The Shareholder Rights and Activism Review

Fifth Edition

Editor
Francis J Aquila

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THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

FIFTH EDITION

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For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Francis J Aquila

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Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
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PREFACE

In the years since the last financial crisis, shareholder activism has been on the rise around the world. Institutional shareholders are taking a broad 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 is a prominent, and likely permanent, feature of the corporate landscape. Boards of directors, management and the markets are now more attuned to and prepared for shareholder activism, and engaging with investors is a priority for boards and management as a hallmark of basic good governance.

Shareholder activism is a global phenomenon that is effecting change to the corporate landscape and grabbing headlines not only in North America but also in Europe, Australia and Asia. Although shareholder activism is still most prevalent in North America, and particularly in the United States, activism campaigns directed at non-US companies continue to make up a large share of global activism. This movement is being driven by, among other things, a search by hedge funds for new investment opportunities and a cultural shift towards increased shareholder engagement in Europe, Australia and Asia.

The outbreak of the covid-19 pandemic in early 2020 caused an unprecedented economic crisis that has further heightened focus on corporate governance. The crisis has significantly tested companies' oversight, coordination and leadership capabilities to manage a fluid and complex situation impacting companies' business, operations, prospects, employees, stockholders, other stakeholders and government relationships – and activists have been paying attention. Although the covid-19 pandemic has decreased activist campaign activity in the short-term, practitioners generally expect to see activism activity return with full force in the next year. Furthermore, activists are likely to incorporate critique over a company's pandemic response into their campaign thesis.

As both shareholder activists and the companies they target have become more geographically diverse, it is increasingly important for legal and corporate practitioners to understand the legal framework and emerging trends of shareholder activism in the various international jurisdictions facing activism. *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 fifth edition of *The Shareholder Rights and Activism Review*. As shareholder activism

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continues to diversify and increase its global footprint, this review will continue to serve as an invaluable resource for legal and corporate practitioners worldwide.

Francis J Aquila
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Chapter 9

NETHERLANDS

Paul Cronheim, Willem Bijveld and Frank Hamming[1]

I OVERVIEW

Shareholder activism is a hot topic in many Dutch boardrooms. In the past five years, several activist campaigns aimed at Dutch multinationals made headlines in the Netherlands, as well as abroad, including in particular the Boskalis versus Fugro battle and the campaigns of Elliott Advisors against AkzoNobel, NXP and NN Group. Following these campaigns the level of public shareholder activism seems to have decreased, even more so as a result of the covid-19 pandemic. Given the current unstable global economic situation, it is difficult to predict what the level of shareholder activism activity will be in this and the coming year. In any case, discussions between boards and shareholders on matters such as strategy, capital returns, executive compensation and environmental, social and governance (ESG) matters, will continue to dominate the agendas within Dutch listed companies. Aside from shareholder activism, we have also witnessed a global wave of increased protectionism in recent years. In the Netherlands, this development was partly fuelled by numerous (unsuccessful) hostile approaches in recent years, including for PostNL, Unilever and AkzoNobel, after which both the general public and the government called for increased protection of (certain) Dutch companies. In 2020, we see that the first steps towards legislation have been taken.

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 boards and the general meeting of shareholders.

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

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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 boards and the general meeting. The Corporate Governance Code focuses on long-term value creation for the company and its business, as well as culture. This fits into the Dutch stakeholder model of corporate governance and can be an important element for companies in encounters with activist shareholders. The Corporate Governance Code applies, in principle, to all Dutch listed companies on a comply-or-explain basis.[2]

Dutch Financial Markets Supervision Act and the Market Abuse Directive

The Dutch Financial Markets Supervision Act (FMSA) contains, among other things, 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 and the Takeover Directives. In 2016, several market abuse provisions were removed from the FMSA, and are now dealt with in the Market Abuse Regulation, which has a direct effect in all EU Member States.

EU Shareholder Rights Directive

In 2017, the European Council adopted a revised version of the EU Shareholder Rights Directive.[3] The Dutch bill implementing the revised EU Shareholder Rights Directive entered into force at the end of 2019. The new rules on remuneration and related party transactions are effective as of 1 December 2019. The provisions relating to electronic voting, shareholder identification and transmission of information to shareholders take effect on 3 September 2020. A remuneration policy needs to be in place for the executive and supervisory boards and must be approved by the general meeting at least every four years. The general meeting will have an annual advisory vote on the remuneration report. In addition, material related party transactions will require the approval of the supervisory board and will be subject to increased transparency requirements. Investors will be required to be transparent how they invest and how they engage with companies they invest in.

Dutch Stewardship Code

Dutch pension funds, insurers and asset managers published the first Dutch Stewardship Code in July 2018.[4] The Stewardship Code sets forth certain principles on institutional shareholder engagement, which, among other things, are aimed at stimulating institutional investors to cast informed votes at shareholder meetings, engaging with listed companies on strategy, performance and ESG topics, and being transparent on its voting policy and history. From financial year 2019 onwards, asset owners and asset managers are expected to apply the Code's principles and to report on its implementation.

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2 For detailed commentary on the Dutch Corporate Governance Code, see: RH Kleipool, M van Olffen and BW Roelvink, *Corporate Governance in the Netherlands – A practical guide to the new Corporate Governance Code* (2018).

3 Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

4 First Dutch Stewardship Code available at www.eumedion.nl/en/news/first-dutch-stewardship-code-published.

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

Dutch law gives companies 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). Most Dutch public limited liability companies with a listing on the Amsterdam Stock Exchange have a two-tier board.[5] In a two-tier board, 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. It is accountable to the supervisory board and the general meeting of shareholders.

The supervisory board is charged with supervising and advising the executive board. It 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. It is accountable to the general meeting.

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

iii Stakeholder model as the guiding principle for a company's boards

The executive and supervisory boards must always act in the best interests of a company and all its stakeholders, with a focus on long-term value creation. In practice, this means that Dutch boards have a fiduciary duty towards a wide range of stakeholders, including shareholders, employees, customers and suppliers, as well as the communities in which the company operates. This is in contrast with the shareholder model of corporate governance, in which a company's main interest is to promote shareholder value, which is the predominant model in jurisdictions with an Anglo-Saxon legal tradition. Yet, in recent years, in these jurisdictions there is a debate around the role of a company and its purpose in modern-day society, in particular if companies, asset managers and asset owners should commit to sustainable long-term investment.[6]

5 On the Amsterdam Stock Exchange, eighteen Dutch public limited liability companies have a two-tier board structure and two have a one-tier board structure. One-tier board structures are often seen with Dutch public limited liability companies with a listing on the New York Stock Exchange or Nasdaq; for example, Mylan NV, NXP Semiconductors NV and Unilever NV.

