

Briefing note by Mirella Visser, Centre for Inclusive Leadership, FidAR conference, Berlin, March 15 2010

## **“Solving the underrepresentation of women on boards in The Netherlands: legislation or self-regulation?”**

### **Two tier board system prevails**

The Dutch legal system currently provides for both two tier and one tier boards; the latter is only possible recently so still very rare. The main role of the supervisory (or non-executive) board is to supervise the policies of the executive board and the general affairs of the company (the monitoring role). Its second task is to support the executive board by providing advice (the advisory role). In discharging its duties the supervisory board must be guided by the interests of the company and must take into account the interests of all stakeholders of the company. These stakeholders include the shareholders and other lenders, the employees, the customers, the suppliers and society as a whole. In the Dutch legal system there is clear separation between the role and person of Chairman of the Supervisory Board and the CEO of the company (unlike the one tier system in which the CEO often is also chairing the non-executive directors).

### **Women’s underrepresentation is serious at executive boards**

The number of women on boards in The Netherlands is around the European average of 10% (according to the European Commission’s database on women and men in decision-making). There is a significant difference between the number of women appointed on the management/executive board and those on the supervisory board. In 2009 only 2.4% of the executive board seats of Dutch listed companies (Euronext) were taken by women and almost one out of 10 (9.5%) of supervisory (or non-executive directors) seats. This equals to 7 female executive directors and 50 female supervisory board members (total no. of companies is 107; board seats 813).

	2009	2008	2007
<b>Supervisory board seats</b>	9.5%	7.8%	6.9%
<b>Executive board seats</b>	2.4%	2.1%	2.1%
<b>Total</b>	7.0%	5.7%	5.2%

The number of companies with women on boards (both executive and non-executive directors) is growing slowly. Still two-thirds of Dutch listed companies do not have a woman on the board.

	2009	2008	2007
<b>Co.'s with women</b>	35.5%	30.8%	28.0%
<b>Co.'s without women</b>	64.5%	69.2%	72.0%

Almost half of the female board members are non-Dutch, whereas only 25% of the male directors come from abroad. Dutch companies seem to prefer to appoint foreign women over local talent.

The average age of the board members is 57.6 years. Women are on average 3 years younger at 54.6 years. This can be explained by the fact that newly appointed women are significantly younger than their male counterparts.

The company with most women on the board is Ahold (food) with 4 female board members out of 13 (31%). This is a result of Ahold's decision to increase the number of board seats from 11 to 13; two more women were appointed then. Second and third are KPN (telecom) and TNT (logistics and postal services) with both 3 women out of 13 board positions (23%).

### **Pressure from the public**

A large number of private initiatives, some in cooperation with government and institutions (employer's federation, unions etc.) have created pressure over the past years to improve the numbers. The establishment of specialist executive search firms like Woman Capital, public websites with profiles of qualified women like Vrouwen in Beeld, several so-called 'manifests' to which topwomen sign their name, organizations like Women on Top, TopBrainstorm, Women Inc., advertisements in business newspapers (signed by men and

women), a great number of conferences and events and an explosive growth of women's networks have collectively put pressure on government.

### **It started with self-regulation**

The accounting scandals in the USA and Europe led to the installation by government in 2003 of a committee of well-known top executives and experts (all male) to develop a Dutch corporate governance code. This is a self-regulation tool which aims to promote sound corporate governance practices in Dutch listed companies. The purpose of the code was to restore confidence of the public and investors in the Dutch corporations. The code contains principles and best practices, which focus on the company's stakeholders (including members of the management board and supervisory board) and other parties (including institutional investors). Despite growing public pressure, the 2003 code did not contain any provision or even reference to the word diversity.

The Corporate governance code is not an isolated set of rules, but part of a larger system, together with Dutch and European legislation and case law on corporate governance. The Supreme Court has given judgments in which provisions of the Code have been described as representing the prevalent legal view in the Netherlands. Nonetheless, the assessment on compliance with the code, including acceptance of any explanation given for derogations, remains a matter solely for the shareholders. No regulatory body outside the company is empowered to judge or to impose sanctions on companies violating the code. The 2003 code was incorporated into legislation a year later, whereby the principle of 'apply or explain' was adopted. This principle implies that any departure from the Code may well be justified, provided that it is explained.

