

Agenda setting: Supreme Court clarifies shareholders' rights for general meetings



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Litigation, Netherlands

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Introduction

Under Dutch corporate law, shareholders have the right to request the board of directors of a public or private limited company to put an item on the agenda of a shareholders' meeting if the threshold and timing requirements are met. Such requests may be refused by the board of directors only in exceptional circumstances – for example, if the request contravenes reasonableness and fairness or constitutes an abuse of rights.

Boskalis v Fugro addressed the extent to which shareholders have a right to request the board of directors to put an item which falls within the authority of the board of directors on the agenda of an upcoming shareholders' meeting as a (non-binding) voting item.

Background

Fugro NV, which is listed on the Amsterdam stock exchange, developed several measures to prevent or deter hostile takeovers – one of which had been implemented by its two wholly-owned subsidiaries located in Curacao. By establishing this anti-takeover measure, the subsidiaries could issue preference shares to the Antillean-based Foundation Continuity Fugro if the latter exercised its option right.

In 2015 Boskalis Holding BV built up a 28% stake in Fugro. The parent company of Boskalis, Koninklijke Boskalis Westminster NV, contested Fugro's protection mechanisms against hostile takeovers. Before the shareholders' meeting on 30 April 2015, Boskalis requested Fugro's board of directors to take its shareholders to vote on a recommendation to end the anti-takeover measure being used by the subsidiaries. Fugro's board of directors did not meet Boskalis's request, but offered to place it on the agenda as a discussion item, which would not result in a (non-binding) shareholder vote.

Shareholders' rights

Pursuant to Article 2:109 of the Civil Code, the board of directors and the supervisory board of a public limited company may convene a shareholders' meeting. The notices convening the meeting must state, among other things, the subjects to be considered.

Both shareholders and holders of depository receipts that are issued with the cooperation of the company that solely or jointly represent at least 3% of the issued capital of the company may request the board of directors to put specific items on the agenda at least 60 days before the date of the shareholders' meeting (Article 2:114a of the Civil Code).

The threshold requirement for nominating agenda items for Dutch private limited companies is at least 1% of the issued capital, provided that:

- the company has received the request no later than 30 days before the date of the shareholders' meeting; and
- it does not conflict with a substantial interest of the company (Article 2:224a of the Civil Code).

The articles of association may provide that the required part of the capital or the value of the shares be lowered and the period for lodging the request be shortened.

Decision

Fugro was summoned to The Hague District Court by Boskalis. Boskalis asked the court to order Fugro to put the proposed item on the agenda of the 2015 shareholders' meeting. The court dismissed Boskalis' claim against Fugro, ruling that:

- the decision fell under the board's competence to set the company's strategy; and
- a shareholders' vote would infringe on the board's exclusive competence.

The court's ruling was upheld on appeal.

In line with its ruling of 13 July 2007 in *ABN AMRO*, the Supreme Court ruled on 20 April 2018 that the policy and strategy to be pursued by Fugro is in principle a matter for the board of directors under the supervision of the supervisory board. Therefore, shareholders do not have the right to demand a shareholders' vote on matters which fall within board of directors' authority, such as the company's policy and strategy, even if such a vote would not be binding.

Comment

The *Boskalis v Fugro* rulings clarify the scope of shareholders' rights under Articles 2:114a and 2:224a of the Civil Code. A shareholder's right to request the board of directors to put an item on the agenda of an upcoming shareholders' meeting is not limited to subjects which are within the competences of the meeting. If the proposed item falls within the competences of the meeting, the board of directors is in principle obliged to include this item in the agenda.

However, save for other provisions in a company's articles of association, shareholders have no right either before or during a shareholders' meeting to demand that a (non-binding) vote will take place on issues which fall within the exclusive authority of the board of directors, such as the company's policy and strategy.

For further information on this topic please contact Mike van de Graaf or Ward Aerts at AKD by telephone (+31 88 253 50 00) or email (mvandegraaf@akd.nl or waerts@akd.nl). The AKD website can be accessed at www.akd.nl.

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Mike Van De Graaf Ward Aerts