6 See for example The UK Stewardship Code 2020 that aims 'to create long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society', and the statement of the US Business Roundtable that 'moves away from shareholder primacy and includes commitment to all stakeholders'.

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The Dutch stakeholder model also applies in takeover and activist situations, as was confirmed in the case of *Elliott Advisors v. AkzoNobel* (see Section V.ii).

III TOOLBOXES OF ACTIVIST SHAREHOLDERS AND COMPANIES

i The activist shareholder's toolbox

The following are tools that activist shareholders commonly use in pursuing their agenda, either alone or, for example, together with other activist shareholders, forming a 'wolf pack':

a private discussions and engagement with the company;
b public engagement with the company;
c stake building;
d right to participate in and vote at the general meeting;
e right to place an item on the agenda;
f right to convene a meeting; and
g initiate litigation.

Private discussions and engagement with the company

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 inbound calls to the company's CEO or chair to discuss strategy and measures to maximise shareholder value, or more formal communication by sending private 'Dear Board' letters.

Companies experiencing this form of shareholder activism are often faced with the question whether they should engage in a dialogue with the activist about their demands or take a more defensive approach by rejecting their demands, which is likely to trigger the activist initiating a public campaign. A private dialogue between a company and an activist shareholder can be very intensive and drag on for months. To get detailed information from the company regarding the topics targeted in their campaigns, activists will often seek to conclude a confidentiality agreement. In order to induce the targeted company to provide such information and enter into a confidentiality agreement, the activist may agree to refrain from initiating a public campaign during the duration of the discussions. While this form of activism may appear 'friendly' from a distance, it may from time to time become as aggressive as the more well-known public activist campaigns.

Public engagement with the company

Where a shareholder activist is dissatisfied with the company's response to issues raised in private discussions, starting a public campaign may be an alternative strategy to realise its agenda. Typically, this includes the use of traditional and social media, teaming up with other shareholders and institutional investors, and gaining support from the investor community at large by publishing investor presentations or setting up websites dedicated to the activist campaign.

In the Netherlands, there have been numerous public campaigns by activist shareholders. Prominent recent examples are the campaigns of Elliott Advisors, the British arm of Paul Singer's US hedge fund, against AkzoNobel in the context of an unsolicited approach from US paint producer PPG Industries, and against NN Group claiming that the company is undervalued and should reset its trajectory.

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Stake building

For an activist shareholder to ramp up the pressure on the company's boards, building a significant stake may be a critical element in its strategy. Stake building may enable an activist shareholder to add weight to its opinions and to be taken as a serious threat by the company, especially when the activist shareholder reaches the threshold for placing items on the agenda of the general meeting or for convening a general meeting (see below). Even with a small 'toehold' stake (e.g., 1–3 per cent), an activist shareholder may have significant influence. In some events, the mere fact that a typical activist shareholder has acquired a stake may push the targeted company to critically review its performance and strategic options to avoid a (public) activist campaign.

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 Netherlands Authority for the Financial Markets (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.[7] A possible new development in this context is the intention of the Cabinet to introduce a new threshold of 2 per cent. The Cabinet is of the opinion that the introduction of such threshold could contribute to long-term value creation by listed companies and preserve a stable shareholder base. A draft bill is currently under consultation.

An activist shareholder building up its stake or partnering with other large shareholders should also be aware of the mandatory offer rules. Under the FMSA, a mandatory offer is triggered by a person, or by a group of persons acting in concert, acquiring 'predominant control' (at least 30 per cent of voting rights).[8]

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

Every shareholder has the right to participate in and exercise its voting right at the company's general meeting. Generally, a holder of one share is entitled to one vote. The articles of association may stipulate a voting record date 28 days prior to the general meeting. The record date determines which shareholders are entitled to vote at the general meeting. Shareholders may vote in person or by proxy (which may be granted electronically).[9]

In the Netherlands, a 'vote no' campaign has been seen on numerous occasions. In 2016, 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. Shareholders sometimes also express their dissatisfaction by voting against the discharge of the board,

7 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.

8 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.

9 As a result of the covid-19 pandemic, the Dutch government introduced an emergency bill that allows Dutch companies to organise virtual general meetings. Anyone attending the meeting, including directors and shareholders, can only do so electronically. This includes providing shareholders with the option to follow the general meeting by video or audio webcast.

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which is normally granted by the general meeting with an overwhelming majority. A recent example concerns Dutch bank ING where the general meeting did not discharge the (former) members of the executive or supervisory boards from their potential liability against the company for their duties performed in the 2018 financial year. This was seen by many as a reprimand for the €775 million fine[10] ING incurred for failing to prevent money laundering. In late 2018, Unilever was confronted with a 'vote no' campaign when some of its shareholders, which collectively owned around 12 per cent of the company's stock, publicly opposed Unilever's plans to move the company headquarters from London to Rotterdam and simplify the company's corporate structure.

In light of the covid-19 pandemic, Dutch companies face increasing investor pressure on their remuneration policies and board or senior leadership compensation. As a result, boards have voluntarily cancelled bonuses and took pay reductions for 2020. For example, Heineken cancelled bonuses for 2020 for their senior managers, including the executive board and the executive team, and the supervisory board of ForFarmers withdrew a proposal from the 2020 AGM agenda regarding remuneration increase.

Right to place an item on the agenda

Shareholders, individually or jointly holding 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 of 1 per cent, which relates to the former statutory threshold for submitting agenda items. The company can refuse to put an item on the agenda of the general meeting if this contravenes the standards of reasonableness and fairness. The Corporate Governance Code stipulates that a shareholder may exercise this right only after it has consulted the executive board. See in this respect the company's right to invoke a 180-day response time and the statutory time-out period (see subsection ii).

Shareholders can submit items for the agenda as either a voting 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 the topic; in other words, shareholders cannot use this right to organise referendums or 'motions' on topics belonging to the primacy of the boards. See the 2016 case of *Boskalis v. Fugro*, discussed in Section V.i.

A notable example of shareholders submitting items for the agenda of the general meeting is the case concerning ASMI, a Dutch multinational active in the semiconductor industry. Two hedge funds Fursa and Hermes put a proposal to replace the CEO and most of the supervisory board members on the agenda of the 2008 general meeting. Further, in recent years social activist Follow This has put a 'green' resolution on the agenda of the general meeting of oil giant Shell in which it requested that Shell set and publish targets that are aligned with the Paris Climate Agreement's goal to limit global warming to well below 2°C. Although the resolution was voted down each time, it gained more support from institutional investors in 2018 than in the previous year, in line with institutional investors' higher prioritisation of ESG issues. After the resolution was withdrawn in 2019 to give Shell more time to achieve its climate ambitions, Follow This again put forward its resolution at the 2020 AGM; the resolution got the support of 14.4 per cent of Shell's shareholders (2017: 6 per cent; 2018: 5.5 per cent).

