

Shareholder cannot set aside response time of the board

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The Enterprise Chamber of the Amsterdam Court of Appeal recently ruled on whether the board's response time may be set aside by a shareholder convening an EGM. The board needed time to respond to requested agenda items that could lead to a change in the company's strategy.

The board of a listed company, Cryo-Save, invoked the 180-day response time in relation to two shareholders on the basis of best practice provisions IV.4.4 and II.1.9 of the Dutch Corporate Governance Code. Cryo-Save did this after a request by the two shareholders that the appointment of a new CEO, the dismissal of two non-executive directors, and the replacement of those non-executive directors be placed on the agenda of an EGM. The board wanted to use the response time for further consultations and to have a constructive dialogue with the two shareholders, as well as to investigate alternatives to the proposals. The two shareholders reacted by sending a notice for an EGM to take place well before the expiry of the board's response time.

Can a board's response time be set aside and an EGM take place?

The Enterprise Chamber ruled that setting the response time aside by convening an EGM was not justified. The EGM may not be held until the response time invoked by the board expires.

According to the Enterprise Chamber, the board did not invoke the response time on invalid grounds. The Enterprise Chamber reached this judgment based on the following grounds and circumstances:

- it was plausible that a newly appointed CEO would lead to a change in strategy (a condition for invoking the response time)
- the two shareholders gave no clear answer to the board's questions about their intentions, and about their opinion on the company's current strategy and how it should be revised
- special caution by the company was justified in view of the two shareholders' conflict of interest

The Enterprise Chamber also considered:

- invoking the response time does not violate the meeting and agenda rights of a shareholder, or any provisions of the company's articles of association
- the best practice provisions II.1.9 and IV.4.4 of the Corporate Governance Code implement the principle that a shareholder should act towards the company, its bodies and the other shareholders in accordance with standards of reasonableness and fairness
- an example of this is the shareholder's willingness to enter into a dialogue with the board when intending to place an

item in a general meeting's agenda that concerns a subject that could change the company's strategy

- the two shareholders must, in principle, respect the response time as invoked by the board
- the response time may be set aside if there are sufficiently important reasons for this, but the two shareholders failed to put forward such reasons

This is the first time that the Enterprise Chamber has ruled on the response time as set out in the Corporate Governance Code. The ruling gives guidance to directors and shareholders during their dialogue on matters that may lead to a change in the company's strategy.