

Elverding Conference 2023

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Conference Report

Enhancing sustainable business and corporate regulation in the EU

26 October 2023, Maastricht

EVENT OVERVIEW



The Elverding Conference 2023 on **Enhancing sustainable business and corporate regulation in the EU** took place on 26 October 2023 at the Maastricht University Faculty of Law. It examined how effective ownership strategies could be used to promote business sustainability and how to align directors' duties and the social role of corporations. It also invited representatives from companies, the investor community, and civil society to identify and explore signals which might boost sustainable business practices and corporate regulation in the EU.

DISCUSSION POINTS

- How can **active ownership** be used strategically and effectively to communicate long-term expectations on sustainability
- Whether companies should adopt a socially oriented **corporate purpose**
- Whether directors should have a **duty of care for sustainability impacts** of their decisions
- Whether and how **recent regulatory developments** could be beneficial for companies and for sustainability
- How to **effectively engage with stakeholders** and receive their input on sustainability matters.

The Elverding Chair is sponsored by Broadview, De Nederlandsche Bank, DSM, ING, Q-Park.

The Elverding Conference 2023 was co-sponsored by **Studio Europa Maastricht**.



SHAREHOLDER ACTIVISM AS A DRIVER OF SUSTAINABILITY

Presentation by Sofie Cools

Professor of corporate law at KU Leuven, co-director of the Jan Ronse Institute for Company and Financial Law, and Professor of Sustainable Company Law at the Radboud University.

KEY TAKEAWAYS

Prof. Cools shared her perspectives on whether shareholders can become a driver for sustainability.



- Although there have been **calls for investor activism** on ESG matters, there has also been a certain backlash, especially in the United States, where this took the form of anti-ESG proposals and anti-ESG legislation.
 - **Shareholders are more incentivized to engage in ESG** as compared to other types of activism, because of universal ownership (which creates a preference for systematic stewardship), coalition building between small investors and institutional investors, and the rise of institutionalized platforms which unite investors and encourage them to act on climate matters.
 - **European companies face less activism than their US counterparts.** This could be because of more concentrated ownership levels, higher share ownership thresholds for the submission of shareholder proposals, and more stringent rules on insider trading and acting in concert.
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- There are **significant differences between jurisdictions in shareholder rights to submit a proposal.** The fact that strategy is typically a board rather than a shareholder competence significantly limits the possibility of submitting ESG proposals in many jurisdictions.

ACTIVE OWNERSHIP STRATEGIES



Presentation by Rob Bauer

Professor of Finance at Maastricht University, co-holder of Elverding chair for Sustainable Business, and director of the European Center for Sustainable Finance.

KEY TAKEAWAYS

Prof. Bauer discussed various strategies of active ownership from divestment, through voting on management proposals and submitting shareholder proposals, to private engagement.

- **Engagement is more likely to succeed when it is collaborative, intensive, and encompasses multiple activities.** There is a higher chance of success if the lead investor is from the same location as the target, and if it holds a high stake in the target. Companies also seem to be more responsive to financially material topics.
- **Divestment does not appear to create a real-world impact:** it does not influence the cost of capital and companies are able to secure their financing elsewhere. Moreover, by opting for divestment, sustainable-oriented investors lose their seat at the table.
- **It is crucial to properly manage existing conflicts of interest:** not only between companies and investors, but also between asset managers and asset owners, and inside financial institutions. Transparency about the engagement is key.
- While **only one-fifth of private engagements of asset managers and engagement agents are successful**, such engagements are associated with improved ESG performance and reduction in CO₂ intensity and correlated with financial outperformance versus peers.

CORPORATE PURPOSE, CORPORATE LAW AND SHAREHOLDER VOICE



Presentation by Paul Davies

Emeritus Professor of Corporate Law and Senior Research Fellow at the University of Oxford, and Fellow of the British Academy.

KEY TAKEAWAYS

Prof. Davies reflected on Colin Mayer's book, *Prosperity*, and questioned its suggestion that a simple change in corporate purpose has the potential to sustainably transform the nature of doing business. He showed that, in any case, a change in purpose alone would not be enough for this aim.

