

Shareholder activism in the Netherlands

Trends and developments for the coming decade

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.

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.

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