

MARCH 2021



Corporate Governance Trends

a look back & ahead

Introduction

Contents

In this publication, we look back at our trend reports over a turbulent year. Globally, 2020 was marked by an unprecedented public health crisis caused by the COVID-19 pandemic. Despite this, we have so far opted not to address COVID-19 and its impact on Dutch corporate governance and practice in our trend reports. But this does beg the question, how has COVID-19 impacted the trends and developments identified in our trend reports? And, looking forward, how do we expect COVID-19 to impact Dutch corporate practice in the longer term?

Looking back: COVID-19's impact on the trends and developments identified

[In our Q1 2020 trend report](#), we identified four main topics that we expect to shape shareholder activism for the coming decade: (i) a renewed focus on stakeholder interests and corporate purpose, (ii) succession vacuums as indicators for activist engagement, (iii) increased engagement by institutional investors and index funds, focusing primarily on ESG topics; and (iv) an increased tendency towards protection of national interests. At that time, in early January 2020, we could not have foreseen COVID-19's impact on shareholder activism. COVID-19 proved an important driver of shareholder activism in the Netherlands. Notable examples of such activism related to public bids by majority shareholders looking to benefit from a (presumably: temporary) market downturn to take their companies private. Shareholder pressure and litigation forced Mr Patrick Drahi to significantly increase his bid for Altice Europe N.V. Similarly, shareholders have criticized the public bid announced Ralph Sonnenberg announced a public bid for Hunter Douglas N.V., facing similar criticism from shareholders.

[In our Q2 2020 trend report](#) we addressed special litigation committees. Special litigation committees may provide important governance advantages when conducting internal investigations and managing complex multi-jurisdictional litigation. So far, we have not seen a notable increase on the use of special litigation committees due to COVID-19 related litigation. This is not surprising, given that such litigation, until now, was mostly comprised of relatively straight-forward summary proceedings.

[In our Q3 2020 trend report](#), we analysed the unprecedented Mediaset ruling, marking the first time that a Dutch loyalty share scheme was successfully challenged, and assessed its impact the future of Dutch loyalty share schemes. While we do not expect that the Mediaset ruling will have a significant impact on the use of loyalty shares in the Netherlands, it will likely expose the rationale of such schemes to enhanced levels of scrutiny. Given that neither such rationale nor the applicable level of scrutiny is likely to be impacted by the COVID-19 pandemic, we do not expect this to have a significant effect on the use and future development of loyalty share schemes in the Netherlands.

Finally, in [our Q4 2020 trend report](#), we discussed whether lessons learned from the use of Dutch foundations (*stichtingen*) in protective measures by listed Dutch companies could also be applied to foreign listed companies. Provided that applicable foreign and securities law is duly observed, we believe that Dutch foundations may help bring defences against hostile takeover attempts and deter hostile stake building. Noting an uptick in shareholder activism related to COVID-19, especially in hard-hit industries, listed companies may look towards novel protective measures to protect against hostile activity.

Looking forward: COVID-19's impact on Dutch corporate governance on the longer term

Another question is what COVID-19's long(er) term impact on Dutch corporate governance could be. Although it is difficult to look ahead and predict developments with any certainty, we believe that the COVID-19 related Dutch corporate governance change that will almost certainly stay is the possibility to hold virtual general meetings of shareholders. A COVID-19 related emergency regulation currently allows shareholders to be barred from physically attending general meetings, while also introducing broader possibilities to attend such meetings virtually and interact with the board, for instance by introducing a framework for shareholders to ask questions in advance of a general meeting. Given the generally positive experiences of attending general meetings virtually, we expect that virtual general meetings may ultimately be permanently introduced in Dutch corporate law once the emergency regulation is withdrawn. This would fit international developments and answers scholarly calls for regulations facilitating virtual general meetings in Dutch companies.

