
THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

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LAW BUSINESS RESEARCH

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LAW BUSINESS RESEARCH LTD

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-910813-09-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BAKER & MCKENZIE – CIS, LIMITED

BOWMANS

DE BRAUW BLACKSTONE WESTBROEK NV

HERBERT SMITH FREEHILLS LLP

MANNHEIMER SWARTLING

MARVAL, O'FARRELL & MAIRAL

MORGAN LEWIS STAMFORD LLC

MORI HAMADA & MATSUMOTO

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EDITOR'S PREFACE

Over the years since the financial crisis, shareholder activism has been on the rise around the world. Increasingly institutional shareholders are taking a range of actions to leverage their ownership position to influence public company behaviour. Activist investors often advocate for changes to the company, such as its corporate governance practices, financial decisions and strategic direction. Shareholder activism comes in many forms, from privately engaging in a dialogue with a company on certain issues, to waging a contest to replace members of a company's board of directors, to publicly agitating for a company to undergo a fundamental transaction.

Although the types of activists and forms of activism may vary, there is no question that shareholder activism has become a more prominent, and likely permanent, feature of the corporate landscape. Boards of directors, managements and the markets have increasingly become more attuned to shareholder activism, and engaging with investors has become a priority for boards and managements as a hallmark of basic good governance.

Shareholder activism has become a global phenomenon that is effecting change to the corporate landscape not only in North America but also in Europe, Australia and Asia. While shareholder activism is still most prevalent in North America, and particularly in the United States, shareholder activism is expanding its reach across the globe. This movement is being driven by, among other things, a search by hedge funds for new investment opportunities and a cultural shift toward increased shareholder engagement in Europe, Australia and Asia.

As both shareholder activists, and the companies they target, become more geographically diverse, it is important for legal and corporate practitioners to understand the legal framework and emerging trends of shareholder activism in the various international jurisdictions facing activism. This inaugural edition of *The Shareholder Rights and Activism Review* is designed as a primer on these aspects of shareholder activism in such jurisdictions.

My sincere thanks to all of the authors who contributed their expertise, time and labour to this first edition of *The Shareholder Rights and Activism Review*. As shareholder activism continues to increase its global footprint, I am confident that this review will serve as an invaluable resource for legal and corporate practitioners worldwide.

Francis J Aquila

Sullivan & Cromwell LLP

New York

October 2016

Chapter 3

NETHERLANDS

Paul Cronheim, Willem Bijveld and Frank Hamming¹

I OVERVIEW

Shareholder activism is a hot topic in many Dutch boardrooms. Discussions between boards and shareholders on matters such as strategy, corporate governance and executive compensation have become a regular feature within Dutch listed companies. This chapter gives an overview of the Dutch regulatory and legal framework in which listed companies and their shareholders operate, points out the key trends concerning shareholder activism in the Dutch market, and zooms in on a few topical battles between companies and activist shareholders.

II LEGAL AND REGULATORY FRAMEWORK

i Primary sources of law, regulation and practice

Dutch Civil Code

Book 2 of the Dutch Civil Code (DCC) is the primary source of law with regard to Dutch corporate law. As such, the DCC also covers the rights and duties of, and the division of powers between, the (one or two-tier) board and the general meeting of shareholders.

Dutch Corporate Governance Code

The Dutch Corporate Governance Code complements the DCC as it lays down principles and best practice provisions that regulate the relationship between the board(s) and the general meeting. The Corporate Governance Code is currently under revision and a new version is expected to come into force in 2017. The Corporate Governance Code applies on a comply-or-explain basis to, briefly stated, all Dutch listed companies.

¹ Paul Cronheim is a partner and Willem Bijveld and Frank Hamming are senior associates at De Brauw Blackstone Westbroek NV.

Dutch Financial Markets Supervision Act and Market Abuse Directive

The Dutch Financial Markets Supervision Act (FMSA) contains, among others, disclosure obligations for listed companies, major shareholders and board members, and rules on takeovers of listed companies. The FMSA has implemented numerous EU directives, such as the Transparency Directive and the Takeover Directive. As per 3 July 2016, several market abuse provisions have been removed from the FMSA and are now dealt with in the Market Abuse Regulation. The MAR has direct effect in all EU Member States.

