



Ministerie van Justitie en Veiligheid

Brussels, February 7, 2019

Submitted through <https://www.internetconsultatie.nl/wetsvoorstelbedenktijd>

Re: ONLINE CONSULTATION ON DRAFT BILL ON RESPONSE TIME FOR DUTCH LISTED COMPANIES (the "Bill")

Dear Sir/Madam,

Institutional Shareholder Services ("ISS") appreciates the opportunity to provide comments on the draft Bill on response time for Dutch listed companies and share some of our high-level thoughts on the direction of the proposed Bill.

ISS is a leading provider of corporate governance solutions to the global financial community, including corporate governance research and voting recommendations for institutional investors. More than 1,700 institutional investor clients globally rely on ISS' expertise in providing background research and voting recommendations to help them make more informed voting decisions. In addition, ISS offers a full suite of corporate governance solutions to assist institutional investors in meeting their compliance needs and fulfilling their corporate governance responsibilities.

ISS has over 30 years of experience in this field, serving institutional investors globally, and our teams are located in many financial centres worldwide, including in Belgium, France, Germany, Sweden, the UK, the U.S., Canada, Japan, Australia, and Singapore.

ISS' comments to this consultation represent our views in our capacity as a proxy advisor and thought leader in the area of corporate governance, and not necessarily those of our clients.

We hope that you will find our comments useful, and we are available if you would like to discuss anything in further detail.

Sincerely,

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Global Governance Standards

ISS' approach to assessing corporate governance standards and to providing research and voting recommendations for our clients is based on structured governance and voting policies, rooted where relevant in global and well accepted corporate governance standards such as the ones defined by the OECD and the ICGN. The proposed introduction of the suspension of some fundamental shareholder rights for a period of up to 250 days - which is referred to in the Bill as a 'response time' - is at odds with globally recognized corporate governance standards.

The OECD's Principles of Corporate Governance¹ recognize that shareholders have the right to influence the corporation through the participation in the general meeting of shareholders and by voting. Because the responsibility for corporate strategy and operations is typically placed in the hands of the board and management, shareholders' ability to influence the corporation are centered on certain limited but fundamental and basic rights, such as the ability to vote on the removal and election of members of the board and on other major decisions. The proposal to suspend some of these shareholder rights at the discretion of the board would be in conflict with these principles and undermine those basic and fundamental rights.

Similarly, the ICGN's Global Governance Principles² consider the voting rights of shareholders on major decisions to be a key tenet of governance, enabling shareholders to hold the members of the board accountable for their actions and decisions. The right to vote on the removal and appointment of directors and the amendments of company bylaws is fundamental. The suspension of the limited but key decision-making powers of shareholders would undermine the proper functioning of a globally recognized good governance framework.

Although the concept of corporate governance has a wide variety of definitions, there is broad consensus that 'checks and balances' and 'accountability' are key tenets of good governance. The potential power of the board itself to suspend shareholders' fundamental rights and inhibit the ability of shareholders to hold directors and the board accountable would be a severe breach of fundamental governance principles and shareholder rights.

Shareholder Engagement

In 2017, the European Parliament and The Council approved new European regulation that encourages long-term shareholder engagement (Directive EU/2017/828). To avoid inadequate monitoring and too much short-term focus, the European Commission believes further involvement of shareholders is a necessity. Hence, the European Commission believes *that "Effective and sustainable shareholder engagement is one of the cornerstones of the corporate governance model of listed companies, which depends on checks and balances between the different organs and different stakeholders. Greater involvement of shareholders in corporate governance is one of the levers that can help improve the financial and non-financial performance of companies, including as regards environmental, social and governance factors, in particular as referred to in the Principles for Responsible Investment, supported by the United Nations."*³ Based on the foregoing, it is surprising to see that the proposed Bill takes a fundamentally different approach to encouraging a long-term focus.

¹ The G20/OECD Principles of Corporate Governance help policy makers evaluate and improve the legal, regulatory, and institutional framework for corporate governance, with a view to supporting economic efficiency, sustainable growth and financial stability. The Netherlands is a member state of the OECD.

² The ICGN Global Governance Principles (GGP) serve as ICGN's primary standard for well-governed companies, and have been developed in consultation with ICGN Members which includes investors responsible for assets under management in excess of \$US26 trillion. Last updated in 2013, the GGP are reviewed periodically to ensure relevance with regulatory or market-led developments relating to high standards of corporate governance. They embody ICGN's mission to promote effective standards of corporate governance and investor stewardship to advance efficient markets and sustainable economies world-wide.

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0828>

Whereas the Directive suggests that shareholder involvement, through dialogue and voting, should be encouraged in order to strengthen the governance mechanism of check-and-balances, the Bill appears to go in the opposite direction and would reduce shareholder involvement on key decisions, director accountability during critical times for the company and its shareholders, and weaken governance mechanisms. The proposed Bill appears to depart from the well established position at the European level that shareholder engagement and stewardship strengthen good governance for the long-term benefit of companies, shareholders and other stakeholders.

Current Dutch Legal Framework and Countervailing Powers of the Board

Within the framework of the aforementioned checks-and-balances, a board of directors for a public company in the Netherlands already has significant countervailing powers.

- Practically all large Dutch public companies have governance arrangements in place that could potentially protect the company against a hostile takeover or undesired shareholder activism when considered not in the interest of the company and its stakeholders. These protective measures are often through a system of preference shares, priority shares, depositary receipts of shares, or having a reference shareholder.
- The Dutch Corporate Governance Code contains a best practice recommendation (4.1.6 and 4.1.7) that would enable the board to invoke a response time of up to 180 days when a shareholder files a resolution that could lead to a change on company strategy (the regulatory framework in the Netherlands also considers potential changes in the board to possibly lead to a change of strategy). This best practice recommendation has been further legally strengthened through case law⁴.
- The articles of association of many Dutch listed companies contain provisions that would already make it difficult to remove incumbent directors (through qualified majority requirements) or to propose shareholder nominees (the board itself has the binding right to nominate directors). Moreover, the board has the right to initiate amendments to the articles of association, making it *quasi* impossible for shareholders to either amend the articles or even change the composition of the board.
- As demonstrated in a recent case, the board can reject a shareholder request to submit an item to the agenda of a meeting of shareholders.

Based on the aforementioned countervailing powers of the board, we consider that the Dutch governance landscape already provides sufficient tools for the board to delay undesired activism or to have sufficient time to contemplate and address shareholder proposals.

Conclusion

For these reasons, we believe that the draft Bill is not well aligned with level of shareholder rights expected by many institutional investors in Dutch companies, with regard to the fundamental principle of board accountability. Our comments are based on extensive interactions with many European and other international institutional investors who own and vote their shares globally, including their holdings in Dutch companies.

We believe the suspension of fundamental shareholder rights as proposed in the draft Bill is not in line with national or international shareholder expectations. Although the right to vote is not the sole determinant of governance quality, consensus has grown among the investor community that a

⁴ Enterprise Chamber Amsterdam, Sep. 6, 2013, ECLI:NL:GHAMS:2013:2836 (Cryo-Save Group/Frederic Amar)

minimum level of access and checks-and-balances is required to ensure a well-functioning and accountable board for the benefit of both the company and its shareholders.

In this comment letter, we do not represent the views of any specific investor, but the views of ISS as a thought leader in the field of corporate governance and as a trusted service provider to many institutional investors in the Netherlands, Europe and throughout the world.