

SUPREME COURT REJECTS NON-BINDING SHAREHOLDER VOTE ON BOARD MATTERS

On 20 April 2018, the Dutch Supreme Court ruled in the Boskalis/Fugro case that shareholders do not have the right to demand a shareholder vote on matters which fall within the management board's authority, such as the policy and strategy of the company, even if such vote would not have a binding effect. The Supreme Court bases its judgment on the Dutch law rule that the board is not required to consult the shareholders on matters which fall within the board's authority, and where the law or the company's articles of association do not specifically provide otherwise.

BACKGROUND

Fugro N.V., a Euronext listed company, has implemented three anti-takeover measures, one of which was installed at the level of a Fugro subsidiary. In 2015, Boskalis, at the time holder of more than 20 percent of Fugro's shares, requested that the management board of Fugro put a non-binding vote on the agenda of an upcoming shareholders meeting to gauge whether the shareholders would be of the view that the board should dismantle the latter anti-takeover measure. The management board refused to do so, but offered instead to put the item on the agenda as a discussion item only, which would not result in a shareholder vote. Boskalis did not accept this proposal and initiated legal proceedings against Fugro. The District Court in preliminary relief proceedings and subsequently the Court of Appeal rejected Boskalis' claims.

INTRODUCTION: THE RIGHT TO PUT ITEMS ON THE AGENDA OF A SHAREHOLDERS MEETING

Shareholders solely or jointly representing 3 percent or more of the issued share capital of a Dutch N.V., have the right to request the management board at least 60 days before the shareholders meeting to put items on the agenda. If an item falls within the authority of the shareholders meeting, it can be put on the agenda as a voting item. If an item falls within the management board's authority, it can only be put on the agenda of a shareholders meeting as a discussion item. This is because under Dutch law the shareholders meeting can only vote and adopt resolutions on matters that fall within its authority.

The management board is in principle obliged to heed a shareholder's request to put an item on the agenda if the threshold and timing requirements are met. The Supreme Court ruling confirms the prevailing opinion that only in exceptional circumstances the management board may refuse such request, for example if the request is unacceptable according to the standard of reasonableness and fairness, or constitutes an abuse of rights.

NON-BINDING SHAREHOLDER VOTE ON BOARD MATTERS?

In its ruling the Supreme Court confirmed that in respect of issues which fall within the management board's authority, shareholders do not have a right to request the board to put such items on the agenda as a voting item, irrespective of whether the vote is non-binding or not.

Does the same apply if a shareholder at the shareholders meeting requests the chairman to allow a non-binding vote in relation to the discussion item, in Dutch legal literature also referred to as a "sounding of views" or a motion (*motie*)? The prevailing opinion until now was that the chairman of the meeting was obliged to allow such a non-binding vote. The Supreme Court ruling, however, implies that also non-binding soundings requested by shareholders during a shareholders meeting can be disallowed by the chairman.

The Supreme Court mentions in the ruling that its considerations are in line with the EU-Directive on shareholder rights.

WHAT'S NEW IN THE SUPREME COURT RULING?

We believe the only novelty in the Supreme Court ruling is the Supreme Court's judgment that shareholders do not have the right to demand prior to or during a shareholders meeting that a shareholders vote be held on issues which fall within the authority of the management board, even if such a vote has no binding effect.

The ruling further contains a number of considerations that confirm existing (case) law, such as:

- the management board is not obliged to consult the shareholders in matters that fall within the management board's authority;
- determination of a company's policy and strategy falls within the authority of the management board;
- the authority to implement, maintain or terminate a particular anti-takeover measure may fall within the authority of the management board (in which case it coincides with the determination of the company's policy and strategy); but it may also fall within the authority of the shareholders meeting, which obviously is the case when a shareholder resolution (e.g. to amend the articles of association) is required.

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