10 Press release, 'ING reaches settlement agreement with Dutch authorities on regulatory issues in the ING Netherlands business', 4 September 2018.

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Right to convene a shareholders' meeting

Shareholders, individually or jointly holding 10 per cent of the company's stock (the company's articles of association can prescribe a lower percentage), may request the company's boards to call a general meeting and put such items on the agenda as requested by these shareholders. If the board refuses to do so, the shareholders could request authorisation from the district court to call a general meeting. The court will decide whether the shareholder has a legitimate interest in convening a shareholders' meeting. The board can refuse to call a general meeting if it is of the opinion that the request contravenes the standards of reasonableness and fairness, or that it does not meet the 'legitimate interest' test. A prominent example of activists exercising this right is Centaurus and Paulson & Co, who called shareholders' meetings at Dutch industrial conglomerate Stork to vote on alternative strategies, including a public-to-private transaction and the dismissal of the entire executive board. In 2017, Elliott Advisors also invoked the right to call a general meeting in its crusade against AkzoNobel, which was rejected by the boards of AkzoNobel. In subsequent court proceedings, the Enterprise Chamber and the Amsterdam District Court rejected Elliott Advisors' request to convene a general meeting (see Section V.ii).

Initiate litigation

Shareholder litigation typically takes place in inquiry (mismanagement) proceedings before the Enterprise Chamber, a chamber of the Amsterdam Court of Appeal specialised in corporate proceedings.[11] Any shareholder that alone or acting jointly holds sufficient shares[12] may initiate inquiry proceedings and request the Enterprise Chamber to order an inquiry by independent, court-appointed investigators into the policy of the company.

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 consist of, for instance, 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. These 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.

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

12 If the company's issued share capital does not exceed €22.5 million of aggregate nominal value, persons who alone or acting jointly hold shares representing at least 10 per cent of the issued share capital or representing an aggregate nominal value of at least €225,000; or the company's issued share capital exceeds €22.5 million of aggregate nominal value, 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 an aggregate 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 (which was the subject of an unsolicited approach by Teva Pharmaceutical Industries) where the nominal value of each share was set at €0.01 and the aggregate nominal value of the issued share capital did not exceed €22.5 million. As a result, a shareholder wanting to initiate inquiry proceedings would at the time need to hold shares with a market value of more than US$1 billion to reach the threshold of €225,000 in aggregate nominal value.

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These interim decisions tend to carry great weight and, despite being provisional, are often decisive in the matter's outcome. It is not uncommon that the Enterprise Chamber postpones a decision to order an inquiry into the policy of a company, and only rules on the requested interim measures.

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; for example, against the boards of the target company (some or all members of which may no longer be regarded as independent) or a majority shareholder.

ii The company's toolbox

Corporate law provides for several structural mechanisms that enable a company to prevent or deter hostile approaches. Many Dutch listed companies have adopted such mechanisms in their articles of association. Examples include the use of listed depositary receipts without voting rights, priority shares with certain control 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 the shareholders' control of the board.

However, no company is immune to shareholder activism even with such structural mechanisms in place. In the following we describe some typical response measures that boards of targeted companies could use:[13]

a enter into a dialogue with the activist shareholder;
b get the company's message out to shareholder;
c relationship, standstill or settlement agreements;
d 'just say no' strategy;
e invoke response time or statutory time-out period;
f issue ordinary shares;
g sell treasury shares;
h trigger call option on anti-takeover preferred shares; and
i 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 cooperative relationship and creating consensus with the activist shareholder can be a strong tool from which the company can benefit in the long run. Entering into discussions with the activist shareholder may give the boards new (industry) insights, 'breathing space' and time to determine its strategy if private discussions do not result in a long-term solution. Companies faced with shareholder activism often want to avoid a public activist campaign by first engaging in private discussions.

13 According to the 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 to maintain the status quo, and provided that they constitute an adequate and proportional response. Implementing defensive measures for an indefinite amount of time, generally, will not be justified.

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Get the company's message out to shareholders

A company dealing with shareholder activism could reiterate and emphasise its current or revised strategy, for example in combination with private discussions or a 'just say no' strategy. The executive board can give presentations to (key) shareholders and potential investors in which it explains that its current or revised strategy is in the best interest of the company and the sustainable success of its business taking into account the interests of its stakeholders, and, next to that, is the preferred path to maximise value for its shareholders. Gaining the support of (other) shareholders might prove pivotal in fending off an activist shareholder. Companies faced with shareholder activism, therefore, often closely monitor their shareholder base to assess the presence of other shareholders that are likely to support an activist campaign or form a wolf pack with other activist shareholders. In addition, companies will often actively engage with their long-term large shareholders to endorse their agenda and retain their support.

Relationship, standstill or settlement agreements

A growing trend in the Dutch market is that listed companies conclude relationship agreements with one or more large, vocal shareholders. In a relationship agreement, the company and the shareholder generally agree on topics such as strategy, governance, financing and exchange of information. The company could give one or more supervisory board seats to the shareholder in exchange for support for its strategy. Relationship agreements are typically concluded with activist shareholders with a significant shareholding (typically more than 10 per cent), but also with non-hostile cornerstone investors in the context of an initial public offering. Examples include the relationship agreements between telecom company KPN and its Mexican suitor América Móvil, and between critical materials company AMG and hedge fund RWC.

Although concluding a relationship agreement may reduce or channel the pressure exercised by a shareholder, the board must be aware that representation of an activist shareholder on the board inevitably has an impact on the boardroom dynamics.

In an activist situation, a company may also seek to enter into a pure standstill or settlement agreement to reach a (temporary) ceasefire with an activist shareholder. An example is AkzoNobel agreeing to a standstill with Elliott Advisors, in August 2017, to end pending litigation and gain support for the proposed change in its board composition, which included new supervisory board members that were nominated by AkzoNobel following consultation with its biggest shareholders.

Invoke response time

Pursuant to the 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, or dismiss an executive or supervisory board member. The executive board must use the response time for further deliberation and constructive consultation with the shareholder involved, and to explore alternatives. 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 shareholders, or to seek alternative measures.

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Statutory time-out period

In December 2019, a bill was submitted to parliament to implement a 250-day statutory time-out period for companies confronted with either a proposal from shareholders concerning the appointment, suspension or dismissal of members of the executive or supervisory boards, or a non-supported public offer for their shares, which, in the opinion of the executive board, conflict with the interests of the company and its stakeholders. The decision of the executive board to invoke the time-out period is subject to approval of the supervisory board and needs to be motivated by the executive board. During the time-out period, the general meeting cannot appoint, suspend or dismiss members of the executive or supervisory boards, or amend the articles of association of the company on these topics. The executive board is required to consult shareholders holding more than 3 per cent during the time-out period to gather their views. Shareholders that hold at least 3 per cent of a company's share capital (i.e. those who have the right to submit items for the agenda of the general meeting) can initiate proceedings with the Enterprise Chamber to challenge the executive board invoking the statutory time-out period.

