

Doelbereiking en effectiviteit van de wet aanpassing
enquêterecht in de praktijk

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SUMMARY

This research report contains the evaluation of the Law amending the Right of Inquiry (in Dutch: '*Wet aanpassing enquêterecht*'), which came into force on 1 January 2013, as laid down in art. II of this law. The following research question was formulated: 'In what ways and to what extent is the objective of Right of Inquiry (in Dutch: *het enquêterecht*), formulated as fast and effective dispute resolution with the effect that the legal entity can continue to operate, be achieved by the introduction of the Law amending the Right of Inquiry and what other effects can be distinguished?'

The aforementioned objective of the Right of Inquiry was aligned with the objectives formulated by the Dutch Supreme Court in the *OGEM*-case. In order to answer the research question, the objectives set by the legislator in the Explanatory Notes (in Dutch: *Memorie van Toelichting*) of the Law amending the Right of Inquiry are considered as the starting point. These objectives, which are discussed in chapter two, have been defined by the legislator within the framework of the objectives formulated by the Dutch Supreme Court in the *OGEM*-case. The Law amending the Right of Inquiry consists of five law amendment categories, concerning 1. The admissibility criteria (in Dutch: *ontvankelijkheidscriteria*); 2. the relationship between the immediate provisions (in Dutch: *onmiddellijke voorzieningen*) and the inquiry (in Dutch: *enquête*); 3. safeguards with respect to the inquiry; 4. submitting statements of defense, and; 5. the costs of defense.

This research report uses a legal research and literature review, a jurisprudence analysis of all the decisions (in Dutch: *beschikkingen*) of the Enterprise Chamber (in Dutch: *Ondernemingskamer*) and the Dutch Supreme Court (in Dutch: *Hoge Raad*) in inquiry procedures in the period 2008-2016 (hereinafter: the ARO population), a qualitative research by means of a questionnaire and a limited number of interviews and an analysis of research and conversation reports in inquiry procedures in the period 2008-2016. A legal framework has been developed on the basis of the legal research and literature review, in which the objectives of the five legislative amendment categories are discussed. These objectives are linked to measurable criteria (chapter 2). These measurable criteria form the basis of the research regarding the achievement of the objectives and the effects of the different legislative amendment categories of the Law amending the Right of Inquiry (chapters 4-8). Below, these findings are discussed per amendment category. In addition, chapter 3 of the report presents the general descriptive data from the jurisprudence analysis and thus provides general insights into the use of the Right of Inquiry and its procedure in practice, also referring to the results of the 2009 Cools/Kroeze report. There are only few differences to be noticed before and after the introduction of the Law amending the Right of Inquiry.

Amendment category 1: admissibility criteria

The first amendment category includes the adjustments of the admissibility criteria. Subsection a) involves a change in the admissibility criterion for shareholders of large companies. The objective of the new admissibility requirement of 1% of the issued capital for

shareholders of large companies was to establish a reasonable relationship between the ownership stakes of shareholders (and depositary receipt holders) in large companies and the size of the company in relation to authorizing an inquiry procedure. Subsection b) of this amendment concerns the new admissibility of the legal person itself, represented by the management board, the supervisory board and the receiver in case of insolvency (in Dutch: *curator*). The purpose of this was to make the behavior of bodies other than the management board and the supervisory board, such as the general meeting of shareholders, subject to the inquiry procedure as well.

This amendment category has been investigated as follows. In the jurisprudence analysis, the number and share of inquiry requests (in Dutch: *enquêteverzoeken*) made by shareholders and the legal entity, the admissibility threshold that shareholders invoke, the ownership stakes of shareholders and the issued capital of listed companies, were studied. In addition, the respondents were asked in the questionnaire for their assessment of the new admissibility threshold for large shareholders and the right of the legal person to invoke an inquiry request. The findings from the jurisprudence analysis provide us with indications that subsection a) did not have a disproportionate effect on the possibility for shareholders of large companies to start an inquiry procedure. For example, there is no significant difference in the type of legal person in which an inquiry request takes place after the introduction of the new admissibility criterion. This also applies to the number and part of the inquiry requests submitted by (minority) shareholders. Nor are there any major changes to be noted with regard to the amount of the issued capital of listed companies in which an inquiry request is made and the admissibility grounds on which the applicants rely. However, it should be noted that the number of observations for this part of the research is low. From the questionnaire, it can be noted that the respondents generally provide a neutral positive assessment of this legislative amendment component. However, it appears from the comments of some of the respondents in the questionnaire that a disproportionate restriction might exist for shareholders of large companies with shares with a low nominal value, which might affect the achievement of this legislative amendment's objective. However, one may note that the jurisprudence analysis does not provide any evidence regarding this viewpoint.

