

To: the Minister for Legal Protection in the Netherlands, Government of the Netherlands

Cc: Commissioner Mairead McGuinness, Directorate-General for Financial Stability, Financial Services and the Capital Markets Union (cc: Tatyana.panova@ec.europa.eu and verena.ross@esma.eu)

The Hague, 5 January 2023

Re: *Consultation on the Dutch Bill, introducing the option to ban physical meetings of shareholders for listed companies*

Dear Minister, dear Commissioner,

European Investors-VEB (hereinafter: EI) greatly valued submitting its reaction to the Netherlands Government's *Legislative proposal to make possible fully online general meetings* (hereinafter: the Bill), which was put out for public consultation on 7 December 2022.¹ The substantive reaction will follow below this cover letter.

For a range of legal entities under the Dutch Companies Act² the Bill enables general meetings of shareholders (or members) to be held exclusively virtually (hereinafter: virtual only). We understand the benefits for non-listed companies. However, the Bill causes a full departure from the prevailing and important requirement at Dutch company law that shareholders of listed companies always have a right *physically* to attend *their* general meetings. EI is of the opinion that depriving shareholders of this fundamental democratic right, marks a turn (for the worse) which will negatively impact the EU's important ambition to deliver on the Capital Markets Union. Extension of the Bill vis-à-vis listed companies must be prevented.

Key for successful delivery of the Capital Markets Union, in EI's view, will be the continuing recognition of fundamental shareholder rights and sustaining minimal shareholder protection. Building on investor trust is more important than reflecting on supply-side efficiency. The introduction of a Bill that would allow Boards to entrench themselves from direct interaction with those that provide their capital at pan-EU-level, must be prevented. EI would strongly advocate against that and would fully support the introduction of a mandatory requirement at EU-level for listed companies to *de minimis* require the possibility physically to attend their general meetings for all shareholders who wish to do so and/or allow for hybrid participation such that shareholders unable to attend in person can participate remotely.

For almost 100 years EI aims to strengthen the representation of investors in Europe by the following activities:

¹ [Legislative proposal to make possible fully online general meetings | News item | Government.nl](#)

² The Dutch Companies Act is contained in Book 2 of the Dutch Civil Code (to be referred to as DCC).

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- engaging with listed companies at their shareholders' general meetings, and in one-on-one meetings with their directors, representing long-term investors, based on our proprietary analyses which encompass qualitative criteria;
- representing investors in legislative and regulatory discussions within Europe on areas which directly impact their legal position and their investments; and
- initiating legal proceedings to mend corporate governance deficiencies or to have compensation awarded to investors who have incurred losses on their investments due to fraud, deceit or mismanagement from the part of companies listed in Europe, banks, auditors and (former) directors.

This (Dutch) Bill purports to resound either existing or prospect laws in several other EU Member States – such laws (already) allowing virtual only meetings. The Bill's Explanatory Memorandum asserts that the Netherlands should not wish to lag behind. Therefore, EI feels there are sound reasons to propose that the development which the Bill entails, cannot be seen in isolation from a bigger (EU) picture – in fact it thereby merits being considered in the wider context of the EU Retail Investment Strategy ('the RIS') and the Capital Markets Union.

We would note that it becomes increasingly clear that attaining the RIS's stated objectives rather depends on the supply-side – investors' confidence and the protection they deserve in acceding the (pan-EU) capital markets – rather than the demand-side (call for capital).

And this brings us to the heart of the matter. Doing away with the obligation for listed companies to hold a physical or hybrid general meeting at least once a year, will likely negatively affect the RIS right from the start. Regulators and supervisors are ever more aware of the psychological and behavioural aspects impacting decision making. Availability heuristics and interpersonal contacts between important stakeholders within a company will impact decision making. Leading a company into the unprecedented challenges of the next decade will require the strongest of relations, sustainable and predictable. Reflecting on one of the most important elements of corporate governance and ESG challenges only in terms of legal and organisational efficiency, and solely from one angle, *i.e.* that of management - is in sheer contrast to what is needed in order to find a closer, stronger and more sustainable connection between different stakeholders.