Although the proposed statutory time-out period overlaps with the response time in the Corporate Governance Code, the Minister for Legal Protection wishes to give boards of Dutch companies the option to choose between the two response measures. However, it is not obvious that boards will invoke both measures at the same time; in that case, it would be logical that the 180 days of the response time will be deducted from the maximum of 250 days of the statutory time-out period, so that unreasonable accumulation of the measures will be prevented.

Issue ordinary shares

As noted above, 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 up to five years. The same applies for the limitation and exclusion of pre-emptive rights of existing shareholders. 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 without pre-emptive rights for 'general corporate purposes' (often 10 per cent) and a certain percentage for the purpose of mergers and acquisitions (often 10 per cent).[14] To defend itself from activist shareholders or hostile bidders, the executive board could decide to issue shares (without pre-emptive rights) 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. An interesting development in this regard is that, since 2018, the Institutional Shareholder Services recommends in its voting guidelines to vote against authorisation for the executive board to issue more than 10 per cent of shares without pre-emptive rights. We have observed that many listed companies have since confined themselves to request an authorisation to issue shares only up to 10 per cent.

14 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 during a 12-month period, or publish an offering prospectus if it issues shares to fewer than 150 retail investors.

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Sell treasury shares

When a company holds a certain number of its own shares (e.g., as a result of a share buy-back) and these shares have not yet been cancelled (treasury shares), a company may 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.

Defence foundation – issuing anti-takeover preferred shares

The most common 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 company's boards may invite the involvement of the defence foundation. It will then be up to the foundation to decide whether to exercise its call option and choose its course of action, including whether it wants to engage with an activist or bidder to signal what the foundation would not find acceptable, or to give an opportunity to an activist or bidder to clarify its intentions. The foundation must make its own decision in accordance with its objectives 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 other things, the continuity, independence and identity of the company and its business.

Foundations rarely exercise their call option, which may be partly explained by the fact that the mere presence of a defence foundation may have a deterrent effect on a hostile activist or bidder. One of the few, and most recent, examples – in which a defence foundation exercised its call option – concerns the defence foundation of KPN, which exercised its call option as a reaction to América Móvil's announcement to launch a hostile bid. Another example is the defence foundation of global pharmaceutical company Mylan NV (having its registered office in the Netherlands), which made use of its call option to deter Teva Pharmaceutical Industries.

Initiate litigation

Although uncommon, a targeted company can also initiate summary proceedings before the district court or inquiry 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.

IV KEY TRENDS IN SHAREHOLDER ACTIVISM

i General overview

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 included the financial conglomerate ABN AMRO, Dutch industrial giants ASMI and Stork, and other well-known multinationals such as Ahold and Philips.

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This wave is partly explained by the (global) surge in the early 2000s of changes in corporate law and corporate governance practice aiming to readjust the balance of power between shareholders and boards of directors by enforcing shareholder rights. In the Netherlands, this new way of thinking resulted in, among others, the introduction of the right to place an item on the agenda in 2004. Not surprisingly, this also had an effect on the relationship between companies and its shareholders and, in some cases, even led to (long-term) conflicts between companies and activist shareholders. After the takeover saga concerning ABN AMRO (UK hedge fund TCI holding 1 per cent of ABN AMRO's stock demanded that the board actively pursued certain transactions, including a sale of the company, to maximise shareholder value), the pendulum regarding shareholder rights swung. By the end of the first decade of this century, the Dutch government introduced measures that limited shareholder rights, for example raising the threshold for shareholder to invoke the right to put an item on the agenda from 1 to 3 per cent. Together with case law that limited the areas where shareholders could effectively exercise their right to put an item on the agenda, this had a large impact on the tactics used by activist shareholders (see subsection iv).

More generally, a surge in shareholder activism must also be seen in light of the stance of the global economy and macroeconomic conditions. The period after the 2007–2012 financial and economic crisis was characterised by an uplift in the global economy that, in combination with low interest rates, generated a boost in M&A activity and, consequently, increased shareholder activism activity. JPMorgan reported 676 campaigns globally in 2018 and 590 in 2019, as opposed to 381 campaigns globally in 2012. From those numbers, in Europe, there were 62 campaigns in 2012 and 139 and 129 in, respectively, 2018 and 2019.[15]

Since 2010, the Netherlands has seen numerous publicly known activist shareholder campaigns. The total level of shareholder activism is most likely significantly higher, however, since shareholder activism in the Netherlands often takes place behind closed doors.

Given the relatively low number of activist shareholder campaigns in the Netherlands compared with the United States and the United Kingdom, trends described in this section are not only based on statistics, but are also based on more subjective observations and anecdotal evidence.

ii Activist shareholders – the usual suspects

Activist shareholders in the Netherlands are predominantly US or UK-based hedge funds with a European or global investment focus. 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 maximise shareholder value, and multi-strategy hedge funds, for which shareholder activism is only one of their strategies. Pure-play activist hedge funds typically have an event-driven investment strategy, in which M&A plays a crucial role (see below). These activist hedge funds often seek to initiate M&A activities by 'suggesting' that a company spin off or sell a division, and also become active in pending M&A transactions to push for a better price. Over the past decade, some of the largest global activist hedge funds have been active in the Netherlands; the most prominent examples are listed below.

15 See, for instance, JPMorgan 2019, 'The 2019 Proxy Season', available at: https://www.jpmorgan.com/jpmpdf/1320747618625.pdf.