In addition, we expect that towards the end of 2021 and early 2022 we might be seeing the first directors and officer's liability proceedings in which COVID-19 will play a role. Can directors and officers use the impact of the unforeseen and unprecedented COVID-19 pandemic as an argument when facing allegations on their conduct during financial distress? We expect that they – to an extent – will be able to do so and that courts will take these circumstances into account when ruling on liability. Recent case law already shows that courts recognize that companies have to traverse difficult waters due to the COVID-19 pandemic's impact. At the same time however, courts will likely be wary of whether this crisis is not used as an excuse to legitimize negligent (or even unlawful) behavior by directors and officers.

Finally, in the Netherlands the COVID-19 crisis and the stimulus provided to companies by the Dutch government to avoid an economic freefall has led to a more fundamental debate on what the purpose of companies should be and whether – for instance – sustainability goals should be demanded from companies in return for such publicly funded stimulus. We expect that this debate will continue during 2021 and accelerate the corporate sustainability agenda of both the Dutch government and many companies. This also fits the trend in which public opinion, politicians and judges become more critical of how companies operate, both domestically and abroad.

Contents



Shareholder activism in the Netherlands

Trends and developments for the coming decade

Shareholder activism in the Netherlands

Trends and developments for the coming decade

Contents

Recent years have shown event driven investors deploy activist campaigns against a number of Dutch listed companies. Noteworthy target companies include AkzoNobel, TNT Express, NXP Semiconductors, Fugro and Delta Lloyd. As activist activity in the Netherlands is largely driven by UK and US based event driven investors, global and European developments in shareholder activism may help identify trends that will affect shareholder activism in the Netherlands for the coming decade.

In this report, we share trends and developments that we expect will shape shareholder activism in the Netherlands over the next decade.

The evolution of shareholder activism in the Netherlands

Activist strategies in the Netherlands continue to evolve. Following a period of relatively proactive US-style activist campaigns, resulting in a number of landmark cases, shareholder activism has recently seen a more restraint approach. Whereas previously campaigns typically sought to directly force a change in strategy, activist shareholders have become more cautious in pursuing this possibility. In the Netherlands, activist shareholders now tend to pursue their goals primarily by increasing pressure on boards through stake building, public and private engagement and – only in rare cases – litigation.

Public confrontations between activist shareholders and boards tend to revolve around matters that fall within the general meeting's competence, in particular board remuneration, board composition and certain governance aspects. In a number of public campaigns, activist shareholders have also sought to impact M&A activity. Over the past few years, we have seen an increase in the use of settlement or relationship agreements in both private and public campaigns. Such agreements typically grant activist shareholders significant information rights and, in certain cases, board seats or even involvement in strategic business decisions.

Trends and developments on the brink of a new decade

As companies, investors and other market parties alike have sought to adapt to or implement new strategies deployed in activist campaigns, these trends and developments have recently been subject of various international research initiatives, both from a practical and an academic perspective. Based on that research, we have identified the following trends and developments that are expected to impact shareholder activism in the Netherlands over the coming years.

i. Focus on stakeholder interests and corporate purpose

We expect that activist campaigns will increasingly focus on broader stakeholder interests and the corporate purpose. This marks a notable shift in strategy. While Dutch corporate governance has traditionally been stakeholder-oriented as opposed to shareholder-oriented, activist campaigns have historically focussed on unlocking shareholder value, in particular in case of M&A activity or restructuring operations.

This change of focus is fuelled by a renewed interest in the purpose of corporations and a global trend towards stakeholder-oriented governance in global corporate governance efforts. Recent examples include the 2019 Business Roundtable statement on the purpose of the corporation, the UK Stewardship Code 2020 and the UK Corporate Governance Code 2018. These projects signal a trend towards a more stakeholder-oriented corporate governance model.