EU Alternative Investment Fund Managers Directive

For hedge funds and private equity funds specifically, the Alternative Investment Fund Managers Directive (AIFMD) is also relevant as it sets out rules and requirements for the authorisation, ongoing operation and transparency of AIFMs.

ii Division of powers – roles of the executive board, the supervisory board and the general meeting

Most Dutch public limited liability companies with a listing on the Amsterdam Stock Exchange have a two-tier board, consisting of an executive and a supervisory board.² In a two-tier board governance model, the roles of the main corporate bodies can be summarised as follows.

The executive board manages the company and is in charge of the company's aims, strategy, risk profile, results and corporate social responsibility issues. The executive board is accountable to the supervisory board and the general meeting of shareholders. The executive board has a fiduciary duty to the company's stakeholders (including, but not limited to, its shareholders).

The supervisory board is charged with supervising and advising the executive board. The supervisory board has certain rights regarding the appointment, suspension and dismissal of executive board members, and the approval of the supervisory board is required for certain important resolutions. The supervisory board is accountable to the general meeting and also has a fiduciary duty to all stakeholders of the company.

The general meeting monitors the performance of the executive board and the supervisory board. The powers of the general meeting are vested in the DCC and the company's articles of association. For example, in principle, a decision of the general meeting is needed for resolutions concerning issuance of shares, dissolution of the company, adoption of the annual accounts, board compensation, and amendment of the company's articles of association. Transactions regarding an important change in the company's identity or character (e.g., sale of the company) require prior approval of the general meeting. The general meeting also has the power to appoint and dismiss board members. The company's articles of association, however, may limit this power by stating that the appointment and dismissal occurs upon a (binding) proposal from the executive or the supervisory board, or can only be taken with an increased majority requirement.

2 Dutch law provides companies with the option to structure their boards based on a one-tier model (single board with both executive and non-executive board members) or a two-tier model (separate executive and supervisory boards). One-tier board structures are often seen with Dutch public limited liability companies with a listing on the NYSE or NASDAQ, for example Mylan NV, NXP Semiconductors NV, and Unilever NV.

iii The activist shareholder's toolbox

This section provides an overview of common tools that activist shareholders use in pursuing their agenda. See Table 1 for the different levels of aggression of these tools.

Table 1

<i>Level of aggression</i>	<i>Tools</i>
Least aggressive	Private discussions and engagement with the company
	Public engagement with the company
	Stakebuilding
	Right to participate in and vote at general meeting
	Right to place an item on the agenda
	Right to convene a meeting
Most aggressive	Initiate litigation

Private discussions and engagement with the company

In the Netherlands, the vast majority of shareholder activism starts with the activist engaging with the boards of the company in a private setting. This could take the form of informal one-on-one discussions or conference calls with the company's CEO to discuss strategy and measures to maximise shareholder value, or more formal communication by sending private 'Dear Board' letters.

Public engagement with the company

When a shareholder activist is not satisfied with the company's response to issues raised in private discussions, starting a public campaign might be an alternative to realise its agenda. Generally, this includes the use of (social) media, teaming up with other shareholders and institutional investors, and gaining support of the investor community at large.

In the Netherlands there have been few public campaigns by activist shareholders. The most notorious example in this respect is still the 2007 campaign of UK-based hedge fund The Children's Investment Fund against ABN AMRO.

Stakebuilding

For an activist shareholder to ramp up the pressure on the company's boards, enlarging its stake could be an effective tool. Even with a small stake, an activist shareholder could have significant influence.

When buying shares, the activist shareholder must observe the rules on disclosure of substantial shareholdings. Pursuant to the FMSA, a shareholder must immediately notify the AFM if its percentage of capital interest or voting rights exceeds (or falls below) a number of specific thresholds. Currently, the thresholds are: 3, 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 and 95 per cent.³

³ For non-EU entities with a listing on the Amsterdam Stock Exchange that choose the Netherlands as their EU home Member State, the thresholds are: 5, 10, 15, 20, 25, 30, 50 and 75 per cent.

An activist shareholder building up its stake should also be aware of the mandatory offer rules. Under the FMSA, a mandatory offer is triggered by a person, or a group of persons acting in concert, acquiring 'predominant control' (at least 30 per cent of voting rights). When a shareholder reaches this threshold it is in principle obliged to make an offer for all remaining shares of the target company.⁴

Right to participate in and exercise right to vote at general meeting

Every shareholder has the right to participate in and exercise its voting right at the company's general meeting. In principle, the holder of one share is entitled to one vote ('one share - one vote' principle). The articles of association may stipulate a voting record date 28 days prior to a general meeting. The record date therefore determines those shareholders entitled to vote at a general meeting. Shareholders may vote in person or by proxy, which proxy may be granted electronically.