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Table 1

Activist shareholder	Target	Objective
The Children's Investment Fund (TCI)	ABN AMRO	Pushing for a sale of ABN AMRO
Centaurus	Stork, Ahold (together with Paulson & Co) and SBM Offshore	Pushing for a split-up (Stork); selling US activities (Ahold); requesting a different financing structure (SBM Offshore)
Hermes	ASMI, and Océ (together with Orbis)	Pushing for a split-up and changes in board composition (ASMI); litigation against recommended takeover (Océ)
Third Point	DSM and Philips	Suggesting a split-up (DSM); stakebuilding (Philips)
RWC	Corbion and AMG	Stakebuilding (Corbion); discussions about strategy, board composition and board compensation (AMG)
Paulson & Co	Stork (together with Centaurus), KPN and Ahold (together with Centaurus)	Pushing for a split-up (Stork); stakebuilding (KPN); selling US activities (Ahold)
JANA Capital	Philips and TNT Express	Talks on performance and capital structure (Philips); pushing for a sale and changes in board composition (TNT Express)
Highfields Capital Management	Delta Lloyd	'Vote no' campaign against Delta Lloyd's proposed rights offering
TT International	TomTom	Suggesting a split-up of TomTom into parts
Eminence Capital	ASMI	Pushing for sale of ASMI's 34 per cent stake in Asian subsidiary ASM PT
Elliott Advisors	AkzoNobel and NXP	Pressing for a takeover by PPG (AkzoNobel); contesting the agreed offer price in the takeover by Qualcomm (NXP)
PGGM, CalSTRS and the City of New York and the State of New York Pension Funds	Mylan	'Vote no' campaign regarding board nominees and executive compensation package
ValueAct Capital	Royal Vopak	Stakebuilding
Elliott Advisors	Intertrust	Stakebuilding
Elliott Advisors	NN Group	Stakebuilding; discussions about undervaluation; return of capital to shareholders and strategic footprint
The Third Way (group of investors)	Wereldhave	Stakebuilding; proposals for adopting an alternative strategy
DavidsonKempner	QIAGEN	Contesting the agreed offer price in the takeover by Thermo Fisher

iii Institutional investors – active behind the scenes

Over the years, we have seen increased attention to shareholder activism from institutional investors. Although we see that institutional investors are not unwilling to play a more active role as shareholders, institutional investors typically refrain from exercising public pressure on the companies they invest in and do not tend to carry out aggressive campaigns in the same way as pure-play activist hedge funds do. Private engagement to challenge boards remains preferred whereby institutional investors tend to focus on corporate governance issues, such as remuneration policy and corporate social responsibility. In line with a recent global trend, Dutch institutional investors show an increasing focus on remuneration and ESG issues; some have actively challenged the companies they invest in to take more responsibility for their contribution to society. For example, Aegon pushed Dutch oil giant Shell to commit to the targets of the Paris Climate Agreement.

The trend of increased attention to shareholder activism from institutional investors is mainly driven by the fact that a vast majority of institutional investors invest through index funds in listed companies. Because positions in index funds cannot immediately

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be offloaded when a company's stock is underperforming, institutional investors turn to activism to bring the stock price back in line with, what they think, the value of a company's assets. Globally, we have witnessed several examples of traditional long-only funds embracing activist tactics and other institutional investors publicly supporting activist campaigns.[16] Although most activism from institutional investors takes place behind closed doors, an example of institutional investors publicly expressing their position in a takeover situation is the 2014 public campaign that Dutch pension fund manager APG, together with Dutch insurer NN Group, waged against animal and fish feed company Nutreco. APG and NN Group 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 Group questioned the Nutreco boards' decision to sell the company to SHV. Eventually, SHV raised its offer, and APG and NN Group sold their shares.

iv 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 is largely driven by the increased financial capacity of the large activist hedge funds. Globally, the total level of capital deployed for new activist campaigns in 2019 amounted to US$42 billion and in Q1 2020 it amounted to US$ 14.4 billion.[17]

In the Netherlands, this trend was first observed with hedge funds targeting Ahold in 2006 (market cap at that point over €10 billion), ABN AMRO in 2007 (market cap at that point over €50 billion) and Philips in 2007 (market cap at that point over €30 billion). In recent years, Shell (market cap over €230 billion) was targeted by activist shareholders, who were pushing for more focus on sustainable energy and a business model that is more climate change-proof. In 2017, Elliott Advisors targeted AkzoNobel (market cap around €20 billion) and NXP (market cap around €30 billion) and in 2020 Elliott Advisors targeted NN Group (market cap around € 10 billion). A company's large size thus does not deter activist shareholders.

v Objectives of activist shareholders – five common themes

M&A situations

M&A has been a fertile hunting ground for activist shareholders; pushing for sales processes, intervening in announced transactions (i.e., bumpitrage), and forcing break-ups and divestitures are illustrious objectives from an activist's playbook. TCI's public 'Dear Board' letter to ABN AMRO is notorious in this respect as it brought the bank into play, resulting in the largest ever takeover battle in the Netherlands. Other notable examples include AkzoNobel, where hedge fund Elliott Advisors pressured the company to engage with PPG after PPG's unsolicited proposals to takeover AkzoNobel; and ASMI, where Eminence Capital urged management to sell the company's 34 per cent stake in Asian subsidiary ASM PT. Elliott Advisors was found on the other side of the gamble at NXP, where it opposed

16 ibid.

17 See, for instance, Lazard's Review of Shareholder Activism – Q1 2020, available at: https://www.lazard.com/media/451191/lazards-q1-2020-review-of-shareholder-activism-vf.pdf.

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the recommended offer made by Qualcomm for NXP, arguing that it had undervalued NXP. We have seen similar dynamics at QIAGEN, where Davidson Kempner opposed the recommended offer made by Thermo Fisher for QIAGEN. The significant slowdown of M&A activity as a result of the covid-19 pandemic will generally reduce the number of M&A opportunities for activist shareholders in the short term. However, activists may find new opportunities in certain industries with potential for further consolidation due to the weakened competition and lower takeover prices, resulting from the impact of the covid-19 pandemic.

Governance or board composition

Activist shareholders often target the governance structure and composition of the company's boards. Demands made by activist shareholders may include representation on the supervisory board, dismissal of certain board members, amendments to executive compensation or a challenge to the company's defence measures. Examples include TNT Express, where hedge fund JANA Capital requested the appointment of three new supervisory board members; AMG, where RWC questioned AMG's governance and remuneration practices; and Boskalis, which requested Fugro to dismantle (one of) its defence mechanisms.

Strategic

Activist investors have pushed companies to make strategic changes and 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 the two activist hedge funds – Hermes and Fursa – criticised the front- and back-end strategies of ASMI.

Capital returns and financial targets

In several cases, activist investors demanded a return of capital to the shareholders in the form of a share buy-back 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, *SBM Offshore*, where Centaurus pressured the board to adopt a different financing structure for its fleet, and *NN Group*, where Elliott Advisors pushed for additional capital returns on an ongoing basis. As a result of the covid-19 pandemic, most Dutch public listed companies have scaled back their share buy-back programmes and have suspended or decreased their dividend in 2020 to maintain sufficient levels of cash to conquer the effects of the covid-19 pandemic.[18]

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 best-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; *DSM*, where Third Point pushed for a split-up; and *ASMI*, where Hermes campaigned for a split-up of the company's front- and back-end activities.

18 In this regard see also: Press release, 'ECB asks banks not to pay dividends until at least October 2020', 27 March 2020.

