NautaDutilh

5 things you need to know about corporate governance in 2022

Intro

Below we briefly discuss five key trends in the area of corporate governance that are high on the agenda for 2022:

#1 increased focus on reporting

#2 upgrading of company law

#3 more requirements in terms of diversity

#4 further ESG developments

#5 greater attention to the corporate purpose

#1

Increased focus on reporting

In 2022, new reporting rules will be introduced, mostly in the area of ESG. For instance, the European Commission recently adopted a proposal for a Corporate Sustainability Reporting Directive (CSRD). The proposed directive revises and strengthens the rules introduced by the Non-financial Reporting Directive (Directive 2014/95/EU). The EU rules on sustainability reporting will be extended to all large companies and all listed companies, regardless of their size and of whether they are incorporated under the laws of a Member State. An exception is provided for micro-enterprises, however. While the proposed directive is still under discussion, particularly its scope and entry into force, the first part of the Taxonomy Regulation entered into effect on 1 January 2022. The Taxonomy Regulation will ensure that companies falling under the scope of the CSRD disclose information on their environmental performance and taxonomy-related economic activities. In addition, the IFRS Foundation Trustees recently announced the creation of the International Sustainability Standards Board (ISSB), which will set a comprehensive global baseline for sustainability-related disclosure standards.

Moreover, the European Commission recently launched a consultation on improving the quality and reliability of public reporting by listed companies. The Commission is considering firm measures to strengthen the quality and oversight of financial reporting. These measures stem from the Wirecard accounting scandal in 2020 and are intended to better protect investors against misreporting, increase confidence in the financial markets, and help prevent bankruptcies. They could also support the EU's climate and environmental targets and sustainable finance agenda by helping to make information on sustainability more reliable and tackling greenwashing. The Commission is also looking into measures in the areas of internal governance, auditing and the external oversight of financial reporting and auditors.

Finally, in the Netherlands, the Corporate Governance Code Monitoring Committee submitted for consultation a proposal to update the Dutch Corporate Governance Code. The committee expects companies to report more comprehensively on how they take ESG factors and corporate social responsibility into account. Amongst other things, the proposal provides for updating of the Code in areas such as long-term value creation and diversity and inclusion.

#2

Upgrading of company law

Several initiatives to improve company law were proposed last year. For example, the European Commission launched a consultation on ways to make IPOs more attractive for small and medium-sized enterprises. Proposals include a reduction in the minimum percentage of shares that must be offered during an initial public offering, facilitation of the procedure to list shares on several stock exchanges, and the introduction of minimum EU corporate governance standards for companies listed on “SME growth markets”. In addition, the Commission is considering legislation to allow all European listed companies to issue shares with multiple voting rights as well as certain restrictions on the issuance of dual-class shares and the inclusion of a so-called sunset clause.

Furthermore, the Commission has launched a consultation on upgrading digital company law. The aim is, amongst other things, to further modernise EU company law, for example to provide for the possibility of a virtual registered office and the incorporation and registration of companies (other than capital companies) completely online. This consultation builds on the directive on the online incorporation of private limited companies, which should be implemented by 1 August 2022. In the Netherlands, a consultation on a legislative proposal to implement the directive was published in 2021, but no bill has been submitted to the Lower House thus far, meaning this deadline will not be met.

Also on the national level, a consultation on a legislative proposal to implement the directive on cross-border conversions, mergers and divisions was published on 7 February 2022. These harmonised rules aim to further contribute to the removal of restrictions on freedom of establishment while ensuring adequate protection for stakeholders such as employees, creditors and shareholders. The implementation deadline is 31 January 2023.

#3

More requirements in terms of diversity

On 1 January 2022, the Act on a balanced ratio of men and women on management and supervisory boards (Stb. 2021, 495) entered into force. The Act provides for:

- a gender quota (at least 1/3 men and 1/3 women) for the supervisory board or non-executive directors of NVs and BVs listed on a regulated market in the Netherlands; and
- a self-imposed appropriate and ambitious target for the supervisory board, management board and sub-senior management of ‘large’ NVs and BVs, with an obligation to draw up a plan and to report on this in their management report and to the Economic and Social Council (SER). The SER will publish reports on the progress being made by these companies.