EI therefore takes the opportunity to extend a strong recommendation to the European Commission, the European Parliament, Council and the European and national regulators to render the physical or hybrid general meeting obligatory – thereby leaving intact the practice until recently – so as to prevent further erosion of shareholders' rights. Investors' confidence that they can assert their interests, first and foremost directly towards the company in the general meeting, secondarily in case of mismanagement, through collective pan-EU redress, is a prerequisite for the success of the RIS.

Yours sincerely,

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There now follows EI's substantive response to the Bill.

1. EI opposes the wider scope of the Bill

EI advances shareholders' long term engagement with the companies they are invested in. This favours companies' continuity, stability and reliability. Active engagement is an essential ingredient for long term value creation for all stakeholders, the shareholders in particular. Typically, physical shareholders' meetings considerably boost the level of engagement.

The Bill also covers non-listed legal entities, and we acknowledge that, where these are concerned, the Bill addresses rather more practical objections. We sympathise with that. But this doesn't prevent us from being concerned about the wider scope of the Bill, causing listed companies to be within its scope. Equally, we are concerned about the apparent ease with which this widening of the scope is backed up by argumentation in the Bill.

2. The conclusions in summary

- ***EI opposes the wider scope of the Bill; EI fully supports the hybrid general meeting. There are undeniable benefits to the additional facility of online participation from a distance.***
- ***Failing physical presence, minimal standards of care are not satisfied. A further erosion of corporate governance should be prevented. Shareholders deserve protection by law against 'the powers that be'.***
- ***The general meeting's autonomy is owed to the shareholders – incumbent and future ones. Physical access to the general meeting is an unalienable shareholder's right. Were it the objective to take drastic measures, these require a strengthened majority vote.***
- ***The Bill lacks the benefits from physical participation. The Bill should not dismantle essential governance safeguards.***
- ***The experiences with virtual general meetings during the coronavirus pandemic are negative. The Bill discards pertinent insights from behavioural sciences. Learning capability and positive motivation benefit from physical interaction. Physical interaction contributes to improved decision making and more effective accountability. Where there is no physical attendance, the safeguards yielded by the auditor and the notary public are made illusory.***
- ***The upshot: the Bill is immature and contradictory to the Dutch Government's ambition.***

3 The hybrid general meeting has EI's full support

EI sympathises with exploring the possibility to increase using electronic solutions in order to advance active shareholders' participation. Should the outcome of the Bill make additional facilities available, this goes to strengthen the corporate governance. Yet, EI voices its emphatic opposition against the option the Bill accommodates that general meetings may be virtual only. EI advocates amending the Bill such that the hybrid meeting is the point of departure. Shareholders should be entitled physically to attend each general meeting (hereinafter: GM). Additionally they may attend virtually, if they so choose and from a distance.

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4 There are undeniable benefits to the additional facility of online participation from a distance

EI acknowledges and embraces the benefits from shareholders having the option to participate via an electronic means of communication. The Explanatory Memorandum already mentions such benefits. In EI's view, the increased ability to attend outranks all others. In listed companies in which the majority of shares are held by foreign parties and/or with a considerable distribution of shares, the facility of virtual attendance brings evident benefits in this regard. EI endorses the aim generically to reduce the number of travel movements, and the sustainability advantages thus attainable. The sustainability gains are, however, too restricted to be compelling in arguing for the abolishment of the physical GM.

Those engaged shareholders wishing to address or to witness the GM (largely travelling by public transport), particularly tend to urge the company to accelerate the sustainability transition. This is precisely what is needed. To take away the word from them, such that they may not do so in the presence of directors, under the argument of sustainability 'gains', is putting the cart before the horse.

