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ENGLISH SUMMARY

Title:

Managing directors (*bestuurders*) in education

Subtitle:

The legal position of members of the management board in five educational sectors

Research questions¹

In The Netherlands, as a result of the freedom of education as set out in article 23 of the Dutch Constitution, both public legal entities (*publiekrechtelijke rechtspersonen*) and private legal persons (*privaatrechtelijke rechtspersonen*) may set up schools or educational institutions. Public funding can be obtained by both public and private legal persons, provided they meet the applicable legal requirements. The members of the management boards (or ‘**directors**’) of these educational entities are charged with day-to-day management. The management tasks of those directors, the interests they are obliged to take into account and the governance principles they have to adhere to are not always clear.

The objective of this thesis is to provide insight in the legal position of directors of complex educational entities. The main question in this thesis is the following: what is the legal position of a professional director of a complex educational entity? For the purpose of this thesis, (i) professional directors are defined as members of the management board of a complex educational entity and (ii) a complex educational entity is defined as a public or private legal person that employs 100 employees or more or has an annual – mainly publicly funded - turnover of € 10 million or more. An educational entity may manage one or more educational institutions (schools).

The main question of this thesis can be divided into the following three sub-questions.

1. Has the legal position of a professional director significantly changed over the past 30 years and what does this development mean?
2. How is the legal position of a professional director regulated and are those rules consistent and consistently applied?
3. Which limits on autonomy does a professional director face?

1 The English definitions and translations are derived from Dutch Civil Law, the Dutch corporate governance code 2016, Juridisch-Economisch Lexicon Online, version May 2015, www.kluwer.nl and the English website of the Dutch Ministry of Education, Culture and Science.

This thesis looks at five educational sectors: primary education, secondary education, secondary vocational education, higher professional education and university education. Each sector has its own specific regulation: the Act on Primary Education ('**Wpo**'), the Act on Secondary Education ('**Wvo**'), the Act on Vocational Education ('**Web**') and the Act on Higher Education ('**Whw**'). In The Netherlands, most public and private educational institutions are governed and controlled by private foundations (*stichtingen*) or private associations (*verenigingen*). However, some institutions, in particular public universities, are (still) public legal persons. The legal position of the directors of educational entities is not only influenced by the specific legal requirements of the applicable educational act, but also by its various private and public legal relationships. Directors are members of the management board and, most of the times also, employees of their educational entity. Directors represent their educational entity, among others in contracts with government, regulators, students/parents and partners.

Thematically structured chapters

The different chapters of this thesis are thematically structured. This structure allows for a discussion on the various limits on the autonomy of the directors and the different legal relationships.

After the introduction in chapter 1, chapter 2 focuses on the historic development of educational entities and the legal position of their boards in The Netherlands until 1985. This second chapter provides information on the history of the freedom of education in The Netherlands. It shows that educational entities became more complex and that management and educational leadership became more important over time. In the 19th century, many primary schools were run by teachers as independent entrepreneurs while universities and schools for the social and political elite were publicly governed. In 1985, a distinction could be made between educational management on the one hand and management boards with a focus on internal supervision on the other hand.

This historical development was not only influenced by general political, economic and social developments. Opinions on the relationship between government, semi-public entities and private legal persons thoroughly influenced the legal position of directors over time. This is shown in chapter 3 of this thesis. Starting in the mid-eighties and continuing in the nineties of the 20th century, the Dutch government and parliament focused on privatization of public educational entities and deregulation. This process led to more complex educational entities, professional management boards and the introduction of supervisory boards. Today, more than 99% of all publicly funded educational entities in The Netherlands are private legal persons. Most of these educational entities have a two tier structure, i.e. a management board and a supervisory board. Chapter 3 describes the various management

definitions used in the aforementioned Dutch Educational Acts, the Dutch Civil Code (*Burgerlijk Wetboek*) and the Dutch General Administrative Law Act (*Algemene wet bestuursrecht*). I reviewed the use of certain definitions in Dutch educational laws such as competent authority (*bevoegd gezag*), management board (*bestuur*), management (*besturen*) and administration (*beheer*). I concluded that a revision of these definitions and their use within the legal framework is necessary. Objective of such revision should be improving the accessibility of Dutch educational laws and, thus, improving legal certainty.

