

**ICGN**

International Corporate Governance Network

Mr. S. Dekker,
Minister for Legal Protection
Ministry of Justice and Safety
PO Box 20301
2500 EH Den Haag
The Netherlands

7 February 2019

Public consultation on draft bill to allow for 250-day response time

Dear Mr. Dekker,

The International Corporate Governance Network (ICGN) welcomes the opportunity to comment on the draft bill, published by you on 7 December 2018, which allows Dutch listed company boards to invoke a statutory response time of up to 250 days in the situation of shareholder activism or a hostile public bid-- thereby denying shareholders the right to engage with such boards on critical governance issues such as board director election or dismissal.

Led by investors responsible for assets under management in excess of US\$34 trillion, ICGN is a leading authority on global standards of corporate governance and investor stewardship. Our membership is based in more than 45 countries, including The Netherlands, and includes companies, advisors and other stakeholders. ICGN's mission is to promote high standards of professionalism in governance for investors and companies alike in their mutual pursuit of long-term value creation contributing to sustainable economies world-wide. Our policy positions are guided by the ICGN Global Governance Principles¹ and the ICGN Global Stewardship Principles², both of which have been developed in consultation with ICGN Members and as part of a wider peer review. They inform the base of our response to the questions posed in this consultation. For more information on ICGN please see: www.icgn.org.

Many ICGN members are based in the Netherlands, and most of our institutional investment members will have investment holdings in Dutch companies. ICGN has been regularly involved with the discussion of Dutch corporate governance issues, both through our conference activities (including our conference in Amsterdam on 11-13 February 2019) and policy work. Our recent policy interventions in the Netherlands include our response to the consultation on the Dutch Corporate Governance Code in 2016.³ More recently,

¹ See ICGN Global Governance Principles: http://icgn.flpbks.com/icgn_global_governance_principles/

² See ICGN Global Stewardship Principles: <http://icgn.flpbks.com/icgn-global-stewardship-principles/#p=1>

³ See ICGN 2016 Dutch Corporate Governance Code response:
https://www.icgn.org/sites/default/files/Dutch%20CG%20Code%20Submission_0.pdf

with specific reference to the legislation currently being proposed on takeover response time, ICGN drafted a letter in May 2017 to the Secretariat of Committee of Economics Affairs of Tweede Kamer and the Minister of Economic Affairs, co-signed by nine other UK prominent investment bodies. in which we challenge the merits of the proposed legislation on the basis of its impact on fundamental shareholder rights.⁴ This was followed by a meeting in the Hague on 5 July 2017 with Mr. Focco Vijselaar of the Ministry of Economic Affairs involving myself from ICGN, along with Rients Abma of Eumedion and Daniel Summerfield from the UK pension fund University Superannuation Scheme (USS).

As you will see, our position from this 2017 exchange of views has not changed, and ICGN remains generally in opposition of the draft legislation being proposed. Moreover, as reflected in our co-signed letter with other investors in 2017, we believe this position is shared by most non-Dutch institutional investors who account for a vast majority of shares issued by Dutch listed companies. In our July 2017 meeting with the Ministry of Economic Affairs, we expressed the specific concern that this could ultimately impact the Dutch market as a whole, and warned against this triggering a “Dutch Discount”. We would all like to avoid this.

Comments on the draft bill

The bill's objective is to promote a careful decision-making process in situations of shareholder activism and a hostile takeover. ICGN shares with the Ministry of Justice and Safety the common aim of ensuring that the interests of those seeking short-term returns do not override the long-term interests of the company and its stakeholders involved. At the same time, we share the views of other investment bodies, including Eumedion, that Dutch listed companies already have adequate means to protect themselves against short-term oriented shareholder activists. Complementary legislation is therefore not deemed necessary and would be of negative impact in that it would impact shareholder rights and the ability of shareholders to hold management and boards accountable.

The Dutch Council of State noted in its advice to the government that due to the legal possibility to invoke a response time, investing in Dutch listed companies can become less attractive to investors. We share this concern. In our 2017 meeting with the Ministry of Economic Affairs, we expressed the specific point that legislation of this nature could ultimately impact the Dutch market as a whole, and we warned against this triggering a “Dutch Discount”. I believe we all would like to avoid this.

As noted earlier we believe that all large Dutch listed companies already have protective measures in place. These cannot only be used in hostile bid situations, but also in situations of short-term oriented shareholder activism, e.g. a request to dismiss one or several executive or supervisory board members that is not reasonable. In addition, the

⁴ See ICGN 2017 letter to Dutch Ministry of Economic Affairs:

<https://www.icgn.org/sites/default/files/Dutch%20antitakeover%20bill%20May%202017.pdf>

Dutch Corporate Governance Code already allows the executive board to invoke a response time of up to 180 days when a shareholder files a resolution that could lead to a change in the company's strategy.

Many Dutch listed companies also have provisions in their articles of association which make it difficult for shareholders to nominate their own candidates for the executive and supervisory board and to dismiss incumbent executive or supervisory board members. In practice many supervisory boards have the right to make binding nominations for the vacancies in the executive and supervisory board and regularly a qualified majority of 2/3 of the votes cast at the general meeting is needed to dismiss executive and supervisory board members. In many cases this qualified vote majority should represent at least a majority of the issued capital. Almost all articles of association of Dutch listed companies exclude the right for shareholders to initiate amendments to the articles of association, including amendments to the existing board nomination, suspension and dismissal procedure.

We are also in agreement with Eumedion's observation that Dutch company law already provides sufficient safeguards to protect them from shareholders with short-termist perspectives. Shareholders already have to take into account the legal principle of reasonableness and fairness when proposing the dismissal of one or several executive or supervisory board members. Dutch law also prohibits the abuse of power by shareholders. Companies are able to request the Enterprise Chamber of the Amsterdam Court of Appeals to take immediate measures against one or several shareholders if the company believes the behavior of these shareholders is unduly harmful for the company.

From this, we believe the suggested statutory response time of up to 250 days is greatly disproportionate and has the potential to threaten critical the checks and balances within the company, as well as diminish accountability to shareholders more generally. ICGN considers the possibility for the general meeting of shareholders to hold the executive board and supervisory board accountable for fulfilling their duties to be a fundamental aspect of a well-balanced governance system. This is especially of importance in a takeover bid and dismissal situation where personal interests of board members may not be aligned with the long-term interests of the company and its stakeholders.

Hence it is important not to compromise the effective functioning of the checks and balances within a company. This includes, among other things,, the appointment, suspension and dismissal of board members and the initiation of amendments to the articles of association regarding the appointment. Weakening or diminishing these shareholder rights potentially breaches the chain of accountability between those who manage the capital and those who provide it.

To conclude, we believe that the suspension of shareholder rights being considered would be viewed by the market as a backward step for Dutch corporate governance and effective stewardship. ICGN is of the view that the introduction of a statutory response time is unnecessary and disproportionate. We recommend you to not introduce additional

measures restricting shareholder rights, as this would harm the reputation of the Netherlands for corporate governance and would be detrimental for long-term investment in the Dutch economy.

We would like to thank the Ministry of Justice and Safety for the opportunity to provide our comments on the draft bill to invoke a statutory response time of up to 250 days in. Should you wish to discuss our comments further, please contact George Dallas, ICGN's Policy Director, by email at george.dallas@icgn.org.

We would be happy to speak further with you on this matter if that would be of help.

Yours faithfully,



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Copies:

Bram Hendriks, Co-Chair, ICGN Shareholder Rights Committee
Eugenia Jackson, Co-Chair, ICGN Shareholder Rights Committee