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vi Tactics used by activist shareholders

Tactics used until ABN AMRO (2007) and ASMI (2010) – proposals at general meetings to change the company's strategy

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 – to split up or sell the company, or to change the company's strategy – at the general meeting.

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 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 on the executive board that must be followed. 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 may attempt to 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 landmark cases most likely led to a change in how activist shareholders approach Dutch listed companies.

Tactics used in recent years – private and public engagement with the boards to force a change in the company's strategy

After *ABN AMRO* and *ASMI*, activist shareholders rarely put forward shareholder resolutions directly aimed at forcing a change in strategy or a breakup of the company. Instead, activist shareholders now tend to build up pressure on the company by acquiring a stake, trying to influence the company's strategy through private or public engagement with the boards and sometimes demanding changes in the board's composition.

Typically, activists that aim 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.

As an example, this strategy was followed by US-based activist hedge fund JANA Capital against TNT Express. JANA put pressure on the board of TNT for a long period, both publicly and privately, in an effort to improve TNT's operational performance, with the aim of proving 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 attempt by JANA to arrange a deal between TNT and UPS (TNT was eventually acquired in a friendly deal by FedEx in 2016). More recently, the tactic of trying to influence the strategy of the company, by putting pressure on the boards, was adopted by Elliott Advisors against AkzoNobel in 2017 and against NN Group in 2020.

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 executive compensation. This trend seems to be largely influenced by landmark cases concerning *ABN AMRO* and *ASMI* – case law that was recently confirmed by the Enterprise Chamber in the *AkzoNobel*

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case. In addition, in the *Fugro* case, 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.

vii Higher prioritisation of ESG issues

Another global trend, which arrived in the Netherlands, is that shareholders, both financial and institutional investors, increasingly demand companies to address ESG issues. ESG issues have become a major corporate governance topic in recent years, reflecting sentiments from a broad group of stakeholders, including customers, employees, suppliers and society as a whole. Activist shareholders and institutional investors alike have taken note of these sentiments, and they are keen to include ESG matters in their campaigns and investment policies. In 2018, for example, Dutch pension fund ABP took the next step in its sustainable and responsible investment policy with its announcement to exclude tobacco and nuclear weapons products from its investments. ABP stated that it reached its decision 'after extensive consultation at board level, based on the insights shared by participants, employers, and various special interest organizations'.[19] Dutch (institutional) investors are particular involved in environmental matters. For example, ABP, Aegon Asset Management, APG, NN Investment Partners and Robeco are part of Climate Action 100+, a five-year initiative to engage important greenhouse gas emitters and other companies that have significant opportunities to drive the clean energy transition and help achieve the goals of the Paris Climate Agreement. In 2019, Climate Action 100+ filed a climate resolution with British oil and gas company BP, demanding (1) a strategy consistent with the Paris Climate Agreement; (2) a formulation of climate ambitions and goals for the short-, medium- and long-term; and(3) an annual report on the foregoing. The resolution gained support by several senior executives of BP. It is yet to be seen whether the covid-19 pandemic will be a catalyst for change towards a more 'green' economy, or whether these topics are being moved more to the background.

V RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

i Boskalis v. Fugro (2016)

Dutch dredging contractor Boskalis built up an unsolicited stake of more than 20 per cent in Dutch geoscience service provider Fugro and subsequently submitted an agenda item – urging the boards to take down one of Fugro's defence measures – for the general meeting. Fugro agreed to put Boskalis' proposal on the annual general meeting's agenda for discussion – but not as a voting item – because 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. In April 2018, the Supreme Court confirmed that shareholders do not have a right to table voting items on the agenda of a public company's general meeting in respect of matters that are for the board to decide upon, including the policy and strategy of the company.

19 Press release, 'ABP Pension Fund excludes tobacco and nuclear weapons', 11 January 2018.

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ii Elliott Advisors v. AkzoNobel (2017)

In 2017, Dutch paint producer AkzoNobel received three unsolicited takeover proposals from its US competitor PPG Industries. Elliott Advisors demanded that AkzoNobel enter into discussions with PPG. After AkzoNobel rejected the first two proposals from PPG, Elliott Advisors – together with certain other shareholders – requested that AkzoNobel convene a shareholders' meeting with the sole agenda item being the dismissal of the chair of AkzoNobel's supervisory board. This request was rejected by AkzoNobel. After AkzoNobel subsequently rejected PPG's third proposal in May, Elliott Advisors filed a petition with the Enterprise Chamber requesting an inquiry into AkzoNobel's conduct and policies, as well as the introduction of certain interim measures, including an extraordinary general meeting to vote on the dismissal of the chair of AkzoNobel's supervisory board, whom Elliott believed was standing in the way of a discussion with PPG. The Enterprise Chamber dismissed Elliott Advisors' requests and set out important viewpoints for corporate governance in takeover situations. First, the Enterprise Chamber ruled that a company's response to an unsolicited takeover proposal falls under the authority of the executive board to determine the company's strategy, under the supervision of the supervisory board. The company's boards do not have to consult shareholders prior to their response to an unsolicited takeover proposal (although they remain accountable to their shareholders for their corporate actions). Second, the ruling made clear that there is no general obligation for a target company to enter into substantive discussions or negotiations with a bidder that has made an unsolicited takeover proposal, even in the case of a serious bidder making a serious bid. Whether substantive discussions or negotiations with a bidder are required depends on the actual circumstances; for example, to what extent the company can assess the proposal without substantive discussions, the bidder's strategic intentions and whether the target company has decided to abandon its standalone strategy. After this landmark ruling by the Enterprise Chamber, on 1 June 2017, PPG announced the withdrawal of its takeover proposal for AkzoNobel.

In July 2017, Elliott Advisors initiated proceedings before the Amsterdam District Court requesting an extraordinary general meeting with the dismissal of AkzoNobel's chair as sole agenda item. AkzoNobel subsequently convened an EGM on its own motion, to be held in September 2018, where AkzoNobel would give further explanation regarding its response to the proposals made by PPG. The dismissal of AkzoNobel's chair was not tabled on the agenda of that EGM. In early August 2017, the Amsterdam District Court rejected the request from Elliott Advisors to convene an EGM regarding the dismissal of the chair and ruled that Elliott Advisors should, before requesting the dismissal of the chair of AkzoNobel, await the explanation AkzoNobel were to give regarding its response to PPG's proposals during the EGM in September 2018. On 16 August 2017, AkzoNobel announced that it had reached a standstill agreement with Elliott Advisors.[20]

iii Elliott Advisors v. NXP and Qualcomm (2018)

On 27 October 2016, Dutch chipmaker NXP Semiconductors and US technology company Qualcomm announced that they had reached agreement on Qualcomm's acquisition of NXP at a price of US$110 per share; this valued NXP at US$47 billion, making it Europe's

20 Press release, 'AkzoNobel reaches agreement with Elliott', 16 August 2017.

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largest ever tech deal. The announcement of the transaction attracted attention, from both the investor community and from regulators around the globe, and showed the growing importance of antitrust and state intervention in M&A deals.