5. Failing physical presence, minimal standards of care are not satisfied

The physical attendance and designated functionalities is a precondition for an adequately and reliably functioning GM. The physical GM is, next to the shareholders, to be attended by the supervisory board, the management board, or, in case the company has a one-tier board structure, the executive and non-executive directors alike. When the GM resolves upon the adoption of the annual accounts, the external auditor is in attendance. Additionally, the notary-public tasked with the voting procedure and the drafting of the minutes is indispensable. If there were no physical GM, the latter functionalities are hindered in their independent observation as to whether the standards of care are being met (also refer to 17 here below).

6. A further erosion of corporate governance should be prevented

It is important to be aware that a virtual only GM would amount to an erosion of the corporate governance. Such erosion not only damages the interests of shareholders and the investment climate in the Netherlands, but also the company's interest to which the management and supervisory directors are held. The company's interest is advanced with the optimal impact effectuated through the responsibilities and the formal vote of stakeholders on the decision making process within the organisation.

7. Shareholders deserve protection by law against 'the powers that be'

EI has been a proponent of cancelling the facility originally having been intended as temporary to prohibit physical attendance of the GM, which facility had been provided for under the Dutch COVID-emergency response act. Consequently, EI was pleased with the recent announcement from the Dutch Government that this facility would no longer automatically be rolled over, it no longer being necessitated by the pandemic. It is with this in mind that EI will not disguise finding the *rebound* through this Bill, reintroducing the possibility entirely to throw out physical attendance, rather inappropriate. Despite the Bill coming from the Minister for Legal Protection, the shareholder feels left out.

The Dutch COVID-emergency response act had been called for by exceptional circumstances. Exceptional circumstances justify extraordinary measures. It is, however, not done to protract these extraordinary measures, being the content of the COVID-emergency response act where this is no longer called for by the circumstances.

EI equally finds it hard that the Explanatory Memorandum makes references to reports from the Expert Group Modernisation plc-law, to legitimise that interest groups, among which European Investors-VEB, have been given their say on the matter. Although – with a view to promoting that its advices are suited to practice and capable of being implemented – the Expert Group’s membership comprises practitioners from the field alongside academics, they all act in a personal capacity, without a mandate, as ‘experts’. The Explanatory Memorandum states that the membership of the Expert Group ‘unanimously held that there should be a permanent arrangement for a virtual only GM’,³ thereby incorrectly suggesting that European Investors-VEB concurs that a virtual only GM should be made possible. This is not the case, and it has never been expressed as such. Including this suggestion is therefore inappropriate.

8. The GM’s autonomy is owed to the shareholders – incumbent and future ones

It is also on two other items that Explanatory Memorandum’s wording elicits EI’s surprise. On the rationale for the requirement that abolishing physical attendance should be provided for in the company’s bylaws, the Minister writes: ‘[T]his is done with recognition that shareholders have a certain degree of say on the design of their own general meeting.’⁴ Indeed, the implied concession is spot on: the GM pertains to the shareholders; it is ‘theirs’. But the premise that shareholders have (but) a *certain degree* of say, is dismissive of the tenet from article 2:107 par 1 DCC; beyond the limits defined by law and the bylaws, all powers are vested with the general meeting of shareholders. The significance in principle of this provision should not be underestimated. It lays down the expression of the (boundaries of) the GM’s autonomy. This may be illustrated with an analogy taken from the order at the meeting. The law is silent on who should chair the meeting. This means that – where the bylaws do not indicate the chairman – this is at the discretion of the GM itself. The evident analogy is this: physical access to the GM pertains to the order at the GM. It is, thereby, at the GM’s autonomy. The order at the meeting is proprietary to the meeting, not to the directors.

9. Physical access to the GM is an unalienable shareholder’s right

Physical access to the GM being proprietary to the shareholders, is corroborated at law by the system of annulment of acts taken within the internal sphere of the organisation of the company – which system is distinct to Dutch company law (i.e. it does not pertain to the domain of annulment as a matter of generic private law). A resolution passed by the GM at which the shareholders had not been given physical access to the meeting,⁵ is, thereby, null and void. This may be contrasted to such acts which are voidable; these are acts which have been passed in breach of non-essential procedural provisions. Thus, the legal condition that shareholders have physical access to GMs is ‘essential’.