With respect to subsection b), both the jurisprudence analysis and the questionnaires provide sufficient insight to conclude that the aim of this subsection has been achieved; it follows from the jurisprudence analysis that this amendment has led to the fulfillment of a practical need. The findings show that in the period 2013-2016, 6% of the survey requests were made by the legal person. These are ten requests, eight of which have been requested by the management board and two have been requested by the supervisory board. This shows that the relevance of the receiver's right to invoke an inquiry request should be nuanced in practice; in no case the receiver was involved as the petitioner. Note that the respondents assess the right to request an inquiry of the management board and the supervisory board positively, while the assessment of the receiver's right is neutral-positive. According to some respondents, the receiver's right to invoke an inquiry does not add any value.

Amendment category 2: immediate provisions

The second amendment category includes the legislative amendment components with regard to the allocation of immediate provisions. This category contains three legislative amendments, namely: a) the legal requirement to weighing the interests for the allocation of immediate provisions; b) the requirement of a provisional opinion by the Court that there are reasonable grounds for doubting a correct policy or proper course of action (in Dutch: *gegronde redenen om aan een juist beleid of juiste gang van zaken te twijfelen*) before imposing immediate provisions, and; c) the requirement that the Enterprise Chamber, after imposing immediate provisions, must decide within a reasonable period whether an inquiry be initiated. The objectives of these legislative amendment components are to strengthen the link between immediate provisions and the inquiry and to remove the uncertainty about any delayed inquiry. In addition, with these legislative amendments, the minister envisaged the possibility of finding a solution of the conflict in mutual consent.

This legislative amendment category has been investigated as follows. First of all, the jurisprudence analysis examined the number and share of requested, allocated, rejected and retained immediate provisions, the different types of immediate provisions and the number of immediate provisions per case. In addition, the consecutive stages of the inquiry procedure after the allocation of immediate provisions were investigated, thereby analyzing the Enterprise Chamber's decision with respect to the inquiry and the duration of this decision. The number and share of out-of-court settlements (in Dutch: *minnelijke regelingen*) after the allocation of immediate provisions was examined too. With respect to the questionnaires, the respondents were asked about their assessments of the three components.

Regarding the first two legislative amendment components (subsection a and b), there are few effects to be noticed in practice. The jurisprudence analysis shows that the share of requests for inquiries where immediate provisions are requested as well, has remained more or less the same before and after the legislative amendments, namely 90% and 91% of the survey requests before and after respectively. The proportion of inquiry requests in which immediate provisions were allocated has increased significantly from 52% to 64% since the legislative amendments. Of these requests in which immediate provisions were allocated, an investigation was ordered in 86% of the cases prior to the amendment of the law; this is 91% afterwards. This increase, although not statistically significant, provides a (slight) indication that since the amendment of the law there has been a stronger link between the allocation of immediate provisions and the inquiry. This may indicate the achievement of the legislator's aim of subsections a) and b). Note that the Enterprise Chamber indicated during the interview that its approach for allocating immediate provisions since the amendment of the law has not been changed *de facto*. The respondents provide in a positive assessment of the requirement of a provisional judgment whether an inquiry can be ordered before allocating immediate provisions by Enterprise Chamber. 76% of the 41 respondents that filled out the statement regarding the linkage between immediate facilities and the inquiry believe that this amendment com-

ponent promotes this linkage. All respondents that filled out the statement on the possibility of finding a solution by mutual agreement (in total 60) indicated that this possibility is not removed.