In August 2017, Elliott Advisors joined the party by acquiring approximately 6 per cent of NXP's stock. During its campaign, which showed levels of aggression reminiscent of its AkzoNobel campaign, Elliott argued that NXP's board did not achieve the best deal for NXP's shareholders; in Elliott's words, the consideration offered by Qualcomm 'dramatically undervalued' NXP. Elliott's tactics included launching a website with analyses of its claim in an effort to persuade NXP shareholders not to tender their shares 'for less than fair value'. Later that year, on 6 November 2017, Singapore-based Broadcom raised the number of players to four, announcing an US$130 billion bid for Qualcomm. Broadcom's unsolicited bid for its rival would create the largest tech company in the world. Broadcom's offer was indifferent on Qualcomm completing its bid for NXP, turning the scene into a classic capitalist multiplayer chess game.

The battle of NXP and Qualcomm versus Elliott – a textbook example of bumpitrage – eventually ended with Qualcomm improving the terms of the transaction. Qualcomm increased the cash consideration payable to the NXP shareholders to US$127.50 per share – an increase of 16 per cent, or approximately US$5.9 billion in aggregate equity value, on the prior offer price. In exchange, Elliott – together with eight other NXP shareholders collectively owning approximately 28 per cent of NXP's stock (including New York-based hedge fund Soroban Capital Partners) – supported the new deal. In response, Broadcom cut its offer consideration for Qualcomm – which, by then, had been increased – to US$117 billion, and was eventually forced to withdraw its bid after President Trump issued an executive order blocking the proposed transaction. President Trump acted on a recommendation by the Committee on Foreign Investment in the United States (CFIUS), which, after reviewing the combination, had concluded that Broadcom 'might take action that threatens to impair the national security of the United States'.[21] Later, in 2018, Broadcom completed its redomiciliation to the United States.

Qualcomm's pursuit of NXP also attracted regulatory scrutiny, particularly from the State Administration for Market Regulation (SAMR) of China. In June 2018, after Qualcomm had extended the offer period multiple times, SAMR refused to grant clearance for the proposed deal. Subsequently, Qualcomm chose not to close the transaction, incurring an US$2 billion break-up fee payable to NXP.

iv Dutch state v. Air France-KLM (2019)

On 26 February 2019, the Dutch state acquired a 12.68 per cent stake (worth €680 million) in airline Air France-KLM SA.[22] One day later, the state announced that it had increased its shareholding to 14 per cent (worth €744 million).[23] The state explained that, through its shareholding, it wanted to be able to exercise direct influence over future developments at the Air France-KLM holding company 'to ensure that Dutch public interests are optimally assured'. One of the reasons for the state to acquire the shares was that it had become

21 Press release, 'Presidential Order Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited', 12 March 2018.

22 Press release, 'The Dutch state acquires 12.68% of the shares in Air France-KLM', 26 February 2019.

23 Press release, 'Update: Dutch state acquires 14% of the shares in holding Air France-KLM', 27 February 2019.

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apparent that significant decisions about KLM's strategy were increasingly taken at the level of the Air France-KLM holding company, where the French state had significant influence through its 14.3 per cent stake.[24] Furthermore, discussions about the reinforcement of existing agreements about public interest (state guarantees) and the management structure were difficult. Given that the position of Schiphol airport and its most important user KLM are of great importance to the Dutch economy and employment – thousands of jobs are directly and indirectly involved with the airport and the intercontinental network of KLM – the state felt the urge to intervene. With the acquisition of the strategic stake, which added to the 5.9 per cent stake the state already held in the company following the merger between KLM and Air France in 2004, the state obtained formal influence at the highest level and secured a seat at the table for future decision-making. The state's move was seen by many as surprising and by some even as incomprehensible and aggressive, reminiscent of actions of an activist shareholder rather than a state shareholder. In May 2020, the Netherlands Court of Audit concluded that the Dutch government acted irregularly by not informing parliament in advance of the acquisition.[25]

v Elliott Advisors v. NN Group (2020)

On 17 February 2020, Elliott Advisors reported that it had acquired a stake of more than 3 per cent in the Dutch insurance company NN Group. Elliott Advisors later announced that it had teamed up with Dieter Wemmer, a veteran in the insurance industry and former executive at Allianz and Zurich Insurance Group – a tactic more commonly used by activist shareholders.

After several months of private discussions with the management of NN Group, Elliott Advisors launched a public campaign on 12 June 2020 only two weeks before NN Group was to present its strategic priorities and new targets at its Capital Markets Day.[26] Rather than placing a frontal attack on NN Group, Elliott Advisors stressed its conviction in NN Group's underlying value and future prospects, which it believed not to be properly reflected in NN Group's current stock price. In a presentation counting 67 pages, Elliott Advisors outlined its views on NN Group's strengths and alleged persistent undervaluation and urged NN Group to use the Capital Markets Day to address these issues. Elliott Advisors also pushed for increased capital returns and portfolio optimisation.

In a response, NN Group stated that it had taken note of the publication by Elliott Advisors and confirmed that it had engaged with Elliott Advisors. At the Capital Markets Day, NN Group seemingly presented its own plans focused on creating sustainable value and did not mention Elliott Advisors once in its presentation. In an interview with the Dutch financial newspaper, NN Group's CEO, David Knibbe, explained that NN Group had already been working on many of the topics addressed in Elliott Advisors' presentation for a while.

24 For the shareholder base of Air France-KLM see: www.airfranceklm.com/en/finance/financial-information/capital-structure.

25 Press release, 'State's 2019 acquisition of Air France-KLM shares was irregular', 20 May 2020.

26 See the website launched by Elliott Advisors on www.thetimeisnowfornngroup.com.

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VI REGULATORY DEVELOPMENTS

The relatively high number of takeover attempts involving Dutch multinationals in recent years has fuelled a political debate on whether those companies should be more protected against foreign takeover threats. Following the takeover battle for KPN in 2014 and the acquisition of Dutch cybersecurity company Fox-IT by UK-based information assurance firm NCC in 2015, on 19 May 2020 the Dutch parliament approved an amendment of the Telecommunications Act, which is soon likely to enter into force. The Telecommunications Act will enable the Dutch government to prevent takeovers of 'telephony, data centres, hosting services and internet' companies that are 'of vital importance to national security and public order'. After unsolicited takeover attempts involving Dutch giants PostNL (2016), Unilever (2017) and AkzoNobel (2017), the focal point of the political debate expanded to protection of Dutch companies in general. The intentions of the Dutch Cabinet to implement a 250-day statutory time out period and the interventionist move of the state regarding Air-France KLM should be seen in this light.