³ Explanatory Memorandum page 22.

⁴ Explanatory Memorandum page 11.

⁵ Of course, the possibility created by the COVID-emergency response act is kept from this example.

10. Were it the objective to take drastic measures, these require a strengthened majority vote

The second point where we criticise the wording in the Explanatory Memorandum is the remark that amending the bylaws so as to introduce virtual only GMs is not ‘drastic’. Where this applies to non-listed institutions, we leave this without discussion. Where listed-companies are concerned this classification is incorrect as much as it is inappropriate. In view of classifying it as not being drastic, the Bill does not require that the resolution to amend the bylaws be passed by a strengthened majority vote. EI opposes virtual only GMs altogether – it would thereby not be necessary to advocate that the resolution to amend the articles should be passed with a strengthened majority vote. This notwithstanding, should virtual only GMs be legally accommodated, the least that can be expected is that the bylaws depend on a resolution passed with a strengthened majority vote. Were this not to be required, we may anticipate that all listed companies will shortly arrange that their GMs be virtual only. In practice, creating the basis within the bylaws will be combined in a proposal for an agenda containing all matter of items the shareholders do find important. Rather; the existing major shareholders dominate the GM and resolve to place the minority shareholders at an even greater distance.

11. The Bill lacks the benefits from physical participation

EI opposes that virtual only GMs bring cost efficiencies. Perhaps the ‘event’ of the GM as such is cheaper if, as such, it takes place without physical attendance. However the revenues from a physical meeting are not being dealt with in the Bill and its Explanatory Memorandum. This is a missed opportunity under the pretense of weighing up the pros and cons. The strength of good decision making lies in its preventing the decline in performance – for instance taking the form of failing management which may not be called to account – or the company incurring disproportionately higher costs – for instance through erroneous acts or inadequate correcting action (fines, compensation of damages) as a consequence of mismanagement. *Without shareholders taking responsibility, management goes unsupervised.* To EI, the right to attend the GM, and to be able to address the meeting and to exercise the vote is axiomatic.

Incidentally – arguably this is redundant where it neglects the heart of our objections – the Bill’s requirement that where the GM is also (thus: not ‘exclusively’) virtual, the shareholders should be able *reciprocally* to view and to access the virtual meeting with video and audio.

12. The Bill should not dismantle essential governance safeguards

The relevance of the GM’s engagement in the corporate governance should not be underestimated. A mature involvement of the GM is a requirement flowing directly from the Shareholder rights Directive. EI would – also having regard to certain other recent developments (for instance the introduction of the statutory timeout right with the response period from the Dutch Corporate Governance Code being retained) – it cannot escape the conclusion that enterprises and legal counsel step by step snap at the heels of the GM’s essence and its relevance, and that this is condoned by the legislature.

A lot goes well in Dutch corporate life. However, every now and then things go awry, this often being unforeseen. The safeguard which the GM provides, also to the legislature, not to confine disciplining wrongs to the national judiciaries and supervisory authorities, disciplining also being a shareholder responsibility, is one practice teaches us to leave it firmly intact. Allocate responsibilities where they lie primarily, where there exists the interest to adjust in time, and facilitate the infrastructure that is fit for purpose.

13. The experiences with virtual GMs during the coronavirus pandemic are negative

Virtual only GMs cause the corporate governance to weaken. EI has gained experience with this during the 2020 and 2021 GM-seasons. European Investors-VEB conducted research on virtual GMs in both seasons. (Particularly) where participants were enabled to participate 'live' (with which was meant that attendants could raise (follow-up) questions during the meeting), the (follow-up) questions were mostly replied to succinctly and it proved practically impossible interactively to raise follow-up questions. The lack of debate rendered the GMs much shallower than usual. The lack of (genuine) interaction rendered the meetings considerably shorter and less effective. Without the customary and illustrative interventions from the audience the chairmen moved the gatherings rapidly to a close.

