

# Trend Report

The use of Dutch anti-takeover defences  
by foreign companies



Introduction >

Dutch anti-takeover measures involving foundations >

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

Looking forward >

We are happy to provide you with tailor-made advice >



## Introduction

### *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. **Depository receipts.** Shares can be held by a foundation, who can exercise the voting rights attached to the shares, while issuing depository receipts for those shares to beneficiaries. Beneficiaries holding such depository 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 depository 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 anti-takeover 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.

## We are happy to provide you with tailor-made advice

This document is primarily intended to provide a high-level overview of developments we see in the market. It is not intended to be exhaustive and should not be used or construed as legal advice.

However, should you feel that the described trend could be an applicable solution to your specific problem or issue, we certainly are at your service. We are happy to research your question and provide you with tailor-made advice. We do this in a pragmatic and efficient manner, boasting many years of experience and in-depth knowledge. Please reach out to your trusted adviser or contact:

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