MANAGED FUNDS ASSOCIATION

AIMA

Dutch Ministry of Justice & Security
Attn. Mr. Sander Dekker, Minister of Legal Protection
Postbus 20301
2500 EH The Hague

Submitted via web-portal

07 February 2019

Dear Mr Dekker,

AIMA and MFA response to the Dutch Ministry of Justice & Security's consultation on the proposed statutory reflection period

The Alternative Investment Management Association Limited (AIMA)[1] and Managed Funds Association (MFA)[2] appreciate the opportunity to provide feedback in response to the consultation on the draft legislation proposing a statutory reflection period for up to 250 days (the 'reflection period') in the context of foreign takeovers and changes to the composition of a company's board proposed by shareholders of publicly-traded Dutch companies (the 'proposal').

Members of AIMA and MFA (together, the 'Associations' or 'we') are asset managers operating at a global level and serving the interests of a broad investor base in the EU, United States, and elsewhere. Our members have long considered the Netherlands to provide one of the most attractive European investment environments, based on a flexible, pro-business and sound regulatory framework.

The Associations understand the political context in which such proposal was drafted but remain concerned with the overall adverse consequences it could have on the general attractiveness of the country for investment.

Our main recommendation is that this draft bill should not be sent to the House of Representatives. Firstly, we believe that the proposal is redundant, since a vast majority of the listed companies are already sufficiently protected by their own protective structures and

[1] AIMA the Alternative Investment Management Association, is the global representative of the alternative investment industry, with around 2,000 corporate members in over 60 countries. AIMA works closely with its members to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes, and sound practice guides. Providing an extensive global network for its members, AIMA's primary membership is drawn from the alternative investment industry whose managers pursue a wide range of sophisticated asset management strategies. AIMA's manager members collectively manage more than $2 trillion in assets.

[2] MFA represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

corporate law (vennootschapsrecht). Secondly, the reflection period is at odds with the free movement of capital and fair treatment of investors.

However, should the proposal be submitted to the House of Representatives we want to draw your attention to several comments in our letter reflecting our members' apprehension.

More specifically, our main comments and suggestions are as follows and are further detailed, together with additional comments, in the following Annex:

- **Fair treatment of investors**: the reflection period is fundamentally at odds with investors' primary rights. Indeed, the suspension of shareholders' voting rights during a long period of time (more than 8 months), while allowing the management board to make use of theirs, deprives shareholders of their ownership rights and calls into question the consistency of the measure with European Union law.
  - We would respectfully urge the government to carefully consider these elements before making any changes to the present rules.
- **Attractiveness and scope:** We are wary of the adverse impact the proposal could have on the general economic attractiveness of the Netherlands not least because the proposal also covers Dutch companies listed outside the Netherlands. These companies may have chosen to utilise a Dutch entity to benefit from the governance rules as laid down in the Dutch Civil Code. The imposition of a 250-day reflection period will likely not be understood by investors in a Dutch company solely listed in the United States, for example. It is also likely that the proposal will conflict with the listing rules of non-Dutch exchanges on which the securities of Dutch incorporated companies have been listed. Furthermore, the measure would be imposed on companies that are already admitted to trading, without allowing the shareholders of such companies to vote on it.
  - We recommend that for companies that are in such situations (i.e., only listed outside of the Netherlands) such measures should be subject to a shareholders' vote.
- **At odds with EU legislation:** Our view is that the proposal is at odds with the Directive 2017/828 (the 'Shareholder Rights Directive") as it effectively frustrates the right to put items on the agenda of the general meeting. More fundamentally, the proposal also contravenes the EU principle of free movement of capital and the rules of the Directive 2004/65/EC (the 'Takeover Directive') as it could have a material impact on the potential success of any hostile bid on a Dutch company and prevents or delays the exercise of shareholder rights. In particular, the possibility of applying the reflection period to proposed changes to the board by shareholders during a tender period could have serious effects on any bid, for reasons that we detail in the Annex.
  - We therefore would recommend explicitly allowing shareholders to vote on board changes during the tender period, under certain conditions that we elaborate below.
- **Ensure that the reflection period is strictly limited to 250 days**: We see a few provisions that need clarifications to avoid that the reflection period is extended further than 250 days, which is already a very long timeframe when applied to capital markets' usual timings for decisions.
  - The reflection period should be invoked and start at the same moment, which we would recommend being when the bid is launched.