Market parties have also been more vocal about environmental, social and governance ('ESG') themes, as is reflected in (amongst others) the 2019 letter to CEO's by Larry Fink, Chairman and CEO of BlackRock. Event driven investors have reacted to this trend by integrating corporate purpose arguments into their campaigns. ESG themes have increasingly

been put forward in activist campaigns. Moreover, the focus of activist campaigns has shifted largely from a traditional shareholder value perspective to arguments supporting long-term value creation for all stakeholders.

ii. Succession vacuums as indicators for activist engagement

We expect that succession vacuums will increasingly play a role as a relevant indicator for shareholder activism, as already is the case in the US. A succession vacuum may present a compelling opportunity for investors to introduce new perspectives, in particular on themes that they feel may have been overlooked or underappreciated under previous management. Target companies lacking clear leadership may have issues duly reacting to such initiatives, meaning that it may be more difficult to counterbalance investor demands where appropriate. Historically in the Netherlands, activist activity has typically followed (rumoured) M&A activity, restructuring operations or disclosure of financial information. While we expect these factors to remain indicators for potential activist engagement, succession vacuums are expected to become another notable indicator. These may present an opportunity for investors to bring forward nominees with a view to obtain board representation. More likely, however, is that investors will attempt to leverage a succession vacuum to present their views on a target company's strategy going forward.

iii. Increased engagement by institutional investors and index funds

We expect to see that the role and impact of institutional investors and index funds on corporate governance and voting outcomes will continue to increase as these parties take on a more active role. This is likely to result in increased interaction between such traditionally passive investors and event driven investors, especially where campaigns concern ESG themes, broader stakeholder interests and the corporate purpose.

Contents

Equity ownership is largely concentrated among institutional investors and index funds, meaning that their influence can be of pivotal importance to the outcome of votes. As such, the position taken by traditionally passive investors may materially impact voting outcomes. Activist shareholders therefore continue to seek the support of these parties.

Meanwhile, institutional investors and index funds have become increasingly more likely to support activist initiatives, including appointment of activist nominees. While such investors traditionally adopted a largely passive approach to investments in the Netherlands, they are, also as a result of changing legislation and Stewardship Codes, taking (and are forced to take) a more dominant role in corporate governance and seeking board engagement more frequently. In such engagements, these investors have also been increasingly vocal on ESG themes.

iv. Protectionism and the increased importance of national interests

We expect that measures intended to protect national interests and assets to become increasingly important over the coming years. This development can be leveraged by Dutch target companies to ward off foreign activist investors seeking engagement. Particularly, increased emphasis on national interests may be used to negatively frame such engagement. It remains to be seen if this trend will also impact standards of court review applicable to traditional defence measures taken by Dutch listed companies.

Recent years have shown a global trend towards the protection of national interests and assets. This is for instance reflected in the new EU foreign investment screening regulation adopted in 2019 and the reformed national security reviews through the Committee on Foreign Investment in the United States completed in 2018. Such international developments have also impacted Dutch corporate law and prompted regulatory response. Notably, a legislative proposal is pending under which listed companies would be granted a statutory response time of up to 250 days in response to activist activity and/or hostile takeover attempts. During this response time, certain shareholder rights would be suspended, effectively creating a stand-still. Reference is also made to a legislative proposal seeking to introduce a CFIUS-like review for the Dutch telecom sector. This proposal, if adopted, would grant the Dutch State the authority to prohibit or annul acquisitions of Dutch telecom companies or assets if such acquisitions are deemed to endanger Dutch national safety or public order.

Contents



Special litigation committees in the Netherlands

Trends and developments in Dutch corporate governance

Special litigation committees in the Netherlands

Trends and developments in Dutch corporate governance

Contents

The use of (ad hoc) special committees has seen a significant shift over recent years. While traditionally such committees have been used primarily to supervise and steer M&A and restructuring transactions, we see an increased use of special litigation committees in high-stakes (often bet-the-company) litigation involving Dutch companies. In this trend report, we share our views on the current use of special litigation committees in the Netherlands and expected developments.