In the Netherlands a 'vote no' campaign has been seen on numerous occasions. Recently, hedge fund Highfields Capital Management opposed the plans of insurer Delta Lloyd to pursue a rights offering. Another example is the 2016 'vote no' campaign of Dutch shareholders' association VEB against the pay package for Shell board members.

Right to place an item on the agenda

Shareholders holding individually or jointly 3 per cent of the company's stock have a right to submit items for the agenda of the general meeting. The company's articles of association can prescribe a lower percentage. The Corporate Governance Code stipulates that a shareholder may exercise this right only after he consulted the executive board. See in this respect also the company's right to invoke a 180-day response time (see below).

A notable example in this respect is the case concerning ASMI, a Dutch multinational active in the semiconductor industry, where hedge funds Fursa and Hermes put a proposal on the agenda of the 2008 general meeting to replace the CEO and most of the supervisory board members. More recently, Dutch civil rights group Follow This put a 'green' resolution on the agenda of the general meeting of oil giant Shell in which it requested the board to invest the profits from fossil fuels into renewable energy.

Shareholders can submit items on the agenda as either a voting item or a discussion item. However, shareholders cannot force the board to put an item on the agenda as a voting item if the general meeting does not have the power to resolve upon the topic; in other words, shareholders cannot use this right to organise referenda or 'motions' on topics belonging to the primacy of the board. See the recent (2016) case of Boskalis against Fugro in paragraph IV.

Right to convene a meeting

Shareholders holding individually or jointly 10 per cent of the company's stock are entitled to call a general meeting and put such items on the agenda as they deem appropriate. The

4 A mandatory offer will not be required if, within 30 days following the acquisition of control, the controlling party reduces its stake below the 30 per cent voting rights threshold, provided that the voting rights held by that controlling party have not been exercised during this period and the shares are not sold to another controlling shareholder of the company. The Enterprise Chamber may extend this period by an additional 60 days.

company's articles of association can prescribe a lower percentage. A prominent example of activists exercising this right is Centaurus and Paulson & Co, who called shareholder meetings at Dutch industrial conglomerate Stork to vote on alternative strategies, including a public-to-private transaction, and on the dismissal of the entire executive board.

Initiate litigation

Shareholder litigation typically takes place in inquiry (mismanagement) proceedings before the Enterprise Chamber.⁵ Any shareholder that alone or acting jointly holds sufficient shares⁶ may initiate inquiry proceedings and request the Enterprise Chamber to order an inquiry into the policy of the company by independent court-appointed investigators.

The Enterprise Chamber may order an inquiry into the policy of a company if it is demonstrated that there are reasonable grounds to believe that there is mismanagement. This may, for instance, consist of abuse of minority shareholders, insufficient disclosure to shareholders, conflicts of interest of board members, or the unjustified use of takeover defences.

The Enterprise Chamber may at any time during the proceedings order interim measures. The interim measures ordered by the Enterprise Chamber may play an important role in takeover situations and activist campaigns. Interim measures may include suspending executive or supervisory board members, appointing interim executive or supervisory board members and suspending shareholders' voting rights. These interim decisions tend to carry great weight and, despite being provisional, are often decisive in the outcome of the matter.

The Enterprise Chamber has repeatedly demonstrated its willingness to act promptly and take rigorous action in takeover and activist situations. In the context of takeovers of public companies, shareholder interest groups and other activist shareholders often use (the threat of) inquiry proceedings to protect the interests of minority shareholders against the boards of the target company (the members of which may no longer be independent) or a majority shareholder.

5 A shareholder can also initiate summary proceedings before the competent Dutch district court. However, summary proceedings are much less common, since the Enterprise Chamber is regarded as the specialised court regarding corporate litigation.

6 If the company's issued share capital does not exceed €22.5 million: persons who alone or acting jointly hold shares representing at least 10 per cent of the issued share capital or representing a nominal value of at least €225,000. If the company's issued share capital exceeds €22.5 million: persons who alone or acting jointly hold shares representing at least 1 per cent of the issued share capital or, if the shares are listed, representing a value of at least €20 million based on the closing price of the last trading day.

