

Public Governance and Corporate Governance

Public governance and corporate governance are much alike. In both instances there is question of bodies that have a certain function together and in association with each other. We all know that there is a government and a parliament that supervises the government. Both these bodies have formal powers that are exercised by people of flesh and blood.

And there are also civil servants. They are the people who are encumbered with the implementation. It is exactly the same within a corporation: the management (the board) performs the work and at larger corporations a board of supervisory directors exercises supervision. This also regards people of flesh and blood representing the legal person. Hence, all similarities. Yet public governance and corporate governance are not entirely the same. In all its actions the government is bound by the 'rule of law': a power can only be exercised if it is based on a (statutory) foundation under public law. This is different in the business community. In that case powers can be exercised on the basis of commercial foundations or idealistic foundations. This is, in some instances, embedded in rules and arrangements under private law, e.g. a sale and purchase agreement or an employment agreement.

There are also other differences. In all its actions the government must observe the so-called general principles of good administration. This involves principles like the principle of legitimate expectations, the principle of legal certainty, the prohibition on acting arbitrarily, etc. These principles can be qualified as elementary rules of decency that should offer a citizen protection against an almighty government. This is slightly different in the business community. This departs from the rationale (if you like, fiction) that everybody is equal. You have freedom of contract. You can agree on whatever you want and, to some degree, in whichever way you want. Fortunately there is also a leading principle of decency: the reasonableness and fairness. Each and every relationship under private law is based on this fundamental principle. Also if an agreement for the provision of services does not exactly regulate how the agreement should be implemented then it should still be done in a decent, respectable manner. If you fail to do so then you commit a breach of contract. The law does not define what decent and what respectable is. In our system it is up to the court to decide this. This is quite strange to Americans. Yet, miraculously, it does work well. It also means that you do not need to regulate everything into detail. You can assume that everyone with whom you agree on an arrangement shall observe the normal standards of decency.

It becomes interesting on the crossroads of public and private governance, for instance at public limited corporations. From a legal perspective these public limited corporations are ordinary limited corporations. The bodies at these corporations are subject to the rules laid down in Book 2 of the Civil Code. Book 2 also states that these bodies must in respect of each other act in a decent and respectful manner (according to the rules of reasonableness and fairness). Hence, this also applies to the State as a stockholder. Under private law the State can, for instance, not act arbitrarily. That is in violation of the reasonableness and fairness. As the occasion arises a double series of restrictions applies: if the State is a stockholder of a public limited corporation then the representative of the State (often the Minister) must, when exercising the stockholder rights, not just observe the rules under private law but also the relevant rules of decency under public law. Hence, stricter requirements are imposed on the State as a stockholder than on 'ordinary' stockholders. Sometimes the opposite happens. The State then actually feels that, as a stockholder, it is permitted to do all sorts of things on account of the fact that the State serves the public interest. Fortunately this misconception is, time and time again, punished by the independent court.



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