The rise of special committees in the Netherlands

US corporate governance practices have significantly influenced the use of special committees in the Netherlands. Traditionally, this has especially been the case in Dutch M&A practice. In US practice, the establishment of special committees of disinterested and independent directors emerged to address (potential) conflicts of interests and satisfy director fiduciary duties in M&A transactions. Dutch special committees are typically established to address similar concerns and evaluate the relevant offer, support executive decision making and oversee and steer the transaction process. Empirical research by Loyens & Loeff senior associate Philippe Hezer shows that (at least) 27 such Dutch target companies of public bids established special committees between 2010 and 2017.

While focus has mostly been on special committees in an M&A context, over the past few years, we have also seen a rise in Dutch companies establishing special litigation committees. In the US, special litigation

committees comprised of disinterested and independent directors are used in derivative actions. In sum, such committees are established to investigate and determine whether the prosecution of a given derivative claim brought by a shareholder is in the best interests of the company. Delaware law provides that establishing such a committee allows the board – as opposed to the relevant shareholder attempting to bring the claim – to retain control over that derivative claim. This statutory framework, along with precedent case law, provides clear guidance on the role and composition of special litigation committees.

This is different from the use of special litigation committees in Dutch practice to date. Absent derivative action mechanics, or any other relevant statutory framework, Dutch companies typically establish special litigation committees to (i) oversee and steer pending or threatened high-stakes (often bet-the-company) litigation and (ii) address potential conflict of interest concerns, but also to (iii) provide relevant stakeholders with a forum where they can share their views and voice concerns.

Use cases and considerations for Dutch special litigation committees

Dutch law does not provide for a statutory framework nor is precedent case law available to give guidance on the use of special litigation committees. As a result, there is significant flexibility but no clear set of tried and tested rules. We believe that there are valid governance-related reasons for Dutch companies to consider establishing special litigation committees when faced with (the threat of) high-stakes litigation. Complex high-profile litigation will often require high-stakes strategic decisions and diligent case management, taking up significant management time. A special litigation committee could take up such tasks to reduce the burden on a larger part of (senior) management. More importantly, however, special litigation committees can be used to (i) address concerns on conflicts of interests, particularly at board level; and/or (ii) coordinate the involvement of relevant stakeholders. In such cases in particular, establishing a special litigation committee may constitute good governance. We have identified the following illustrative scenarios where establishing a special litigation committee may constitute good governance:

1. Internal investigations

Establishing a 'clean team' special committee to oversee and steer internal investigations into irregularities helps ensure independent fact-finding and prevents that such investigations are adversely affected by individuals involved in the irregularities under investigation, especially when it remains unclear at the start of the investigation who is potentially involved.

2. Actions concerning director misconduct

Actions may be brought against the company concerning alleged misconduct of one or more directors, for instance alleging involvement of those directors in a fraudulent scheme. Depending on the nature of such a claim, a special litigation committee may be used to 'shield' the company from the directors (potentially) involved in that conduct and emphasise the independence of the company in relation to the relevant directors.

3. Stakeholder engagement

Certain litigation may require close stakeholder engagement. Such engagement may be considered if, for instance, the relevant stakeholders' interests are subject to significant exposure depending on the outcome of the litigation. In those cases, a special litigation committee may provide a forum for such engagement and could, in part, even be comprised of representatives of the relevant stakeholders (e.g., financiers or parties that have entered into a standstill).

If the decision is made to establish a special litigation committee, due consideration should be given to its task and composition. Relevant considerations include:

- Will the committee have a supervisory or executive role? In case of the latter, will the committee be involved in preparing resolutions or have a more prominent role in the decision making process?
- Will the committee be comprised of both executive and supervisory directors? What about (senior) management and/or outside counsel and other advisors? Are there any requirements in terms of expertise and independence?

Contents

- Are there circumstances requiring involvement of outside parties, such as external stakeholders and/or parties to a standstill? How will that involvement be structured?
- How will the committee's access to information be structured, both from a legal and technical perspective? Are there any specific confidentiality or security concerns that need to be addressed?
- Will the committee have its own counsel and/or other advisors and, if so, how will they be funded and engaged?