The threshold for an activist shareholder to have standing in the Enterprise Chamber can be extremely high as a result of the capital structure of the company. This was the case at Mylan where the nominal value of each share was set at €0.01 and the issued share capital did not exceed €22.5 million. As a result, a shareholder wanting to initiate inquiry proceedings would need to hold shares with a market value of more than US\$1 billion to reach the threshold of €225,000 in nominal value.

iv The company's toolbox

Dutch corporate law provides for several structural mechanisms that enable a company to prevent or deter shareholder activism. Many Dutch listed companies have adopted such mechanisms in their articles of association. Examples include the use of listed depositary receipts without voting rights, shares with double or multiple voting rights, voting caps, the use of change of control clauses in financing arrangements, golden parachutes and structures that limit shareholders' control of the board. However, no company is immune to shareholder activism even with structural mechanisms in place. In the following, we describe some typical response measures that a targeted company could use.⁷ See Table 2 for different levels of aggression regarding these tools.

Table 2

<i>Level of aggression</i>	<i>Tools</i>
Least aggressive	Enter into a dialogue with the activist shareholder
	Get the company's message out to shareholders
	Relationship agreement
	Just say 'No'
	Invoke the response time
	'Put up or shut up' rule
	Trigger call-option on anti-takeover preferred shares
	Issue ordinary shares
Most aggressive	Sale of treasury shares
	Initiate litigation

Enter into a dialogue with the activist shareholder

The most informal response measure for a company is to enter into a dialogue with the activist shareholder. This provides the opportunity for the company's boards to assess the activist's views on the company's strategy, and shows their willingness to listen to the activist shareholder's concerns and suggestions. Building a relationship of trust and creating consensus with the activist shareholder might be a strong tool for the executive board from which the company can benefit in the long run. Entering into discussions with the activist shareholder may give the executive board 'breathing space' and time to determine its strategy when private discussions do not result in a long-term solution.

Get the company's message out to shareholders

A company dealing with shareholder activism could reiterate and emphasise the company's current strategy (in combination with a 'just say no' strategy). The executive board can give

⁷ According to the Dutch Supreme Court, defensive measures can be justified if they are necessary with a view to the (long-term) continuity of the company and its various stakeholders, provided that the measures are taken in order to maintain the status quo pending negotiations between the target and the bidder, and provided that they constitute an adequate and proportional response. Implementing defensive measures for an indefinite amount of time, generally, will not be justified.

presentations to key shareholders and potential investors in which it explains that its current strategy is in the best interest of the company and is the preferred path to maximise value for its shareholders. Gaining support of key shareholders might prove pivotal in fending off an activist shareholder.

Relationship agreement

A growing trend in the Dutch market is that listed companies conclude relationship agreements with large and vocal shareholders. In a relationship agreement, the company and the shareholder agree on topics such as strategy, governance, financing and exchange of information. The company could give one or more supervisory board seats to the activist shareholder in order to gain support from the activist for the company's strategy. Although the concluding of a relationship agreement provides a (temporary) ceasefire between a company and an activist shareholder, the boards must be aware of the fact that the representation of the activist shareholder on the board inevitably has an impact on the dynamics in the boardroom. Examples include the relationship agreements between telecom company KPN and its Mexican suitor América Móvil (see paragraph IV), and between critical materials company AMG and hedge fund RWC (see paragraph IV).

Invoke response time

Pursuant to the current Corporate Governance Code, the executive board may invoke a 180-day response time when shareholders request certain agenda items that could lead to a change in the company's strategy, such as the request to appoint a new CEO. The executive board must use the response time for further deliberation and constructive consultation. Case law has further defined that in principle shareholders must respect the response time as invoked by the executive board; the response time may only be set aside if there are sufficiently important reasons for this. The response time provides the executive board with some 'breathing space' and the opportunity to enter into a dialogue with the activist and to seek alternative measures.

'Put up or shut up' rule

The objective of the 'put up or shut up' rule is to prevent a listed company from being the object of rumour and speculation regarding a potential public offer for its securities. At the request of the potential target company, the Dutch securities authority AFM can impose disclosure obligations on an entity or person that has published information that could create the impression that it is considering the preparation of a public offer. This could be, for example, an activist shareholder who is building up a stake in a company. Following the AFM's instructions, the potential bidder must 'put up' or 'shut up', that is, within a given period announce a public offer for the target company or indicate that it does not intend to launch a public offer, in which case it will be prohibited from announcing or launching an offer for the target company for a period of six months. So far, there have been no instances in which the AFM has actually given such instructions.