- Incorporating corporate purpose into corporate law is a proposal that is simple in formulation but difficult in implementation. **To produce transformative corporate purposes, extensive changes in corporate law and shareholder objectives are required.**
- In a Friedmanite world where all shareholders focus on financial value, the adoption of any meaningful purpose statements seems unlikely since they would interfere with the ultimate goal of companies to maximize profit. Davies suggested, moreover, that mandatory purpose statements would require an effective court review or a full shift in decision-making competencies toward the board.
- In a non-Friedmanite world, where the shareholders focus on financial *and* non-financial value, it would not be necessary to include corporate purposes in corporate law as a mandatory requirement.
- It follows that **the corporate law reform presented in *Prosperity* would be either ineffective or unnecessary**, indicating that it might be better to invest social and political capital on other, more effective projects.

SUSTAINABILITY, A PARADIGM SHIFT

Presentation by Jaap Winter

Professor of Corporate Law, Governance, and Behaviour at VU Amsterdam, Partner at Phyleon, and Chair of the Supervisory Board at Schiphol.

KEY TAKEAWAYS

Prof. Winter offered insights on sustainable corporate decision-making. He spoke about the idea of responsible corporate citizenship and the need for an explicit duty of societal responsibility for companies.



- **Companies are members of society** and benefit from societal resources, assets, and opportunities. They therefore need to take into account the interests of other members, and should assume responsibility for actions that negatively affect these members.
- Parts of corporate law are trapped in learned helplessness and corporate idolatry. **Need to re-imagine corporations as human constructs**, under human leadership, under our responsibility.
- The **circle of stakeholders to whom companies owe a duty of care should be extended** from internal stakeholders to include external stakeholders, meaning anyone who is affected by the company's activities. This notion is already reflected in some Dutch Supreme Court and Enterprise Chamber decisions.
- Decision-making at different levels, including the boardroom, has to change fundamentally to **ensure that values, intentions, and convictions are integrated into choices and decisions**.
- The Dutch Corporate Governance Code places responsibility for sustainable long-term value creation on the shoulders of the executive board, and may be viewed as an example of regulatory efforts in the area of corporate social responsibility.
- However, **there is still the need for an explicit legal basis for corporate social responsibility** to address companies which are not covered by the Code, such as private companies.

PANEL DISCUSSION

Panel members

- **Annelien van Meer**, Sustainability Manager of a.s.r.
- **Rients Abma**, Executive Director of Eumedion
- **Simon Rawson**, Director of Corporate Engagement and Deputy CEO of ShareAction