Contents

Expectations for the future

Our expectation is that the use of special litigation committees in the Netherlands will increase, especially in the context of internal investigations and complex bet-the-company litigation. The more well-established these committees become, the more likely this is to impact Dutch corporate governance standards. This would likely also lead to more concrete guidance on the role and composition of Dutch special litigation committees.

The background of the slide is a complex financial chart with a dark blue and black color scheme. It features multiple data series: a prominent red line, a blue line, and a candlestick chart. The chart is overlaid with various geometric shapes and lines, creating a sense of depth and complexity. The overall aesthetic is modern and data-driven.

Recent developments in Dutch loyalty share schemes

What does the future hold for loyalty share schemes in Dutch corporate governance?

Recent developments in Dutch loyalty share schemes

[Contents](#)

What does the future hold for loyalty share schemes in Dutch corporate governance?

Over the past years, the Netherlands has seen growing use of loyalty share schemes, incentivizing long-term shareholding by granting additional dividend or voting rights to long-term shareholders. In the recent Mediaset ruling, the Amsterdam Court of Appeal rendered an unprecedented judgment in which the implementation of a loyalty share scheme – as part of a merger – was successfully challenged.

In this trend report, we share our thoughts on how this development may impact share loyalty structures in the Netherlands.

Loyalty share schemes in Dutch corporate governance

Loyalty share schemes have been a hot topic in Dutch corporate governance for a number of years. In December 2006, Royal Dutch DSM N.V. was the first Dutch company to announce its intention to implement a loyalty share scheme. This scheme was subsequently challenged by a number of investors, supported by Dutch shareholders' association VEB. In its landmark 2007 ruling, the Dutch Supreme Court sanctioned the use of DSM's loyalty share schemes. While the DSM case related to loyalty dividends, it is generally accepted that the same applies to loyalty voting rights. Since the DSM ruling, a number of companies in the Dutch market

have successfully implemented loyalty share schemes. Notable examples include CNH Industrial N.V., Fiat Chrysler Automobiles N.V., Exor Holding N.V. and Ferrari N.V.

In sum, under Dutch loyalty share schemes, shareholders are invited to register their shares in a so-called loyalty registry held by the company. In doing so, shareholders undertake not to transfer their shares. Provided that the shares remain registered to the same shareholder for a set period of time (typically three or five years), that shareholder may be granted certain additional 'loyalty' benefits; typically additional voting or dividend rights. If a shareholder is no longer eligible for the loyalty share schemes, such loyalty shares must be transferred to the company

(usually against little or no financial compensation). These loyalty share schemes may be similar to, but should be distinguished from, dual share class structures in which different classes of shares may have different rights attached to them (e.g., low/high voting stock). Examples of Dutch companies that have included such a dual share class structure include Altice N.V., Trivago N.V. and CNova N.V.

Dutch loyalty share schemes are subject to the principle of equal treatment. Under this principle, shareholders need to be treated equally in equal circumstances. In certain circumstance, a measure causing unequal treatment of shareholders may be permissible, provided that (i) there is a purpose providing an objective justification for such unequal treatment; (ii) this measure provides an equate way to achieve that purpose; (iii) the relevant measure is necessary to achieve that purpose; and (iv) the unequal treatment is proportional to that purpose. If a loyalty share scheme is challenged, a Dutch court will consider all facts and circumstances of a given case, taking into account that Dutch companies have a certain degree of discretion when determining the loyalty share scheme. Traditionally, it would often be assumed that a loyalty share scheme is permitted under Dutch law provided that all shareholders could, in theory, meet applicable criteria to access that scheme.