One of the objectives of privatization and deregulation was to provide educational entities with more autonomy. In exchange, the accountability of educational entities and their directors became more important. During the last 30 years, the Dutch government introduced multiple duties of care (*zorgplichten*) for educational entities and their directors in The Netherlands. Duties of care are described as open formulated legal obligations for educational entities with respect to certain behavioral alternatives. Chapter 4 describes and analyses the development of the use of duties of care in The Netherlands. In it, I show that, since 1985, the use of duties of care has increased while each duty of care became more specific. Fulfilling each duty of care is a legal requirement for public funding. The central duty of care is ‘good education’. This duty of care can be differentiated in more specific duties, such as good governance (*goedbestuur*), separate management and supervisory functions (*scheiding bestuur en intern toezicht*), organization (*interne bestuursorganisatie*), professional management (*professionaliteit van het bestuur*), professional financial management (*goed [financieel] beheer*), participation by students, parents and employees (*medezeggenschap*) and professionalism (*professionele ruimte docenten*). A lot of those duties of care focus on the management conditions perceived essential by the Dutch government and regulators for providing good education. The increase in the number and specificity of these legal duties of care and the focus on management conditions affect the legal position of directors, both directly and indirectly. Directly because it sets out the tasks and obligations of management boards and thus of their members, the directors. Indirectly because breaching a duty of care may result in administrative sanctions for the educational entity.

Chapter 5 describes and analyzes the public supervision on educational entities and their directors. This public supervision is mainly conducted by the Dutch Inspectorate of Education (*Inspectie van het Onderwijs*) and the Netherlands-Flemish Accreditation Organization (NVAO). The Act on the Inspectorate of Education (*‘Wot’*) forms the legal basis for supervision by the Inspectorate of Education. The legal basis for the NVAO can be found in the Whw. Both the Wot and the Whw became effective in 2002. The Inspectorate of Education is responsible for the inspection and review of schools and educational institutions in The Netherlands. The NVAO assesses educational programs for higher and

university education in Flanders and The Netherlands. Publicly funded entities for higher education can offer accredited educational programs when they meet certain quality standards. Both inspectorates are entitled to lay out aspects of quality in guidelines. These guidelines interpret the legal requirements and different duties of care. Not fulfilling a guideline can result in more extensive public supervision. Breaching a legal requirement (including a duty of care) can result in various administrative sanctions; among them, most importantly, the cancellation or amendment of public funding. In the event the Inspectorate of Education determines that professional mismanagement (*bestuurlijk wanbeheer*) has occurred, the Dutch Minister of Education, Culture and Science can issue an administrative direction (*bestuurlijke aanwijzing*). This direction is qualified as an administrative sanction *sui generis* and can order the dismissal of directors.

The legal research in chapter 5 shows that public supervision and the various instruments for administrative sanctions strongly emphasize the accountability of educational entities and their directors. The number of instruments and the use of administrative sanctions has increased exponentially since 2002. This development occurred simultaneously with the choice of the Dutch government and regulators to promote more autonomy and attention to accountability. I conclude that especially the principle of proportionality for any administrative financial sanctions deserves extra protection of /against lawmakers, regulators, inspectorates and judges. Also, in the event of alleged professional mismanagement, the legal status of directors as parties involved needs strengthening.

Public supervision addresses educational entities directly. The results of such supervision can indirectly impact the view on a director's performances and may conflict with the business judgment rule. This business judgement rule presumes that directors carry out their functions in good faith, after sufficient investigation, and for acceptable reasons. Unless this presumption is rebutted, third parties should abstain from second-guessing well-meaning management decisions. The described development of public supervision infringes the management autonomy of directors excessively. Especially in situations of reasonable and legitimate legal uncertainty or social and political pressure, the (financial) risks of potentially not complying with insignificant requirements or complex regulations are unseemly high. In those situations the legal position of both inspectorates is strong. This position is even stronger due to three factors. Firstly, the Inspectorate of Education and the NVAO are obliged to be transparent and publish their reports. This can easily result in naming and shaming. Secondly, they have the task to not only assess if educational entities are legally compliant but also to determine the fulfillment of the applicable guidelines. This increases the risk of hindsight bias; what could have been done better? Thirdly, the Inspectorate of Education and the NVAO are obliged to report any findings of both significant and insignificant unlawful conduct.