Issue ordinary shares

As noted earlier, the general meeting has the power to issue ordinary shares. However, pursuant to the DCC, the general meeting may delegate this power to another corporate body for a period of up to five years. The same applies for the limitation and exclusion of pre-emptive rights that shareholders have. Typically, as is the case for the vast majority of

Dutch listed companies, the general meeting authorises the executive board to issue ordinary shares. In general, the authorisation stipulates that the executive board can issue a certain percentage of shares for ‘general corporate purposes’ and a certain percentage for the purpose of ‘mergers and acquisitions’.⁸ As a measure to defend itself from activist shareholders or hostile bidders, the executive board could decide to issue shares to a ‘friendly’ third party – for example, a long-time strategic party. Although perceived as aggressive, such an issuance dilutes the activist shareholder’s stake in the company and accordingly reduces its influence.

Sale of treasury shares

When a company holds a certain number of its own shares, for example, as a result of a share buyback, and these shares have not yet been cancelled (treasury shares), a company could sell these to a ‘friendly’ third party. As a result, similar to issuing ordinary shares, the third party acquires a stake in the company and dilutes the shareholding of the activist shareholder. Alternatively, a company could use treasury shares as consideration when purchasing certain assets from a third party. Depending on the specific situation, the company’s boards must be aware that this defensive measure, similar to issuing ordinary shares, is likely to be perceived as aggressive not only by existing shareholders, but also by the investor community and regulators.

Protective foundation: issuing anti-takeover preferred shares

The most common Dutch defensive measure consists of the possibility for a company to issue preferred shares to an independent, yet ‘friendly’, foundation. The company grants the foundation a call option, pursuant to which the foundation can effectively obtain up to 50 per cent of the votes.

The board of the foundation must be independent from the company. Accordingly, the company is not able to determine whether the call option is exercised – the foundation has to make its own decision in accordance with its objects as stated in its articles of association. In general, the foundation’s articles of association state that the foundation serves the interest of the company and its stakeholders by safeguarding, among others, the continuity, independence and identity of the company and its business.

Foundations rarely exercise their call option. One of the few and most recent of examples is the defence foundation of KPN, which exercised its call option as a reaction to the announcement of América Móvil to launch a hostile bid. Another example is the defence foundation of global pharmaceutical company Mylan NV (which has its registered office in the Netherlands), which made use of its call option in order to deter Teva Pharmaceutical Industries. Examples of hostile takeovers where a foundation was in place, but the foundation did not exercise its call option, include *Staples/Corporate Express* (2008), *Boskalis/Smit* (2009), and *Mexichem/Wavin* (2012).

8 In general, a prospectus is required for both the offering and the listing of shares. Under Dutch law, companies can make use of an exemption to publish a listing prospectus if it issues less than 10 per cent of the company’s stock to qualified investors, or to publish an offering prospectus if it issues shares to fewer than 150 retail investors.

Initiate litigation

Although not common, a targeted company can also initiate summary proceedings before the district court or enquiry proceedings, before the Enterprise Chamber. In such proceedings, the company can request interim or provisional measures to neutralise the attack or campaign of an activist shareholder.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

i General overview

Shareholder activism is a hot topic in boardrooms in the Netherlands, even though in absolute terms the number of activist shareholder campaigns is relatively limited when compared with those in the US and the UK. Shareholder activism reached its first peak between 2000 and 2007, when various US and UK-based hedge funds targeted listed companies in the Netherlands. Examples include the financial conglomerate ABN AMRO, Dutch industrial giants ASMI and Stork, and other well-known multinationals such as Ahold and Philips.

Shareholder activism is currently approaching pre-crisis levels as a result of market and economic conditions and a boost in M&A activity in the last few years. Market studies mention in particular the following key drivers for increasing shareholder activism post-crisis in Europe:⁹

- a* access to debt financing against historically low interest rates;
- b* high levels of cash on company balance sheets;
- c* stagnating revenues resulting in an increased pressure from investors to create shareholder value through dividend policy, operational improvements and changes in strategy;
- d* peak in M&A activity that supports activists in pushing companies to merge, acquire or be acquired, or divest or spin off non-core businesses; and
- e* less tolerance for poor governance and high executive compensation among the public and investors.