Recent developments: Mediaset ruling

On 1 September 2020, the Amsterdam Court of Appeal rendered its Mediaset ruling. This ruling relates to a shareholder dispute within Mediaset, an Italian mass media company listed on the Milan Stock Exchange. Mediaset's controlling shareholder Fininvest, holding a 44% stake in the company, and Vivendi, holding a 29% stake in the company, have been in dispute over the acquisition by Vivendi of Mediaset Premium, a Mediaset subsidiary offering PayTV services.

The dispute has led to multi-jurisdictional litigation in which Vivendi has sought to – in short – block a cross-border merger pursuant to which Italian and Spanish Mediaset entities would merge into a newly incorporated Dutch holding entity. This Dutch holding company would apply a tiered loyalty voting right structure pursuant to which, according to the court, Fininvest would effectively be granted full control over the company's general meeting. Vivendi sought to obtain injunctive relief blocking that merger, arguing inter alia that this loyalty voting right scheme would unreasonably prejudice its position.

The Court of Appeal ruled in favor of Vivendi and blocked the merger on the ground that this specific loyalty share structure served solely to secure absolute control over the Dutch holding for Fininvest while unreasonably prejudicing the position of Vivendi and other shareholders. At the same time, the Court of Appeal underlined that, as a starting point, Dutch law in principle permits the use of loyalty voting schemes.

The Mediaset ruling is the first notable judgment to be rendered on loyalty share schemes since the landmark DSM ruling and marks the first time that such a structure is successfully challenged in the Netherlands. While the judgment can be appealed before the Supreme Court, we believe that this judgment may grant further guidance on the implementation of loyalty share schemes in the Netherlands.

Contents

The future of loyalty share schemes in the Netherlands

Loyalty share schemes are still permissible, but depending on the specific mechanism could be challenged in court. How will the Mediaset ruling impact Dutch market practice? We have three key take-aways:

1. Clear rationale.

The loyalty scheme needs to serve a certain legitimate (presumably, governance-related) purpose. As such, it is important to substantiate why (for instance) promoting long-term share ownership is important to the continuity of the company or how the loyalty share scheme contributes to the overall capital structure of the company.

2. Proportionate measure.

The loyalty scheme needs to be a necessary and appropriate measure to achieve that purpose. In particular, it is important to note whether such purpose could also be achieved through other measures that would have less of a negative impact on the position of the other shareholders. Generally speaking, we believe this means that the mechanics of the loyalty share structure need to be scrutinized, not the use of the loyalty share structure as such.

3. Balancing of interests.

Parties should be able to demonstrate that due consideration was given to balancing the various interests involved. This may in particular require an analysis of why the particular loyalty share structure is in the interest of the company itself.

All this considered, the Mediaset ruling should not have a significant impact on the use of loyalty share schemes in the Netherlands, but will expose the rationale for such schemes to higher levels of scrutiny. As such, we expect that Dutch market practice will develop in such a way that Dutch companies seeking to implement a loyalty share scheme will more explicitly set out the rationale for implementing that scheme and how this relates to the (other) shareholder interests involved.

Finally, we note that there are valid arguments to incentivize long-term shareholdership through loyalty share schemes. For instance, long term shareholders help create a stable shareholder base, meaning that a company will be less susceptible to minority shareholder activism and helps foster shareholder engagement. Such governance considerations are in line with the objectives of the revised Shareholder Rights Directive (Directive (EU) 2017/828), which also seeks to encourage shareholder engagement in the long term.

Contents

The use of Dutch anti-takeover defences by foreign companies

Could well-established Dutch anti-takeover measures involving foundations help defend non-Dutch groups against hostile activity?

The use of Dutch anti-takeover defences by foreign companies

Contents

Could well-established Dutch anti-takeover measures involving foundations help defend non-Dutch groups against hostile activity?

The Netherlands has traditionally embraced the use of strong anti-takeover measures to ensure long-term value creation for stakeholders. In large part, these measures involve the use of a Dutch foundation (stichting) that is granted special rights intended to prevent an unsolicited takeover or other hostile activity. Recently, such an anti-takeover measure involving a Dutch foundation was implemented by the French Suez group. This trend report explores the use of such well-established Dutch anti-takeover measures by non-Dutch groups.