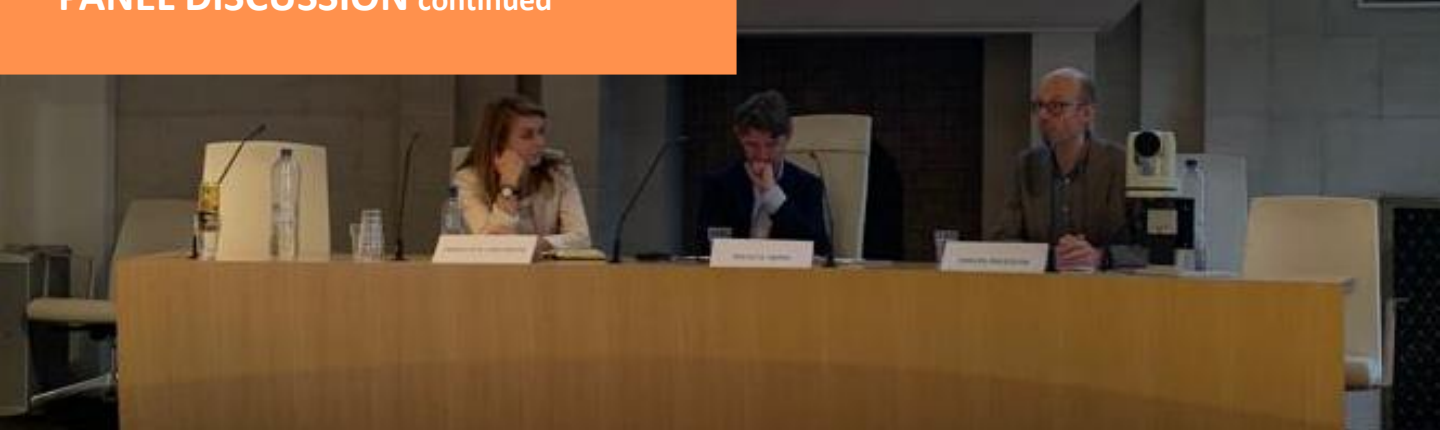
KEY TAKEAWAYS

The panel featured speakers from diverse backgrounds to reflect on the day's discussion and create bridges between theory and practice. Its members were invited to share insights and explain how their organisations pursue sustainability goals and engage with stakeholders.

- Annelien explained how a.s.r. aligns its sustainability policy with stakeholder expectations. She emphasised **the role of leadership and the importance of language**. Thoughtful communication, in particular in general meetings and similar forums, can positively influence perceptions and outcomes.
- Rients spoke about the **importance of engagement with both portfolio companies and policymakers**. He mentioned that while occasional divergences arise in opinions on specific shareholder proposals, institutional investors consistently demonstrate a strong consensus in their stance on sustainability. He also mentioned a concern that **the prescriptive and detailed nature of some shareholder resolutions can potentially infringe on the board's competence**.
- Simon shared how ShareAction not only submits environmental shareholder proposals but also has behind-the-door conversations with companies to encourage meaningful action on sustainability. He also highlighted the **importance of exploring different pathways to expose companies to the perspectives, preferences, and interests of their ultimate beneficiaries**.



PANEL DISCUSSION *continued*



Q&A SESSION

Lobbying with policy makers

- The panel members agreed that climate change is a collective challenge in need of collective solutions. They also agreed that **active ownership and responsible investment includes lobbying** for policies which are consistent with sustainability goals.
- However, lobbying is only justified when coupled with additional actions; **it should not be used to delay or excuse inactivity.**

Engagement with stakeholders

- The panelists highlighted the need to proactively seek feedback from diverse stakeholders, aimed at fostering an organised dialogue. They saw it as a **key part of active ownership to ask executive directors about stakeholder expectations.**
- Pension funds should identify the preferences of their members through consultations, polls, or surveys. It is a **positive first step to recognise that these investors may have interests beyond their financial concerns.**

Sustainability vs profit

- While impact investment often has lower short-term returns compared to regular investment, there was also a consensus among panelists that **customer preferences include non-financial values** and that **many are willing to pay a premium for sustainability performance.**
- It may be possible, for investors with diversified portfolios, to meet both profits and sustainability targets by using a **system stewardship approach** that focuses on the harmful, system-level impacts of companies. While this approach may reduce profits from a single company, it **should maximise overall portfolio value.**

Obligations towards beneficiaries

- Generally seen as a moral and ethical principle to be a responsible and sustainable company.
- Because of substantial assets under management, **institutional investors owe a duty to the general public.** This is why Eumedion, for example, aims to be transparent and publishes all of its lobbying efforts, annual focus letters, and positions on legislative proposals.

The Elverding Conference 2023 was organized by the Elverding Chair of Maastricht University and co-sponsored by Studio Europa Maastricht.

The research theme of the Elverding Chair is to investigate how sustainable, long-term corporate decision making can be enhanced from both a national as well as a European perspective. In this respect, the research team examines the following:

- The role of corporate leadership in promoting sustainability
- The relationship between the corporate purpose and sustainability
- Corporate culture and participation of stakeholders such as employees

The Chairholders will also consider the relationship between hard law and soft law, the international and comparative dimension of corporate practices and regulation, and the role and influence of institutional investors such as pension funds.

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