14. The Bill discards pertinent insights from behavioural sciences

However much EI realises that the requirement of visual and auditory reciprocity from the Bill, *in technical terms* represents the maximum attainable (and, thereby: sought-after), we may unambiguously assert that a virtual only meeting seriously undermines the function of the GM as a consultative organ. It will result in (too) brief, shallow gatherings with a high precooked nature lacking vitality and discussion. Adequate mirroring of the physical meeting cannot possibly be realised through a virtual only meeting. A GM should be an as equal as possible discussion between the management board, the supervisory board and the shareholders. At physical meetings shareholders in normal circumstances commit themselves perfectly to the order of the meeting as set by the chairman.

In the submission to the consultation EI wishes explicitly to attract the attention to insights from behavioural sciences. These remain without discussion in the substantiation of the Bill. The Bill therefore lacks the required reflection on scientific research on the most sought-after structure of decision-making processes. Wrongly so: the option to hold virtual only meetings created by the Bill, discounts elementary principles at the coming about of decision-making and accountability. This concerns principles where behavioural components lie at the basis and in which conscious and subconscious biases play an important role.

EI wishes to point the legislature to five *Core social motives*,⁶ elementary underlying psychological processes which impact the thinking, the sentiment and intersubjective behaviour. People are committed to the development and retainment of relationships within a group and in staying in connection with others.

⁶ Fiske (2010)

People are attached to strong, stable relationships with others ('belonging'). People wish to understand their environment and they wish to be able to adjust to insecurities and change ('understanding'). People like to see a connection between behaviour and result ('controlling'). People value self-esteem and self-achievement ('self-enhancing'). And people see others as good-natured and reliable ('trusting'). All five *Core social motives* prove differently, better, in a physical than in a virtual setting (see at 13 above). The physical GM is the best venue by far where *checks-and-balances* are rendered manifest in unison. Physical proximity has a considerable psychical effect on people. The human being as a social creature performs optimally in direct interaction with other social creatures, and, even better still when all senses are 'switched on'. It is self-evident that a virtual environment renders part of the senses inoperative. Physical proximity enhances the calibrating (attuning between too loud, or, conversely, too soft) of the questions and answers mutually exchanged.

Additionally other than such insights from behavioural sciences mentioned, support that the Bill weakens the corporate governance. Suppressing physical GMs causes losing out on essential aspects likely to influence the performance of directors, supervisory board members and the accountant. It moreover limits the effective exercise of its powers of the GM (as an organ). There is a likely assumption that the engagement of shareholders is impaired. The physical GM is an integral element among the visible checks-and-balances within a company. Good decision-making is advanced by leaving the judgment for what it is, by first raising questions, hearing other questions – and audibly and visibly receiving the reaction. Physical interaction and independently reaching a conclusion lead to improved, more shared and better motivating decisions. This implies, for instance, that where decision-making occurs is in physical GMs on items on the agenda – even where this concerns items for discussion only (next to attention to remuneration one could think of agenda items moved by shareholders addressing sustainability and carbon emissions) – there are higher voting percentages.

Equally, where the course of events at the meeting is concerned – the 'order' – there is an essential discrepancy between a (partly) physical and a virtual environment. A physical GM eases the supervisory board in gauging the sentiment among key stakeholders and to experience this first-hand. This is an indispensable element in the fulfilment of the supervisory board's duties. In a virtual environment the chairman is unable to observe the dynamics among the participants and effectively to act upon it.

This unavoidably causes a degradation of (the level of) the discussion. Furthermore it prevents shareholders from taking the GM's pulse, to react to each others' questions and discussion points raised, let alone that shareholders may question one another.

15. Learning capability and positive motivation benefit from physical interaction

The core mechanism from the availability heuristic has it that people are inclined to learn from those occurrences which come to mind most easily. This mostly concerns occurrences having caused emotions and which have been lived in a tangible (i.e.: physical) experience. Therefore personal experiences considerably influence what actors remember more or less easily.