Since 2010, we have seen around 15 publicly disclosed activist shareholder campaigns in the Netherlands. The total level of shareholder activism is most likely higher, since shareholder activism in the Netherlands predominantly takes place behind closed doors.

In this section, we describe the activist shareholder landscape in the Netherlands as well as the main trends observed in the last decade. Given the relatively low number of activist shareholder campaigns in the Netherlands, trends described in this section are not only based on statistics, but also on more subjective observations and anecdotal evidence.

ii Activist shareholders: increased attention for activism from institutional investors

Activist shareholders in the Netherlands are predominantly US or UK-based hedge funds with a European or global investment focus, which applies to roughly 40 per cent of all activist hedge funds.¹⁰ Activism comes from both pure-play activist hedge funds, which acquire a stake in a company and subsequently put pressure on the management to adopt their views to

9 See for instance: JP Morgan 2014, 'Knocking on the door – shareholder activism in Europe'.

10 Preqin Hedge Fund Activist Report, June 2014.

maximise shareholder value, and multi-strategy hedge funds, for which shareholder activism is only one of their strategies. Over the last decade, some of the largest global activist hedge funds have been active in the Netherlands, including:

- a* The Children's Investment Fund, known for initiating the takeover of ABN AMRO;
- b* Centaurus, which launched a campaign against Stork and had positions in Ahold and SBM Offshore;
- c* Hermes, which together with Fursa battled in court against ASMI, and initiated litigation against Océ, which was backed by hedge fund Orbis;
- d* Third Point, which suggested a split-up of DSM;
- e* Southeastern Asset Management, which had a stake in Philips;
- f* RWC, known for building up positions in Corbion and AMG;
- g* Paulson & Co, which teamed up with Centaurus against Stork, and bought a stake in KPN and Ahold;
- h* JANA Capital, which targeted Philips and TNT Express;
- i* Highfields Capital Management, which holds a position in Delta Lloyd; and
- j* TT International, which suggested a break-up of TomTom.

Besides these usual suspects, we observe an increased attention for shareholder activism from institutional investors. The (potential) role of Dutch pension funds is especially noteworthy, since together they hold approximately €1,200 billion in assets under management (AUM) and have substantial investments in Dutch listed entities.

After the crisis, European and Dutch politicians called upon institutional investors to take a more active role as shareholder. Even though this did not result in legislative changes, the pressure fuelled the increased engagement of Dutch pension funds in the debate with the companies they invest in. Activism from institutional investors in the Netherlands focuses mainly on corporate governance issues, such as remuneration policy and corporate social responsibility. Campaigns carried out by institutional investors often take place behind the scenes and are, on average, less aggressive than the campaigns from pure-play activist hedge funds. There are several examples, however, of institutional investors publicly criticising Dutch listed companies.

In 2015, the largest Dutch pension fund ABP announced that it would look at the sustainability of its investments with more scrutiny and that it would enter into a dialogue with the companies it invests in to realise its sustainability goals. ABP claimed that its criticism at the general meeting of Shell contributed to Shell's decision to cease its exploration activities in Alaska.

Another recent example of institutional investors becoming more vocal is the 2014 public campaign that Dutch pension fund manager APG, together with Dutch insurer NN, waged against animal and fish feed company Nutreco. APG and NN disagreed with the board's decision to sell the company to SHV claiming that the offer significantly undervalued Nutreco's business while, at the same time, Cargill and private equity firm Permira had expressed their interest in Nutreco (although they did not make an offer). In a public letter, APG and NN questioned the Nutreco boards' decision to sell the company to SHV. Eventually, SHV raised its offer and APG and NN sold their shares.

iii Targets for activist shareholders: size is no deterrence

One of the recent global trends also observed in the Netherlands is activist shareholders expanding their focus to some of the largest companies. This trend is largely driven by the

increased financial capacity of the large activist hedge funds. In the early 2000s, there were only a few activist funds with AUM in the US\$10–15 billion range. Currently, more than 10 funds manage over US\$10 billion. On aggregate, activist funds worldwide are estimated to hold at least US\$200 billion in AUM.