Dutch anti-takeover measures involving foundations

A Dutch foundation is a legal entity that can hold assets (including shares) and execute contracts and deeds. It is an orphan entity that is controlled by its management board and is prohibited from having any members or shareholders. Absent mandatory statutory appointment mechanics, it is common for the incumbent managing directors to determine the management board's composition through a system of co-optation. Dutch law offers only limited options for external stakeholders to challenge a foundation's management board conduct. These factors allow for a highly autonomous functioning of the management board

of the foundation, subject to the scope of the foundation's statutory object. In Dutch practice, foundations are used to serve a broad array of purposes, including charitable entities, pension funds, ad hoc claim vehicles and trust-like entities used for estate planning purposes.

Foundations are also commonly used in the implementation of anti-takeover measures by Dutch listed companies. In such cases, the foundation serves as an (independent) orphan entity holding shares in the company and exercising the rights attached thereto. Broadly speaking, in that context, three uses for the foundation can be distinguished:

i. Option right.

Foundations may be granted call option rights to shares in the capital of a company. In relation to Dutch companies, such option rights will typically grant a right to acquire preference shares, which can be used without any pre-emptive right of existing shareholders. Such option rights can result in a poison pill-like defence that provides a strong deterrent to hostile activity.

ii. Special control rights.

Foundations can be granted special control rights, typically through so-called priority shares. Such control rights may, for instance, relate to control of board composition or special approval or initiative rights.

iii. Depositary receipts.

Shares can be held by a foundation, who can exercise the voting rights attached to the shares, while issuing depositary receipts for those shares to beneficiaries. Beneficiaries holding such depositary receipts will be entitled to receive any distributions on the relevant shares, but the possibility for the beneficiaries to effectively exercise voting rights can be limited or in certain cases even excluded altogether. The foundation within this context is commonly referred to as a trust office foundation (*stichting administratiekantoor*).

All three options are in practice used as anti-takeover measures.

For instance, 50.1% of the shares in the capital of ABN AMRO are held by a trust office foundation. Instead of shares, the depositary receipts issued for such shares by the trust office foundation are listed and traded amongst investors. Many Dutch listed companies have granted option rights to an independent foundation. Such an option right proved instrumental to prevent a hostile takeover of Koninklijke KPN N.V. by América Móvil in 2013. A notable example of a Dutch listed company that has issued shares holding special control rights to a foundation is AkzoNobel N.V.

Although historically such anti-takeover measures have typically been implemented at the level of the listed holding company, these measures may also be used at subsidiary level. An example that received a lot of media attention related to two subsidiaries of Fugro N.V. that granted a foundation option rights to shares in the capital that could be invoked in case of a hostile takeover. Efforts by Royal Dutch Boskalis N.V. as a shareholder of Fugro to have an informal shareholder vote on this defensive measure in 2016/2017 were unsuccessful.

Under Dutch law, the implementation of new antitakeover measures at the level of a non-listed subsidiary typically will not require external shareholder involvement. As such, the implementation of such measures is likely to present less of an implementation risk than traditional anti-takeover measures implemented at the level of the listed holding company, particularly in case of midstream implementation. We therefore expect to see an increase in the use of subsidiary-level anti-takeover measures.

Suez: A case study on the use of Dutch foundations in anti-takeover measures by non-Dutch companies

Dutch statutory law does not prohibit the use of a Dutch foundation in anti-takeover measures by non-Dutch companies. Recently, Suez S.A., a leading French multinational with operations in water, energy, and waste management, implemented an anti-takeover measure involving a Dutch foundation. This anti-takeover measure came as a response to the announcement dated 30 August 2020 of French conglomerate Veolia of its intention to acquire all shares in the capital of Suez.