In 2008 the code was revised by a new Committee Frijns (composed of 8 members, of which one female union representative) and finally reference was made to the need for diversity on boards. The new clause and best practice provision read:

#### *Principle III.3 Expertise and composition*

*"...The composition of the supervisory board shall be such that it is able to carry out its duties properly. The supervisory board shall aim for a diverse composition in terms of such factors as gender and age..."*

*Best practice provision:*

*“...The profile shall deal with the aspects of diversity in the composition of the supervisory board that are relevant to the company and shall state what specific objective is pursued by the board in relation to diversity. In so far as the existing situation differs from the intended situation, the supervisory board shall account for this in the report of the supervisory board and shall indicate how and within what period it expects to achieve this aim....”*

The revised code clearly and deliberately stays away from recommendations on numbers or targets. According to the committee there is no support for including those. The code will have to be applied by companies as from 2009 and we might expect companies reporting on the ‘objectives pursued’ in their annual reports over 2009 (which most companies will publish in the spring of 2010).

A special Corporate Governance Monitoring Committee was established by the Minister of Finance in July 2009 (composed of 3 women and 3 men). Its task is to ensure that the code is up-to-date and practicable and to monitor its compliance and application. On the subject of diversity the chairman of the Committee reported after having analyzed the 2008 situation: *“It’s disappointing to see that diversity has not increased in terms of gender, despite all the efforts that have been made”*.

### **Widely supported private initiatives**

Another tool of self-regulation was established in 2007: the so-called **Charter ‘Talent to the Top’**. This tool was the result of close cooperation between the Confederation of Netherlands Industry and Employers (VNO-NCW), Dutch Trade Union Federation (FNV), the Social and Economic Council (SER) and representatives of corporation, the Ministry of Education, Culture and Science (OCW) and the Ministry of Economic Affairs.

The Charter aims to realize and preserve a continuous smooth flow of women in particular into top positions. By selecting and publishing best practices and tools and instruments on a public website, and providing advice and tailor-made programs, companies are supported in their endeavors to promote more women into senior management positions. By signing the charter companies

publicly announce their good intentions and plans. Signing the charter is voluntary, but not without commitment. A Monitoring Committee was installed with the task to evaluate company's progress against their plans and report on a no-name basis to the public of collective progress. More than 100 companies but also government institutions and NGO's have signed the charter so far and more are expected to sign up. A numbers of issues have been hindering the Charter's effectiveness. The establishment of the Monitoring Committee took a very long time and the committee is struggling to receive the necessary information from the companies in order to fulfill its monitoring task properly. Companies may choose to remain 'anonymous' when reporting the progress on their plans so monitoring of individual companies is not in the public domain. Some companies are said to have used the signing ceremony as a vehicle to generate positive PR.

### **Parliamentary activity**

In 2008 for the first time in history consensus among political parties was reached. The parliament adopted a so-called motion on April 24 2008 in which it called government "to include ambitious targets of 25-30% women in executive and supervisory boards in 2015 in the Corporate Governance Code". No action was taken by government or the Committee.

Therefore, parliament agreed to a motion again, which was adopted on December 9 2009 by almost all political parties; the orthodox Christian and extreme right wing parties refrained. The proposal asks to include 'soft targets' in the Dutch Company Law. The reasons parliament cited for this proposal was that more women on boards are necessary not only from the perspective of equal rights, but also from the perspective of a well-functioning labor market where all talents need to be utilized.

Key elements of the parliament's proposal for law are:

1. The target (so not quota) is to have at least 30% women and at least 30% men on boards (both executive and supervisory boards). The law should apply to all large public and limited liability companies (NV and BV). It would not apply if a company fulfills two out of three of the following criteria:
  - Assets on the balance sheet are less than E 17.5 million
  - Annual net income is less than E 35 million

- Average number of employees is less than 250.
- 2. Second key element is the 'apply or explain principle' again. Companies that do not comply with the targets should explain in their annual report why the distribution of board seats is not according to the target, which activities the company has undertaken to repair this inequality and in what way the company will put in place actions to get to the required balance in the future.
- 3. The third element is that the legislation would be in effect until January 2016 only because it is seen as a temporary remedy to the current situation.

### **Status**

For now the proposed legislation is put on hold since until a new government has been formed after the elections in June. In the mean time, the Senate needs to come to terms with the proposal of parliament too (the Senate can sign off on proposals or reject them). One of the key points being debated now is the desirability to have the law apply to executive boards.

In the meantime, the revised Corporate Governance Code continues to be in force so companies will continue to have to 'apply or explain'. The absence of real penalties in the current system and the uncertainty of the future of the parliament's proposal indicate that so far self-regulation is prevailing.