In addition to this new national legislation, a 2012 proposal for a European directive on gender balance was revived in January 2022. The Commission president has indicated that the legislative process could be completed in 2022. The proposed directive provides that 40 per cent of the non-executive directors in listed companies should be women, with the possibility to lower this target to 33 per cent for companies with a single-tier management structure. Companies that fail to meet this target will have to explain why and report on the steps they plan to take. The directive, which will not apply to small and medium-sized companies or unlisted companies, does not set sanctions, however, leaving this matter to the Member States.

Another noteworthy development for listed companies is the Dutch Corporate Governance Code Monitoring Committee's statement, in its December 2021 report, that listed companies should place diversity higher on their agenda and make greater efforts to report properly on diversity-related matters. The Committee noted that diversity should be interpreted broadly and should not be considered to refer to gender alone.

#4

Further ESG developments

In addition to the abovementioned developments regarding ESG (including diversity) reporting, further ESG developments are on the horizon, mostly deriving from European legislation. One example is the consultation on sustainable corporate governance, which aims to encourage companies to focus on the creation of sustainable long-term value rather than short-term benefits and has already resulted in a concrete proposal for a directive on corporate sustainability due diligence, published in February 2022. According to the proposal, large companies will be required to identify and, where necessary, prevent, end or mitigate, throughout their global value chains, the adverse effects of their activities on human rights, such as child labour and the exploitation of workers, as well as on the environment.

In addition, a Dutch legislative initiative on responsible and sustainable international business practices was submitted to the Lower House in March 2021. The purpose of this initiative is to establish a threshold for corporate social responsibility in international business practices that ensures Dutch companies, as well as foreign companies carrying out activities in the Netherlands, comply more fully with international standards on human rights, employment and industrial relations as well as OECD guidelines. The drafters deliberately chose not to await the European proposal for a directive on sustainable corporate governance, which contains similar obligations but has yet to be approved by the Commission. The 2021 coalition agreement also states that the Netherlands should promote international corporate social responsibility (ICSR) legislation in the EU and introduce national ICSR legislation that assumes a level playing field with neighbouring countries and the possible implementation of EU rules. Therefore, it is safe to say that, as far as the Netherlands is concerned, companies will have to ensure greater compliance with ICSR legislation in the near future.

Listed companies need to go a step further. Both Eumedion (a Netherlands-based corporate governance and sustainability forum for institutional investors) and Milieudefensie (Friends of the Earth Netherlands) ask such companies to publish and discuss with their shareholders a comprehensive strategy and action plan compatible with the transition to a net-zero emissions economy and with the limiting of global warming to 1.5° C, in line with the Paris Agreement.

#5

Greater attention to the corporate purpose

In 2020, a group of academics argued that the corporate purpose of a public or private limited-liability company should be laid down in its articles of association. Having regard to the increased focus on sustainability, businesses are paying more attention to their corporate purpose and asking how they (can) contribute to society as a whole. For those that wish to make a strong statement in this regard, it will soon be possible to indicate the social focus of a business in its corporate form. To this end, a consultation on the private limited-liability company with a social purpose (BVm) was recently published. The proposal suggests that a BV with a social purpose may, if it meets the applicable requirements, add the abbreviation BVm to its name, so that the social enterprise can be better presented to suppliers, investors, purchasers and other involved or interested parties. Businesses will be free to choose whether they wish to be bound by rules on, amongst other things, the allocation of profits, impact measurement, and the inclusion of corporate social responsibility in their annual report. The 2021 coalition agreement indicates that the BVm will indeed be introduced and that there will be a clear framework for reporting by social enterprises, although the timing is still unknown.

About the team

Our multidisciplinary Corporate Governance team advises on the roles and responsibilities of various corporate bodies, decision-making processes, application of corporate governance regulations, the role of stakeholders and supervisory authorities and other corporate governance issues. The team helps corporate clients achieve and maintain a balanced distribution of control, so as to guarantee effective and precise decision-making and optimally facilitate fulfilment in the interest of the company.

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