The jurisprudence analysis provides a (slight) indication that the objective of the amendment component c is achieved, since the time interval between the allocation of the immediate provisions and the ordering of the inquiry has decreased on average since the introduction of the Law amending the Right of Inquiry. It should be noted, however, that this decrease is not statistically significant and that it concerns a very small number of observations. The vast majority of respondents report positive effects of this legislative amendment; for example, the respondents indicate that the amendment promotes legal certainty for those involved and the speed of the inquiry procedure. It should be noted here that the Enterprise Chamber has the possibility to postpone the appointment of the 'inquiry researcher' (hereinafter: researcher) after assigning the inquiry; the parties can then request the appointment of the researcher.

Amendment category 3: guarantees in the research phase

Law amendment category 3 contains three legislative changes that relate to the research phase of the inquiry procedure. For example, subsection a) contains a clarification of the investigator's liability standard, subsection (b) states that researchers should be able to give the persons named in the inquiry report the opportunity to comment on substantive findings regarding those persons, and subsection c) introduces the appointment of the Court's supervisory commissioner (in Dutch: *raadsheer-commissaris*) who supervises the research phase. The objective of the last two legislative amendment subsections is to introduce more guarantees in the research phase. In addition, subsection a) would contribute positively to the researchers' inclination to take on a research task. For these legislative amendments, the jurisprudence analysis includes those cases in which the parties express themselves (critically) about the working method of the researcher or the research report, and those cases in which the 'hearing-and-rebuttal principle' (in Dutch: *hoor en wederhoorbeginsel*) is examined. In addition, the appointment period of the researchers and the designation of the supervisory-commissioner were analyzed. In the questionnaire, the respondents were asked about their assessment with regard to the three components separately. Finally, the analysis of the inquiry reports (in Dutch: *onderzoeksverslagen*) included the number and share of involved persons who responded on substantive findings regarding those persons. The researcher's reference to the reactions of those involved to the draft inquiry report and what the researcher has subsequently done with these reactions was also included in the analysis. With regard to the role of the supervisory-commissioner it has been investigated whether any reference was made to this role.

With regard to the first legislative amendment component (a), it can be stated that the jurisprudence analysis does not provide in any conclusive statement with regard to achievement of this component's objective. There are no known cases of liability of the researcher in the ARO population, and the average appointment period of the researcher has not been significantly reduced since the amendment of the law. On the other hand, the

average assessment of the respondents with respect to this amendment is positive. It also follows from the conversation with the Enterprise Chamber and the other interviews that the Enterprise Chamber has no difficulties in finding researchers willing to take on a research task. As a result, it can be stated that, although from this research it does not completely follow that this amendment to the law has reached its goal, there are indications that the risk of liability of the researcher is not a major problem in practice.

The legislative amendments b) and c) achieve the legislator's objectives (to a large extent), because the safeguards have been increased in the research phase of the inquiry procedure. Amendment subsection b) provides the parties with the opportunity to comment on (certain sections in) the inquiry report. In the jurisprudence analysis only three decisions have been found that (directly) deal with this aspect of the hearing-and-rebuttal principle. The analysis of the inquiry reports shows that since the amendment of the law, the proportion of draft inquiry reports submitted to those involved has increased by four percentage points. This increase is not statistically significant. The number of inquiry reports in which the interview reports (in Dutch: *gespreksverslagen*) and research design are presented to the parties has increased significantly since the amendment of the law. In addition, the number of people involved who responded to the essential findings that relate to them has increased as well. Moreover, the number of inquiry reports referring to the parties' reactions to the draft inquiry report, as well as the number of inquiry reports in which the researcher actually included these reactions in some way in the research report, also increased. However, one may note that none of these increases are statistically significant. In contrast, there has been a statistically significant increase since the introduction of Law amending the Right of Inquiry in the proportion of inquiry reports in which the researcher *substantively* refers to the reactions of the parties. Finally, the respondents in the questionnaires provide a positive assessment of this legislative amendment component. The majority of the respondents believe that the risk of incorrect information in the report of the researcher has been reduced since the legislative amendment and that the Law amending the Right of Inquiry provides better guarantees in the research phase. These findings lead to the conclusion that the objective to enhance the 'hearing and rebuttal principle' in inquiry procedures has been fulfilled.