In the Netherlands, this trend was first observed with hedge funds targeting Ahold in 2006 (market cap at that point over €10 billion in 2006), ABN AMRO in 2007 (market cap at that point over €50 billion) and Philips in 2007 (market cap at that point over €30 billion). More recently, Shell (market cap over €180 billion) was targeted in 2015 and 2016 by activist shareholders who were pushing for more focus on sustainable energy and a business model that is more climate-change proof. The size of a company thus does not seem to deter activist shareholders from acquiring a stake and putting pressure on the boards.

iv Objectives of activist shareholders: five common themes

We see five common themes in activist campaigns in the Netherlands, largely in line with US and UK practice:

Conglomerate discount

Several Dutch companies were pressured by shareholders to unlock shareholder value by divesting or spinning off non-core divisions or breaking up the company. The most well-known examples include Ahold, where Paulson & Co and Centaurus demanded the sale of Ahold's US activities; Stork, where Paulson & Co and Centaurus pushed to break up the company; and DSM, where Third Point pushed for a split-up.

M&A situations

Although less common, there are examples of activist shareholders pushing mergers and acquisitions, such as sale of the company. TCI's public 'Dear Board' letter to ABN AMRO is notorious in this respect as it brought the bank in play, resulting in the largest ever takeover battle in the Netherlands.

Strategic

Activist investors have pushed companies to make strategic changes and to improve their performance. This is often part of campaigns aimed at breaking up or selling the company, as discussed directly above. A prominent example is ASMI, where activist hedge funds Hermes and Fursa criticised the front and back-end strategy of ASMI.

Inefficient balance sheet

In several cases activist investors demanded a return of capital to the shareholders in the form of a share buyback or dividend payment. Well-known examples include Philips, where shareholders demanded that the capital raised by spinning off Philips' semiconductors unit NXP be returned to the shareholders; and SBM Offshore, where Centaurus pressured the board to adopt a different financing structure for its fleet.

Governance or board composition

Activist shareholders often target the governance structure and composition of the company's boards. Demands made by activist shareholders include being represented on the supervisory board, dismissal of certain board members, amending executive compensation and challenging

the company's defence measures. Examples include TNT Express, where hedge fund JANA Capital requested appointment of three new supervisory board members, and AMG, where RWC questioned AMG's governance and remuneration practices.

v Tactics used by activist shareholders

Another trend we observe is that following the landmark cases concerning ABN AMRO in 2007 and ASMI in 2010, the strategy deployed by activist shareholders is, on average, less aggressive.

Tactics used until ABN AMRO (2007) and ASMI (2010): direct attacks on strategy at general meetings

Between 2005 and 2010, several large activist hedge funds initiated aggressive US-style campaigns in the Netherlands. These hedge funds typically started their campaigns with 'Dear Board' letters in which they presented their ideas to the company. As a next step in their campaign, these hedge funds generally submitted shareholder proposals at the general meeting to split up or sell the company or to change the company's strategy.

In several cases, the activist shareholders and the company ended up in court to determine who had the final say on the matter. In landmark cases *ABN AMRO* and *ASMI*, the Dutch Supreme Court ruled that the company's strategy is within the remit of the executive board subject to the approval of the supervisory board. As a result, shareholders cannot impose a strategy to be followed on the executive board. If shareholders disagree with the execution of the strategy by the executive board or otherwise disagree with how the executive board is running the company, they should exercise the specific powers vested in them in the DCC and the company's articles of association, such as the power to appoint and dismiss board members. These cases most likely led to a change in how activist shareholders approach Dutch listed companies.

Tactics used in recent years: persistent, but less direct attacks on strategy at general meetings

After *ABN AMRO* and *ASMI*, activist shareholders rarely put forward shareholder resolutions to force a change in strategy or to break up the company. Instead, activist shareholders tend to build up pressure on the company by acquiring a stake, sometimes demanding seats on the board, and trying to influence the company's strategy through private or public engagement with the boards.

Typically, activists aiming to change the company's strategy put pressure on the boards by challenging them on a broad spectrum of matters, such as the appointment and dismissal of board members, operational performance, and board compensation. In an aggressive campaign, activist shareholders may demand that their own candidates replace current board members.

This strategy was, for example, followed by US-based activist hedge fund JANA Capital against TNT Express. JANA put pressure on the board of TNT for a long period of time, both publicly and privately, in an effort to improve TNT's operational performance, likely to prove its potential to possible buyers. JANA demanded seats on the supervisory board, including one for a former M&A executive of UPS, which may have been seen by some as an indirect effort of JANA to arrange a deal between TNT and UPS (TNT was eventually acquired in a friendly deal by FedEx in 2016).