The Dutch Civil Code functions as an additional assessment framework. Chapter 6 describes various relevant instruments of private law that limit the management autonomy of directors of educational entities. Attention is paid to statutory limitations and mandatory adoption of limitations in the articles of association. Educational entities and their directors must act in accordance with these limitations [under mandatory law and] to comply with the requirements for public funding. I also analyzed the subject of liability claims directed to the educational entity or to the directors themselves. Special attention is attributed to the civil instrument of the dismissal by the civil court of the director who has acted, or has omitted to act, in a way that is in violation with the law or the articles of association, or who can be held accountable for mismanagement due to improper administration. Such dismissal may be ordered by the court upon the request of any interested party. Chapter 6 shows that the Dutch government and regulators have broadened the scope and have promoted the use of such instruments available under private law. Consequently, the overlap between public and private instruments of sanction increases. Public subsidy requirements further seem to give substance to private standards in all legal relationships. This development not only diminishes the threshold for government and third parties to intervene in the management of educational entities and to impose liability claims. It also increases the risk of piercing the corporate veil of educational entities; and thus the risk of personal (financial) implications for directors when managing the educational entity.

A development described in Chapter 7 is the dependency of educational entities and their directors on social networks. The number of mandatory cooperations is rising. Some of these cooperations are mandated by law, others a necessity for public funding. More often cooperation is expected for social or public reasons and demanded by local stakeholders. The need for cooperation was partly met with the upscale of educational entities in the nineties of the last century, which resulted in more complex educational entities, professional management and a focus on accountability. This century, more attention is paid to the risks of upscaling educational institutions. Educational entities can become 'too big to fail' and demand high standards of professional administration and management. This, taking together with a political focus on the freedom of education, has led to legal limitations on mergers between educational entities and institutions and more focus from government, inspectorates and internal supervisory boards on the quality of financial administration and management. This development has resulted in an implicit duty of care for cooperation. Chapter 7 shows that openness to cooperation is expected from directors. The increasing importance of social networks and the various mandatory cooperations can, however, damage the management autonomy of directors. Educational entities have become more dependent on their partners and (local) stakeholders and it affects the balance of interests.

The main focus of chapter 8 is the legal position of individual directors. I analyzed the appointment procedure and the various (considered) mandatory personal competences. Attention is further paid to the Standards for Remuneration Act ('WNT'), which restricts excessive remuneration and severance payments of directors as senior officials of semi-public entities. I also analyzed the process of dismissal of directors. Chapter 8 shows that, since the start of this century, the focus of the Dutch government and regulators has been strongly directed at the legal position of individuals acting as directors as well as employees. The termination of both legal relationships is relatively straightforward. If applicable, the internal supervisory board mostly acts as the employer and the termination of the employment agreement does not need prior external approval. The WNT and the recently amended Dutch labour acts have limited the room for severance and redundancy payments severely. This development has not only led to a further limitation of the autonomy of educational entities. Directors nowadays are more vulnerable personally. This vulnerability can come at the expense of their business judgment rule and may influence the balance of interests.

The legal position of a director is dependent on a highly complex web of regulations, standards and expectations

The director central in this thesis is a professional director of a complex educational entity. He is usually a member of the management board and an employee. Managing is his profession. The legal position of a director and his duties, responsibilities, rights and obligations vary by legal relationship. This thesis shows that the legal position of a director is dependent on a highly complex web of laws and regulations, articles of association and internal regulations, soft law, individual agreements and factual circumstances.

The outcome of this highly complex web is that the legal position of a director of an educational institution is determined by the following four subconclusions:

1. A director is both the face and the head of the educational entity

Directors not only represent their educational entities, but also manage them. A director is held accountable for the functioning of the educational entity and his educational institutions. If these educational entities do not perform properly, if there is financial hardship or if there are concerns on the functioning of the educational entity, this has significant influence on the legal position of an individual director. Nevertheless, directors often lack sufficient autonomy and administrative powers to fulfill the high expectations put upon them. They are dependent on their support among stakeholders and on their social network. It is therefore desirable to distinguish between practical accountability and legal responsibility. Addressing a director is understandable insofar as it follows the fact that they represent their educational institution. They can be held practically accountable as 'spokesperson'.

Regarding their legal responsibilities, the business judgment rule implies that they cannot simply be held personally responsible for every specific act of the educational entity.