- We believe a general meeting should be held right at the end of the 250 days to have the possibility to resolve the matter straightaway after the end of the reflection period and that shareholders should be given the rights not merely to discuss the report of the management's actions during the reflection period but to vote to approve or disapprove of those actions (and that there should be consequences for management if their actions are disapproved).

- **Avoid piling protective measures:** Protective measures are already existing and have proven to be successful, we believe therefore that the proposal is redundant and that it should at least be prevented to be used cumulatively with other pre-existing measures.
  - We suggest that the use of both the existing 180-day period in the Dutch Corporate Governance Code and the proposed reflection period should be ruled out and should not be permitted to run consecutively.
  - Furthermore, there is nothing in the proposal preventing the possible cumulation of the reflection period with companies' own protective structures (i.e. preference and priority shares). We believe this is at odds with the following statement in the coalition agreement:[3] *"This measure cannot be used in conjunction with corporate protection structures itself such as the issue of preference shares or priority shares"* and that such statement should be reflected in the proposal.
- **Legal uncertainty:** The proposal could have an impact on the financial markets and on the value of Dutch companies.
  - We recommend reducing as much as possible any legal uncertainties such as: avoiding that this measure is cumulated with others, clarify certain triggering elements such as "substantially conflicting with the interests of the company" or clarify that if a hostile bid does not go through the reflection period should cease automatically.
- **Transparency**: Provisions should be included to ensure that all shareholders are informed if and when the management board decides to invoke the reflection period.

We would be happy to elaborate further on any of the points raised in this letter. For further information please contact Marie-Adelaide de Nicolay, Head of AIMA Brussels office (madenicolay@aima.org) or Matthew Newell, Associate General Counsel in MFA's Washington DC Office (mnewell@managedfunds.org).

Yours sincerely,

/s/
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Global Head of Government Affairs
Alternative Investment Management Association

/s/
Michael Pedroni
Executive Vice President & Managing Director, International Affairs
Managed Funds Association

[3] Regeerakkoord 2017: 'Vertrouwen in de toekomst', October 2017.

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ANNEX

This Annex provides an overview and certain suggested changes to the most material aspects of the proposal.

Scope

The scope as foreseen in proposed Article 114b(1) covers any Dutch company admitted for listing on a public market. This scope therefore also includes Dutch companies that are listed only on foreign market with potentially very few Dutch investors. The proposal's protective measures are likely to be highly off-putting to some non-Dutch investors and such investors are therefore likely to resist, in the future, to any re-domiciliation of a company's headquarters to the Netherlands.

We expect that the proposal will conflict with the listing rules on one or more of the non-Dutch exchanges on which the securities of Dutch incorporated companies are commonly admitted to trading. For example, the Hong Kong listing rules require that minority shareholders are able to convene an extraordinary general meeting and add resolutions to a general meeting agenda[4].

- We would therefore recommend that the proposal be amended to include a provision to the effect that where there is such a conflict between the requirements of the proposal and the listing rules of any non-Dutch exchange on which the securities of a company have been admitted to trading, that the listing rules prevail.
- In any case, and in order to mitigate the impact on foreign investors, we recommend limiting the scope of measures to firms that are listed exclusively on a Dutch regulated exchange while potentially adopting an "opt-in" possibility for Dutch companies not listed on a Dutch regulated exchange.

Interactions with already existing 180-day period

The 180-day period as foreseen in the Dutch Corporate Governance Code already provides for a reflective period when shareholders propose an agenda item which could result in a change to the company's strategy. We believe this provision is a strong protective element for Dutch companies and we do not recommend adding a similar – but statutory and more extensive – additional measure.

- Should the proposal be adopted, we strongly recommend that amendments are made to clarify how the new measure will interact with the already existing reflective period. Indeed, although the explanatory note of the Ministry of Justice & Security states that the intention is not to allow a management board to make use of both protective measures in a cumulative way, there are no specific provisions in the proposal forbidding such proceedings. Our recommendation to avoid any confusion and any cumulative effect would be to delete the 180-days period in the Dutch Corporate Governance Code which now seems redundant.
- Should the 180-days period be maintained in the Dutch Corporate Governance Code, we recommend adding a provision clarifying the non-cumulative effect of both measures so that if a management board chooses to use one protective measure, it should not be able to use the other. Such provision would ensure that reflection periods are not extended indefinitely.

[4] See rules 19C.07(7) and 8A.23 of the Hong Kong Stock Exchange Rules and Guidance.

- Similarly, we would also recommend adding a provision stating that the reflection period cannot be invoked more than once for the same event. Indeed, although the explanatory notes specify that such a scenario would not be desirable, we believe that it should be clearly exposed in the new rules to avoid any excessive recourse to this protective measure.