In sum, direct confrontations between boards and activist shareholders at general meetings are now generally restricted to topics on which the general meeting has the power

to resolve, such as board composition, annual accounts, compensation policy and board members' compensation. This trend seems to be largely influenced by landmark cases regarding ABN AMRO and ASMI. In addition, in a recent case concerning Fugro, Dutch courts barred shareholders from putting pressure on the executive board by demanding a 'referendum' vote on a topic on which the general meeting cannot resolve.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

In this section, we describe some examples that are illustrative of the trends regarding shareholder activism in the Netherlands.

i **América Móvil v. KPN (2014)**

An example of a strategic party acting as an activist shareholder concerns América Móvil and KPN. Over the course of two years, América Móvil built up a stake of 29.9 per cent and eventually announced a hostile offer for all KPN shares in order to gain full control. The takeover was countered by KPN's defence foundation based on *inter alia* national security interests. In its battle, KPN deployed numerous defensive mechanisms to fend off its Mexican suitor, including divesting its crown jewel E-Plus to Telefónica, and eventually KPN concluded a relationship agreement with América Móvil in an effort to at least temporarily bury the hatchet. América Móvil did not pursue its offer, and it eventually sold its stake and moved on to acquire full control of Telekom Austria in order to set foot on the European telecom market.

ii **RWC v. AMG (2015)**

Hedge fund RWC, run by former managers of hedge fund Hermes, built up a stake of approximately 20 per cent in global critical materials company AMG and initiated discussions regarding AMG's strategy, governance and remuneration practices. AMG and RWC eventually reached a ceasefire and signed a relationship agreement. The relationship agreement included the endorsement of AMG's strategy by RWC, the nomination of RWC's managing director and another person for appointment as member of AMG's supervisory board, and the undertaking of AMG to review its prevailing executive compensation policy.¹¹

iii **Boskalis v. Fugro (2016)**

Dutch dredging contractor Boskalis built up a stake of more than 20 per cent in Dutch geoscience service provider Fugro and subsequently submitted a shareholder proposal to the general meeting to urge the boards to take down one of Fugro's defence measures. The board of Fugro agreed to put the proposal of Boskalis on the agenda of the annual general meeting for discussion, but not as a voting item, since decisions regarding defensive measures are the exclusive domain of the boards. Boskalis challenged this decision in court, but without success in both first instance and on appeal.

11 Press release, AMG signs Relationship Agreement with its largest shareholder RWC European Focus Master Inc., 9 March 2015.

iv **Highfields Capital Management v. Delta Lloyd (2016)**

Highfields Capital Management, with a stake of approximately 10 per cent, publicly opposed Delta Lloyd's plan for a rights offering. This eventually resulted in Highfields Capital Management commencing litigation before the Enterprise Chamber in which it requested to prohibit the voting on the proposed rights offering at the upcoming general meeting. Highfields Capital argued that the information given by Delta Lloyd to the shareholders was inadequate to form an opinion and that the rights offering was not necessary since Delta Lloyd was adequately capitalised. The Enterprise Chamber dismissed the hedge funds' request holding that the shareholders were properly informed and that the general meeting is the appropriate forum to discuss the merits of, and decide on, a rights offering.

V REGULATORY DEVELOPMENTS

At the national level, the Dutch Corporate Governance Code is currently under revision. A new version is expected to come into force in 2017.

At the European level, negotiations are pending regarding a proposal for revision of the EU Shareholder Rights Directive.¹² Topics that are dealt with in the proposal include the identification of shareholders, voting rights concerning executive compensation ('say on pay'), and transparency on and shareholder engagement in related party transactions.

VI OUTLOOK

Over the last decade, there have been a number of high-profile cases where activist shareholders pushed companies to break up, to sell divisions and to change their corporate governance structures. Following decisions of the Dutch Supreme Court in ABN AMRO and ASMI, while still pursuing the same objectives, the approach of activist shareholders seems to have shifted from direct confrontations on the company's strategy in general meetings to private and public engagement with the boards in order to change the target company's direction. Shareholder activism is expected to continue to be a hot topic in many Dutch boardrooms. Apart from the usual suspects, such as hedge funds, mutual funds and other event-driven institutions, institutional investors and shareholder lobby groups seem poised to take a more active role in the corporate governance debate within Dutch listed companies.

12 Proposal (COM 2014/213) to amend Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

Appendix 1

ABOUT THE AUTHORS

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