The rise of protectionist political sentiments in the Netherlands is consistent with the global trend. Not only in the United States, where the CFIUS has intervened in several high-profile transactions (e.g., Qualcomm, Lumileds, Aixtron and Lattice), but also across Europe, various initiatives are being deployed that should protect countries' 'national champions' against undesirable control by third parties. On an EU level, for example, a new EU Regulation for the screening of foreign direct investments (FDI Regulation) officially entered into force on 10 April 2019 and will apply as from 11 October 2020. Although the FDI Regulation neither introduces a screening mechanism on an EU level nor introduces a regulatory body that can issue binding decisions, it does create a cooperation mechanism where Member States and the Commission are encouraged to exchange information and raise concerns related to specific investments. It is expected that the framework will have a significant impact on foreign investment control into the European Union, in particular focused on the growing Chinese investments into the European Union. In response to the covid-19 outbreak, the EU Commission has indicated that member states need to be vigilant and use all tools at EU and national level to use or set up screening mechanisms where acquisitions or investments would be a risk to critical health infrastructures.[27]

The Dutch government submitted a draft bill implementing the FDI Regulation mid-January 2020; it has not yet been submitted to parliament. In addition, the Dutch government has announced that it will submit a draft bill on M&A screening mechanisms for takeovers or investments regarding vital infrastructure or technology affecting national security. Early June 2020, the Dutch government announced that it intends to introduce a reference date in the draft bill on M&A screening mechanisms.[28] The reference date is set on 2 June 2020 and the government would retroactively screen takeovers and investments if there is reason to do so based on national security grounds, as per that date once the bill enters into force.

27 Communication EU Commission, 'Coordinated economic response to the COVID-19 Outbreak', 13 March 2020.

28 Ministry of Economic Affairs and Climate Policy, 'Announcement of the reference date in the bill on investment assessment for risks for national security in acquisitions and investments' (in Dutch), 2 June 2020.

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VII OUTLOOK

Over the past two decades, there have been several high-profile cases in the Dutch market where activist shareholders have pushed companies to break up, sell divisions and change their corporate governance structures. Following decisions of the Supreme Court in ABN AMRO and ASMI, activist shareholders (while still pursuing the same objectives) have been forced to shift their approach to some extent: from having confrontations over a company's strategy at general meetings (by proposing agenda items), to engaging privately and publicly with boards to change the target company's direction. As a result of these landmark cases, tools available to activists may seem to have lost some of their power over the years. But that's not all. The introduction of the principle of long-term value creation in the Corporate Governance Code; the efforts made to restore the balance of power between boards and shareholders after the financial crisis; and, more recently, the regulatory developments in light of the protection of (certain) Dutch companies, have all contributed to changing how activist shareholders operate and execute their campaigns.

Despite all these changes, the continuous rise of shareholder activism over the years highlights the simple fact that it is here to stay. With this in mind, boards, management teams and general counsel of leading Dutch multinational corporations have to be vigilant and well prepared for the unexpected. Especially, considering that today, activist shareholders are – given these changed circumstances – more comfortable to engage in private negotiations with company boards. The fact that activist shareholders choose to fly under the radar makes them less predictable and makes it harder for the outside world to draw lessons from a company's experience in dealing with an activist shareholder. Apart from continuously monitoring the company's share price and shareholder base and, more frequently, taking a careful look at the company's strategy and vulnerabilities, boards must actively prepare for activist shareholders and unwanted bidders, for example, by conducting simulations and trainings together with their advisors.

There is, however, one thing shareholder activism has not been proven immune to: the covid-19 pandemic and its effects on the global economy. In the immediate aftermath of the covid-19 outbreak, shareholder activist campaigns seem to have declined in Europe. One explanation for this is that M&A activity is now down across the globe, which historically has been one of the most important drivers for shareholder activism. The current volatility and instability of the public equity markets could, however, eventually lead to an increase in opportunistic moves by activist shareholders and strategic and financial parties because they could sweep up a company's stock at a relatively low price, as compared with the underlying value of the company's assets and value creation potential. Companies facing difficult financial situations may also increasingly be confronted with activist shareholders demanding changes to the company's management or strategic path, in an attempt to turn the company around and creating shareholder value on the short- to medium-term. Whether activists will be successful in doing so and whether this will have positive effects on the company on the long term remain to be seen.

All in all, it is likely that the covic-19 pandemic will have an impact on shareholder activism for the next few years – both in terms of activity levels and activist themes. While the covid-19 pandemic has taught us to hold back on crystal ball gazing, a careful prediction is that while shareholder activism may dip on the immediate short-term it is expected to come back to pre-covid-19 levels in the years to come. Especially given the many challenges that companies are facing in the near future, it will be critical for companies to be prepared for when that moment comes and an activist shareholder is – remotely – knocking on the door.

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Appendix 1

ABOUT THE AUTHORS

PAUL CRONHEIM

De Brauw Blackstone Westbroek NV

Paul Cronheim is a partner in De Brauw Blackstone Westbroek's Corporate/M&A department. Paul has a well-established international corporate practice, representing listed companies, large multinationals and private equity firms. His practice focuses on corporate law and mergers and acquisitions, including corporate governance and shareholder matters. Paul has handled a wide range of Dutch and cross-border public takeovers, private acquisitions and disposals, auctions and joint ventures. He has also acted as counsel or arbitrator in numerous ICC, AAA and NAI arbitrations.

WILLEM BIJVELD

De Brauw Blackstone Westbroek NV

Willem Bijveld is a senior associate in De Brauw Blackstone Westbroek's Corporate/M&A department. Willem advises corporate clients and financial sponsors on private and public mergers and acquisitions, corporate governance, and corporate and securities matters. He has particular experience in bilateral and auction sale processes, public-to-private transactions, corporate governance and matters concerning shareholder activism.

FRANK HAMMING

De Brauw Blackstone Westbroek NV

Frank Hamming is a senior associate in De Brauw Blackstone Westbroek's Corporate/M&A department. Frank has a primary focus on corporate law and public and private mergers and acquisitions. Frank regularly advises listed companies, private equity funds and governments on complex cross-border transactions in a variety of industries. He also regularly advises listed companies on shareholder activism and contested takeover situations.

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DE BRAUW BLACKSTONE WESTBROEK NV

Claude Debussylaan 80
1082 Amsterdam
Netherlands
Tel: +31 20 577 1519 / 1713 / 1788
Fax: +31 20 577 1775
paul.cronheim@debrauw.com
willem.bijveld@debrauw.com
frank.hamming@debrauw.com
www.debrauw.com

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