Under Suez's anti-takeover measure, an independent Dutch foundation was issued one share in the capital of two Suez subsidiaries. Pursuant to the constitutional document of those subsidiaries, the transfer of certain activities outside of the Suez group would be subject to unanimous shareholder approval, thereby effectively granting the independent foundation a (de facto) veto right.

This measure was intended to preserve the sustainability of the Suez' French water activities as operated by Suez Eau France within the Suez group.

It is still unclear whether Suez will be successful in fending off the hostile takeover attempt by Veolia. Veolia has already acquired a significant stake in Suez but has not yet launched a public bid for the remaining shares. Meanwhile, Veolia is challenging the anti-takeover measure in court and has taken a first successful step before the President of the Commercial Court in Nanterre.

Looking forward

In the Netherlands, a well-established practice has been developed on the use of Dutch foundations in anti-takeover measures. Dutch law provides a flexible and attractive statutory regime on the use of such foundations, which grants significant autonomy to the management board. We expect that this flexibility, combined with lessons learned and experience gained in Dutch practice, will in the future be leveraged by non-Dutch companies in the implementation of anti-takeover measures involving a Dutch foundation.

While it remains to be seen whether the anti-takeover measures implemented by Suez will successfully fend off a hostile takeover by Veolia, it appears that the anti-takeover measure used has at least contributed to a significant delay of a hostile public offer, causing nuisance and uncertainty for Veolia. Such factors may serve as a strong deterrent for parties seeking to launch a hostile bid.

Provided that applicable foreign corporate and securities law is duly observed, we believe that Dutch foundations may help bring defences, either at holding or subsidiary level, against hostile takeover attempts and deter hostile stake building. This may include listing securities without voting rights, implementing poison pill-like dilution mechanisms and/or granting special control rights (including (de facto) veto rights) to a foundation. Ideally, to further mitigate litigation risks the management board of the foundation should be comprised of independent members. We expect that parties will find innovative ways to use Dutch foundations and that the use of such foundations in non-Dutch structures will increase. This may in turn also lead to an increase in litigation surrounding the use of such foundations in these structures.

Contents

Get in contact

[Contents](#)

For more information, please reach out to Bastiaan Cornelisse, Mijke Sinninghe Damsté, Michel van Agt, Bastiaan Kemp or Philippe Hezer via the contact details below.



Bastiaan Cornelisse

Partner / Civil law notary

T +31 10 224 65 28

E bastiaan.cornelisse@loyensloeff.com



Bastiaan Kemp

Attorney at law

T +31 20 578 50 46

E bastiaan.kemp@loyensloeff.com



Mijke Sinninghe Damsté

Partner / Attorney at law

T +31 20 578 56 66

E mijke.sinninghe.damste@loyensloeff.com

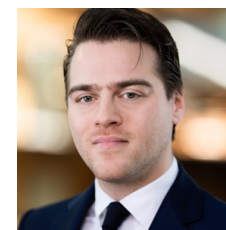


Philippe Hezer

Attorney at law

T +31 20 578 59 26

E philippe.hezer@loyensloeff.com

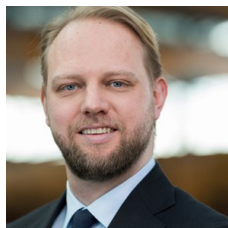


Michel van Agt

Partner / Senior deputy civil law notary

T +31 20 578 52 61

E michel.van.agt@loyensloeff.com



As a leading firm, Loyens & Loeff is the logical choice as a legal and tax partner if you do business in or from the Netherlands, Belgium, Luxembourg or Switzerland, our home markets. You can count on personal advice from any of our 900 advisers based in one of our offices in the Benelux and Switzerland or in key financial centres around the world. Thanks to our full-service practice, specific sector experience and thorough understanding of the market, our advisers comprehend exactly what you need.

Amsterdam, Brussels, Hong Kong, London, Luxembourg, New York, Paris, Rotterdam, Singapore, Tokyo, Zurich