Legislative section c) refers to the appointment of the supervisory-commissioner. The jurisprudence analysis shows that, in all but one case since the amendment of the law, a supervisory-commissioner has been appointed. In addition, it appears that the parties also make a request for steering by or an order from the supervisory-commissioner on a number of occasions, indicating that the supervisory-commissioner actually plays a role in practice. From the analysis of the inquiry reports it follows that in five of the 27 reports, the supervisory-commissioner is referred to, with a substantive remark about the role of the supervisory-commissioner being made once. The questionnaire shows that the role of the supervisory-commissioner is considered neutral-positive in practice. Where two-thirds of the respondents that filled out the statement on the course of the procedure indicate that the investigation is progressing better with the supervision of the supervisory commissioner, some respondents state that there is some confusion regarding the role of

the supervisory commissioner. Nevertheless, it can generally be said that this third legislative amendment component has (largely) achieved the legislator's objective.

Amendment category 4: submission of defense statements

Amendment category 4 concerns the period of submission of defense statements. The amendment holds that the Enterprise Chamber must determine a date prior to the public hearing for submitting the defense statements. The objective of this amendment is to promote a good process order. This legislative amendment category was examined in the jurisprudence analysis by means of the period between the submission of the defense statement and the public hearing. In addition, the respondents in the questionnaires were asked about their assessment of this legislative amendment category.

It can be concluded that this legislative amendment reaches the legislator's objective. From the analysis of the jurisprudence it follows that the periods between the submission of the (first) request (in Dutch: *verzoekschrift*), the defense statement and the public hearing changed since the introduction of the Law amending the Right of Inquiry; the periods have been significantly increased since the amendment of the law, which means that on average the parties have had more time for preparing their defence. The new requirement that a date for submitting defense statements, prior to the public hearing, should be determined was judged positively by the respondents in the questionnaires; a vast majority of the respondents explicitly agrees that the amendment to the law benefits the process order.

Amendment category 5: costs of defense

The final amendment category, category 5, holds that the reasonable and reasonably incurred costs of defense of researchers and Enterprise Chamber-officers (hereinafter: EC-officers, in Dutch: *OK-functionarissen*) will be at the expense of the legal person. A distinction is made between researchers on the one hand, whereby the reasonable and reasonably incurred costs are for the account of the legal entity, and EC-officers where the Enterprise Chamber *can* determine that these costs of defense will be at the expense of the legal entity. In addition, since the amendment of the law, it has been stipulated that a compensation awarded once by the Enterprise Chamber or the remuneration of researchers and EC-officers cannot be reclaimed as an undue payment. The objective of this legislative amendment category is to prevent difficulties in finding researchers and EC-officers. In the jurisprudence analysis, the appointment period of researchers and EC-officers was investigated. In addition, the respondents provided in an assessment of this legislative amendment category.

This legislative amendment category does seem to achieve its legislative objective with respect to the position of the researcher.. The findings of the analysis of amendment category 3 have already shown that the average appointment period of the researcher has not decreased significantly since the amendment of the law. However, the Enterprise Chamber states that it does not encounter any difficulties in finding researchers who are willing to carry out a research task in inquiry procedures, and, in general, the respondents do not appear to experience any major problems with regard to a (threatening) liability

claim of those researchers. As far as the EC-officers are concerned, there is also no significant change worth mentioning in the appointment period. One may note that some of the respondents indicate that, although they are positive about the amendment of the law, EC-officers would still face threats of liability. Note that the jurisprudence analysis in this research does provide any evidence for this statement.

Closing remarks

In general, it can be stated that this research shows that the objectives of the various legislative amendment categories are (largely) achieved. With respect to amendment 5, some respondents from the questionnaire indicated that EC-officers would still run the risk of being held liable in practice. In addition, the questionnaire shows that the effects of the Law amending the Right of Inquiry on the duration of the inquiry procedure, the quality of the inquiry procedure - including the research phase - and the number of inquiry procedures are not very substantial. With respect to other (unintended) side-effects of the Law amending the Right of Inquiry, the literature search and the questionnaire revealed that a disproportionate limitation to address the court could exist for shareholders of large companies with shares with a low nominal value.