Duration of the reflection period

The duration of the reflection period as foreseen in Article 114b(2) is up to 250 calendar days. This period is calculated from the day (i) following submission of a shareholder request for board changes or (ii) following the day on which the non-agreed bid was launched.

We believe a couple of clarifications could be made in order to ensure that the reflection period does not go beyond 250 days – which is already a very long timeframe in an extremely fast and constantly moving environment.

In the context of a hostile bid, there is in the proposal a lack of synchronization in the proposal between the moment a reflection period can be invoked, which is when a hostile bid is announced, and the moment the reflection period starts, which is when the hostile bid is launched. The 250-day period can in theory therefore start several months after the bid has been announced. This potentially de facto extends the reflection period beyond 250 days. We would therefore welcome a synchronization of the moment a reflection period is invoked and the moment it starts to avoid an undue lapse of time.

We would also welcome clarifications in case the bid does not go ahead after having been announced, to ensure that any invoked reflection period would then automatically be cancelled.

We would also draw your attention on the fact that, following the end of the 250-day period, should the shareholders still wish to vote on the proposed change that triggered the protective measure, they will need an additional 60 days, which is the minimum period required to add an item to a general meeting agenda. This would effectively extend the reflection period to a total of 310 days.

- We suggest including a provision that would require a general meeting to be held at the end of the reflection period to avoid such unintended extension. We also recommend that shareholders should be given the right not merely to discuss at the general meeting the report of the management's actions during the reflection period but to vote to approve or disapprove of those actions (and that there should be consequences for management if their actions are disapproved).

Transparency

The proposal does not give any specific details regarding communications to all shareholders, whereby the management board would inform all shareholders that it intends to invoke a reflection period. Transparency of information is a key feature of capital markets and we believe it is crucial that all shareholders are informed that such a measure is about to be launched, since not only the voting rights of the shareholder proposing the changes will be suspended, but also the voting rights of all other shareholders.

Consequences of shareholders right suspensions

We would like to draw your attention on the unintended consequences a suspension of shareholders' voting rights on changes to a company's board might have, especially in relation with the Takeover Directive.

Indeed, we believe that such measure might have adverse effects on the completion, or even the launch, of any bid not previously agreed upon with the management board. It is common practice for the bidder seeking to acquire the majority of a company's shares to put on the agenda of the general meeting held during the end of the tender period (which is mandatory), items to replace directors. The adoption of these resolutions is always subject to the completion of the bid. However, because of the suspension of the voting rights, shareholders will not be allowed to vote on such items and the bidder will have to wait for another general meeting after the completion of the bid, which may take up to an addition 60 days, in other to effectively take control of the company the bidder will have acquired.

This usual practice is also part of the conditions asked by lenders financing bidding operations. They will guarantee the funds if they are certain that the bidder will gain control of the company at the moment, he acquires the shares. Because of the suspension of the voting rights on shareholder proposed board changes, a bidder would now not gain control at completion (as required by lenders), which might bar access to financing for a bid. Since a bid may only be announced after a bidder has announced that it can fulfill its cash consideration obligations as laid down in article 3(e) of the Takeover Directive, bids with respect to which this issue is not addressed would become de facto impossible.

- We would therefore strongly recommend allowing shareholders to vote on board changes at the general meeting during the tender period, provided that such votes directly relate to the hostile bid and are fully conditional to the completion of this bid.

Recourse

We note the possibility, in Article 114b(4), for the shareholders to request that the Enterprise Chamber of the Amsterdam Court of Appeals (the Enterprise Chamber) grant an early termination of the reflection period. We understand that the Enterprise Chamber must deny the shareholder's request if the management board could reasonably have concluded, at the relevant time, that the relevant shareholder's changes to the board of hostile bid did substantially conflict with the interests of the company.

- We would recommend that the Enterprise Chamber be empowered to consider the totality of the circumstances relating to the shareholders' request. For example, notwithstanding that removal of a particular director may arguably conflict with the interests of the company (because for example he is a key man for the purpose of executing strategy) there may be circumstances where shareholders have reasonably concluded that he should be removed – for example in circumstances where credible allegations of financial or moral impropriety or of criminal conduct have been levelled against him.
- Additionally, since the reflection period covers a relatively long period of time during which many elements can evolve, to the benefit or the detriment of the management board's strategy, we believe that when conducting its assessment, the Enterprise Chamber should consider all circumstances that arise after the reflection period has been invoked.