2. The task of administration and management is refined and comprehensive

The task of administration and management has become more refined and comprehensive. The last thirty years have been characterized by a gradual increase in standards of accountability. These higher standards not only create more specific duties of care for educational entities, but also a more refined and more comprehensive task of administration and management. More interests are involved and must be balanced. The trend towards more granularity of the various duties of care is accompanied by a demanding social network. The various legal cooperation obligations, the growing importance of internal supervision and the influence of social participation influence the intricacy of the task of directors. The involvement of the Dutch government and regulators with the appointment process, mandatory personal competences and remuneration and the recent restriction of severance and redundancy payments help this process even more. An effect is higher expectations for the directors and an increase of dependency on social, local and political support. This diminishes the management autonomy of the directors.

3. Standards of conduct are emphasized

Making business judgments and balancing interests are key functions of management. The administrative powers of directors are not only limited by private law, the articles of association or legal requirements for public funding. The current process of public supervision, the distinction made between compliance and appreciation and the trend in some educational governance codes to emphasize the importance of soft governance, result in the use of standards of moral behavior when assessing the performance of directors. Core values such as integrity, reliability, responsibility, openness and transparency encompasses normative and ethical elements. These moral standards of behaviour seem to lead to higher expectations of the management performances and competences of directors.

The emphasis on moral standards of behavior manifests the desire for social responsible and personally accountable directors. This thesis shows that some reticence is desirable in the assessment of administration and management performances and in the use of public administrative sanctions and private legal instruments. The interest of an educational organization and the public service they provide, can conflict with other social and public interests. In order to uphold the necessary business judgment rule for a director, which is considered to be in the interest of educational innovation, one needs to be aware of those potential conflicts. It is the exclusive task of directors, as members of the management board and as representative of the educational entities, to balance the interests involved.

4. The legal position of a director is highly dependent on social and political trust

The legal position of a director depends on trust. As administrative and management tasks become more intricate and comprehensive, the focus on required standards of moral conduct is promoted and the regulation of the legal position is highly complex and sometimes inconsistent. As a result, the legal position of directors lacks the necessary legal certainty. Directors must be put in a position where they can indicate and rely on their own management powers, duties and responsibilities. The demand of the various stakeholders and interested parties to be involved in management and policy is nevertheless high. Granting legal administrative powers to others than directors would raise the question whether those additional powers increases the responsibilities of those interested parties and decreases the legal responsibility and liability risks of directors themselves.

This thesis shows that especially in situations of social doubt, public pressure or (alleged) financial problems, the legal position of directors is weakened. The director is in full spotlight and can only rely on trust and communication. The result is a strong dependency on the interpretation of the factual circumstances when assessing the functioning of a professional director; and thus of personal trust. This applies to all private and public legal relationships in which directors, and their educational entities, are involved. The importance of personal trust has an adverse effect on the autonomy necessary for innovative education, the freedom of education and the distinction between public government and privately organized educational entities.

Closing statements

The problems identified in this thesis are answered by analyzing the laws, regulations and standards applicable to the director of an educational entity. I conclude that Dutch education laws are very complex and that the different acts, statutes and regulations lack sufficient cohesion. This does not promote the accessibility of Dutch educational laws and affects their legal certainty. This explicitly requires the attention of the Dutch government, regulators, inspectorates and members of supervisory boards. The risk is managerial helplessness and an overdependence on social support, interested parties and trust. This conflicts with the expected main focus of directors to continuously improve the quality of education.

Autonomy as a principle is valuable. Directors have - on behalf of their educational entity - the right to stress the importance of the principle of educational and management autonomy. That is legitimate, suitable with the history of the Dutch educational system and beneficial for the improvement of the quality of education. An appeal to autonomy is not *a priori* defensive. Autonomy presupposes taking initiative, thinking, making choices and balancing interests. Even if the outcome would be difficult or painful. In the end, a

director must be in a legal position to ensure sustainable value; “*education that is a little bit better every day*”.

The value of the principle of autonomy does not presuppose that legal limits are out of bounds. After all, with management power comes responsibility. Taking this into account, the fact that directors represent their educational entities and that it is their task to manage, should not result in a low or other threshold for personal liability under the Dutch Civil Code. That would adversely affect the Dutch principles on piercing the corporate veil. If a director or the educational entity is not functioning properly, the director of course has principal responsibilities. It is concluded that this current principal responsibility of a director is almost political. This conclusion confirms the personal vulnerability of directors and the significance of support and trust. At the same time it expresses the need for autonomy and substantial distance of interested parties. Good management involves trust and time. But, it also begs initiative of directors, educational entities and national educational associations to define themselves the requirements for good education, good governance and professional management.