

Societal Challenges and the Future of Corporate Governance Codes: Sustainable Value Creation in the New Dutch Code as an Example

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Societal Challenges and the Future of Corporate Governance Codes: Sustainable Value Creation in the New Dutch Code as an Example

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In their paper titled 'Thirty Years and Done', Cheffins and Reddy argue that after thirty years the UK Corporate Governance Code, and the comply or explain approach on which it is based, has lost its appeal.¹ According to the authors, much of the content of the code has become irrelevant while disclosure and compliance expectations lead to considerable costs. Next to that, they argue that the code is increasingly used to address broader stakeholder issues for which the comply or explain mechanism and its dependence on shareholder enforcement is no longer suited.

Despite this criticism, corporate governance codes are still regarded as an important means of regulation within the EU Member States. The German Corporate Governance Code was revised in the spring of last year and the new version of the Dutch Corporate Governance Code saw the light only very recently at the end of December 2022.

The world is changing and against this background, the question as to the value of these corporate governance codes is indeed a valid one. Not only is what we expect from companies and therefore the content of what is seen as good corporate governance changing, also the form in which these issues are dealt with is subject to change. Compared to thirty years ago, when the UK Corporate Governance Code was adopted, there is a growing demand from society for hard corporate law rules. The idea that hard law rules are needed in order to secure a more sustainable world for future generations, seems to gain attraction. The previous soft law approach is often replaced, at the national as well as at the EU level, by hard law rules requiring companies to take into account the consequences of their activities on, for example, human rights and the environment. The Corporate Sustainability Reporting Directive (CSRD) and the draft Corporate Sustainability Due Diligence Directive (CSDDD) are examples of this development at the EU level. These developments entail that there

can be considerable overlap between hard law provisions and the principles and best practices incorporated in corporate governance codes. Avoiding such overlap was also one of the aims underlying the recent revision of the Dutch corporate governance code.² At the same time litigation with regard to sustainability is on the rise. Companies are increasingly confronted with, for example claims by NGOs when they disregard certain societal interests.³ The latest versions of the codes show signs of adaptation to this new era. The Dutch monitoring committee acknowledges in the new version of the Dutch Code that this increase in claims and judicial proceedings put pressure on the traditional comply or explain principle.⁴ The various responses to the draft revisions of the code also seem to suggest that there is a general fear for judicial proceedings in the Netherlands and that this can and has potentially hindered reaching agreement on (more) ambitious corporate governance principles amongst the various stakeholders in the 2022 revision round of the code.

Despite these difficulties, the newest version of the Dutch Corporate Governance Code does reflect the need for companies and their main actors to take societal challenges into account. While it is not the aim to set out all changes to the Dutch Corporate Governance Code in this editorial, there are several new principles and best practices worth mentioning.

The previous version of the Dutch Corporate Governance Code already required the board to fulfil its duties in the long-term interest of the company. This concept has now been adapted as the new version of the code requires companies to strive for sustainable long-term value creation. The management board has to develop a view on sustainable long-term value creation by the company and its affiliated enterprise and formulate a strategy in line with this.⁵ In

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1 B. R. Cheffins & B. V. Reddy, *Thirty Years and Done – Time to Abolish the UK Corporate Governance Code*, Journal of Corporate Law Studies (2022), DOI:10.1080/14735970.2022.2140496.

2 Dutch Corporate Governance Code 2022, at 6.

3 For example, the claim of Milieudefensie against Shell in the Netherlands with regard to its Co2 emissions.

4 Closing document of the monitoring Committee, at 5.

5 Best Practice 1.1.1 Dutch Corporate Governance Code 2022.

doing so, it has to take into account the impact of the actions of the company and its affiliated enterprise on people and the environment and it has to weight the stakeholder interests.⁶ This development seems to be in line with the revision of the German Corporate Governance Code, which also requires corporate planning to include ‘financial and sustainability-related objectives’.⁷ Some European Member States even go a step further in incorporating sustainability as an element of corporate governance. France for example has opted for hard law rules in this respect. Article L225-64 applicable to French public companies (Sa’s), in short, requires the board to fulfil its duties in the interest of the company while taking into account a number of other issues such as the social, environmental and cultural consequences of its activities.

The Dutch Code furthermore requires companies to develop a policy for an effective dialogue with stakeholders in order to ensure that the interests of the relevant stakeholders are considered when deciding on the sustainability aspects of the strategy.⁸ Another peculiarity of the new Dutch Code is that it strives to involve the shareholders in the quest for sustainable long-term value creation. The preamble states as point of departure that shareholders are still allowed to give priority to their own interests.⁹ However, principle 4.4 requests from shareholders, including institutional investors, that they recognize the importance of a strategy focused on sustainable long-term value creation for the company and its affiliated enterprise. It is not yet entirely clear what such a recognition would entail. One of the arguments of Cheffins and Reddy in favour of abolishing the use of codes is, as mentioned above, that codes increasingly address stakeholder issues while the actor who is expected to hold the board accountable for not complying with the Code is the shareholder. The revised Dutch Corporate Governance Code attempts to tackle this problem by involving the shareholders in the mission of the company and requesting that shareholders also acknowledge the need for sustainable long term value creation.

In conclusion, the Dutch developments do show signs of the struggle of codes and the need to adjust these means of regulation to a changing corporate environment. Despite these challenges and the critique mentioned in the literature that the code is not ambitious enough, the Dutch Corporate Governance Code has been adapted and requires companies to take into account societal challenges. The code can still be used as a means to explore new avenues where hard law rules on a specific issue may be deemed too far reaching at a certain point in time. In that sense, the code can be used as an experimental tool for later legislation or more binding regulation. From a Dutch perspective, this is for example the case where the code requires the board to take human rights and environmental consequences of the company’s activities into account in setting the corporate strategy. Including a duty of care for the board of directors to this effect in Dutch company law was previously proposed.¹⁰ However, introducing such binding rule seemed to be a bridge too far at the time. Nevertheless, the focus on compliance with corporate governance codes in combination with the increased willingness of societal actors to litigate undeniably puts pressure on the comply or explain approach. It is therefore important to bring the codes back to their roots. This entails avoiding overlap with hard law rules and placing the emphasis on the fact that codes contain best practices but not one size fits all solutions. This requires a rethinking of the type of provisions that are incorporated in corporate codes and an emphasis on meaningful reporting on deviations rather than compliance with its content. The Dutch Monitoring Report provides an interesting example of how this can be done. Instead of checking compliance with all code provisions, the Monitoring Committee decided to instead do a more in-depth check of how companies interact with a certain number of specific code provisions.¹¹

6 Principle 1.1 Dutch Corporate Governance Code 2022.

7 Recommendation A.1 of the German Corporate Governance Code 2022.

8 Best Practice 1.1.5 Dutch Corporate Governance Code 2022.

9 Preamble, Dutch Corporate Governance Code 2022, at 6.

10 Twenty-five professors proposed explicitly incorporating in the law that the board of directors has the duty to ensure that the company conducts its business in a responsible manner see J. W. Winter a.o., *Naar een zorgplicht voor bestuurders en commissarissen tot verantwoordelijke deelname aan het maatschappelijk verkeer*, *Ondernemingsrecht* 2020/86 and *Ondernemingsrecht* 2021/6. An advisory group on modernizing Dutch law for public companies advised against this. See *Kamerstukken II* 2020/21, 29752, 14, at 3 and 6–7.

11 <https://www.mccg.nl/publicaties/rapporten/2022/12/20/rapport-monitoring-boekjaar-2021>.