who chairs and co-ordinates the deliberations and actions of the supervisory board regarding (i) supervision of the Executives and (ii) advice to the Executives. Even though the two corporate bodies, the Executives and the supervisory board, are separate under law, they mostly meet in joint session, presided over by the Chairman. By law and practice executive responsibilities remain exclusively with the Executives who may need, however, the specific approval of the supervisory board for certain actions.

Once a 'strong' Chairman has been introduced into the context of a two-tier system, the Executives, in particular the CEO, must feel comfortable with this new division of power and responsibilities within the company. It is best to create a process which involves a gradual shift of duties and responsibilities towards the Chairman which may, or may not, result eventually in a move towards a one-tier board. If that process is not fluent, but staggered, it may well result in serious misunderstandings, to the detriment of the company.

The process of change should also be accompanied by communications with the various stakeholders who must all understand how they can perform their roles appropriately.

The study has resulted in eighteen Observations (an English translation is included). It is not the intention to create another set of corporate governance rules or best practices; there are enough rules

and codes. Moreover, the issue under discussion is not appropriate for monitoring by stakeholders or outsiders. The Observations have been phrased with the objective of serving as a basis for an internal discussion within the board about its own function and its efforts for improvement.

These Observations have been discussed in two separate sessions, involving a total of approximately sixty prominent Dutch chairmen, CEOs and other experts with the relevant experience. Consequently, these Observations have been tested and may be considered realistic within the Dutch context.

It is proposed that the code will require the supervisory board (in the case of a one-tier system: the board) to explain in its board report (which is part of the Annual Report of the company) what, in actuality, the duties and responsibilities of the Chairman are and the division of duties and responsibilities between the Chairman and the CEO. The report should also express how much time the Chairman anticipates devoting to the role, during the ordinary course of business.

Any discussion concerning the role of the Chairman inevitably results in a discussion about governance in the UK and the US, with all the presumed and hearsay assumptions and misunderstandings related thereto. Occasionally, there are strong proponents of either the one-tier or the two-tier system, but almost everybody believes that the two systems are converging. This may result in some sort of 'one-and-a-half-tier board'. Even though convenient as an expression of a certain model (often called the 'third model'), it is misleading as a concept since it obscures the real question what the duties and responsibilities of the relevant board are and, more particularly, whether it has a 'strong' Chairman.