

# Legal Alert

## Dutch Supreme Court ruling in *ASMI* : no duty to mediate for supervisory boards

15 July 2010

### Introduction

The Dutch Supreme Court has ruled on the position of the managing board and the supervisory board (SB) vis-à-vis activist shareholders. The case under review concerned ASM International N.V. (ASMI). On 9 July 2010, the Supreme Court reversed an order of the Enterprise Chamber to hold a corporate inquiry into ASMI's policy and conduct of business.

In this Legal Alert we first summarise the decision of the Enterprise Chamber. We then discuss the main elements of the recent Supreme Court ruling.

### Decision of Enterprise Chamber

In August 2009, after three and a half years of conflict between management and the external shareholders, the Enterprise Chamber ordered a corporate inquiry into ASMI.

The Enterprise Chamber was of the view that ASMI

- had consistently put off addressing its strategic problems and had tried to resolve them within the limited circle of its own executives and major shareholders, and
- supported by dated governance, had taken a defensive and closed stance towards its other shareholders.

The Enterprise Chamber ruled in respect of the SB that the SB had failed to:

- meet its responsibilities with regard to creating transparency towards the external shareholders, and
- fulfil its duty to mediate in conflicts between management and external shareholders.

In addition, the Enterprise Chamber considered that there was justified doubt that ASMI had conducted a sound policy with regard to Stichting Continuïteit's exercising an option to take anti-takeover preference shares in ASMI. The Enterprise Chamber thereby took into account the fact that by the mere exercise of its option Stichting Continuïteit had co-determined ASMI's policy.

### Supreme Court ruling

#### *Strategy with management*

In line with its earlier ruling of 13 July 2007 in the ABN AMRO inquiry, the Supreme Court ruled that the strategy to be pursued by ASMI was, in principle, a matter for the managing board.

It was up to management, under the SB's supervision, to consider if it was desirable to discuss strategy with external shareholders and to what extent. In the absence of different provisions in the law or the company's articles, the managing board does not have a duty to involve the general meeting of shareholders

in its decision-making if the matters in question fall within the managing board's scope of competence.

The fact that external shareholders disagree with the policy pursued by the managing board and the SB does not automatically mean that the managing board has a duty to respond to the shareholders' views. A lack of response by the managing board does not demonstrate a defensive and closed attitude.

The Supreme Court also noted that the established facts showed that the managing board had entered into a dialogue with the external shareholders and acted in accordance with the (recitals to the) Corporate Governance Code 2008. According to the Supreme Court, the Enterprise Chamber had failed to recognise this.

### *SB's mediating role?*

The SB has a statutory duty to supervise the policy of the managing board and the general conduct of business in the company. It supports the management in an advisory capacity. The SB's mandate does not entail a duty to play a mediating role in conflicts between management and shareholders. This view is not altered by best practice provision III.1.6 in the Corporate Governance Code 2008, which provides that the SB's supervision includes the relationship between management and shareholders. According to the Supreme Court, the SB is not accountable to the shareholders on this point either. The SB can be approached by the shareholders with requests for mediation or otherwise and it will have to act adequately within its own scope of responsibilities. Assuming a *duty* of active mediation would be inconsistent with the SB's discretionary powers. The SB should be at liberty to consider case by case if direct contact with the shareholders or mediation between shareholders would be desirable.

### *Stichting Continuïteit's anti-takeover measure*

The Supreme Court ruled that Stichting Continuïteit's exercising its option to take anti-takeover preference shares in ASMI did not concern the policy of AFMI itself. Insofar as the exercise of its option was concerned, Stichting Continuïteit could not be regarded as a co-policymaker for the purpose of corporate inquiry rules.

The Supreme Court reversed the decision of the Enterprise Chamber. The latter will now have to

assess if the other grounds put forward by the shareholder activists and the Dutch Shareholders Association (*VEB*) justify ordering a corporate inquiry into ASMI.

**Contact information**

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