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Decision making processes are strongly impacted as the complexity of facts and the accompanying considerations are interpreted from a given point of view, interest or background. This occurs both consciously and unconsciously. Biases impact everyone's decision making. Everyone is susceptible to groupthink, and everyone is rather more inclined to embrace the confirmation of their self-righteousness than to face the internal confrontation with an opposite point of view. This applies equally to self-confirming patterns generated with the assistance of *artificial intelligence* or self-learning systems. Particularly in a virtual setting it is considerably more difficult to identify the biases in time, to acknowledge them and to resolve them. In those circumstances one either fails to come across the opposite perspective altogether or the opposite perspective is faced less frequently and less visibly. This does not advance the quality of decision making, leads to accidents and it magnifies (instead of bridges) differences of opinion.

The absence of physical interaction between the management board, supervisory board members, the accountant, and shareholders reciprocally leads to fewer and remoter experiences. Analogies from the coronavirus period come the fore: sports without public, music performances without public, parliamentary debate without public and in a very limited setting. With the diluting of the experiences, the performance decreases. One may also think of virtual only court hearings. These cause a considerable reduction of the impact on those seeking or meeting justice. All this is evidently undesirable.

16. Physical interaction contributes to improved decision making and more effective accountability

The GM's traditional function is threefold: debate, accountability, and decision making. The generally recognised paradigm has it that 80 per cent of communication is non-verbal. In itself, this already speaks volumes on the quality of debate absent physical presence. To this, it should always be reminded that decision making ought to be the outcome of prior consultation. Shareholders should be able to address the management board and the supervisory board on the (future) policy and on the supervision held. Particularly where the accountability from the management board and the supervisory board is concerned, impact is lost out on; both in a positive and negative sense. Where the latter aspect is concerned, an analogy comes to mind. A meaningful performance appraisal is conducted physically as opposed to virtually. The loss on impact is not confined to specific items on a GM's agenda, but also affects the mutual understanding after the GM. Physical interaction thereby forms an essential shareholders' right, carrying a positive impact that should not be underestimated on the way decision making within the company is effectuated and the strictness of accountability for the implementation of decisions made.

17. Where there is no physical attendance, the safeguards yielded by the auditor and the notary public are made illusory

As said earlier, where the GM is held physically, the external auditor and the notary public should be in attendance. The physical attendance of these parties serves several objectives. The auditor should be in a position to act if he is implicated in an incorrect representation of facts and circumstances pertaining to the company or to his own involvement.

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The extent to which an auditor is capable of doing so, strongly depends on his physical attendance. A virtual setting renders this important function of the auditor's right to attend the meeting practically illusory. The notary public's physical attendance enables him to monitor who is given the floor, and (rather) who is not, or from whom the floor is being taken away. Effectively monitoring adherence to procedural safeguards is impossible without physical presence.

18. The upshot: the Bill is immature and contradictory to the Government's ambition

It will, in view of the above, not come as a surprise that EI would be unhappy were the Bill to be enacted unamended. The Bill is, as yet, too wide in scope. As said, EI fails to see that in doing so we – having regard to the Dutch investment climate – advance the corporate governance; on the contrary. EI cannot escape the assumption that the departure from the tenet that there is always a physical component to a GM, inherent in this Bill, may not be seen in isolation from the often heard criticism on the functioning of the GM. Management board members and supervisory board members simply do not appreciate accounting for their actions of receiving criticism. These sometimes appear unjustified or undiplomatic. But this cannot ever justify taking the right to address the GM and active involvement in voting in our democratic legal order. Being a good management board member of supervisory board member, whether in the public or private sphere, requires that one is capable of dealing with it and capable of making the connection. EI is pertinent in its opinion that further distancing the shareholders from the company in this manner, contributes to the marginalization of the GM, to lesser decision taking, poorer accountability and a management layer deeming itself impervious. We assume that this is not intended. Especially where the Cabinet envisages greater attention to inclusion, diversity, strengthening the public function, managerial vulnerability and new leadership. It would be regrettable indeed if this Bill inadvertently were to muddy the waters as regards this ambition.

EI makes a pressing request to reconsider; it's better to turn halfway.

Yours sincerely,

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