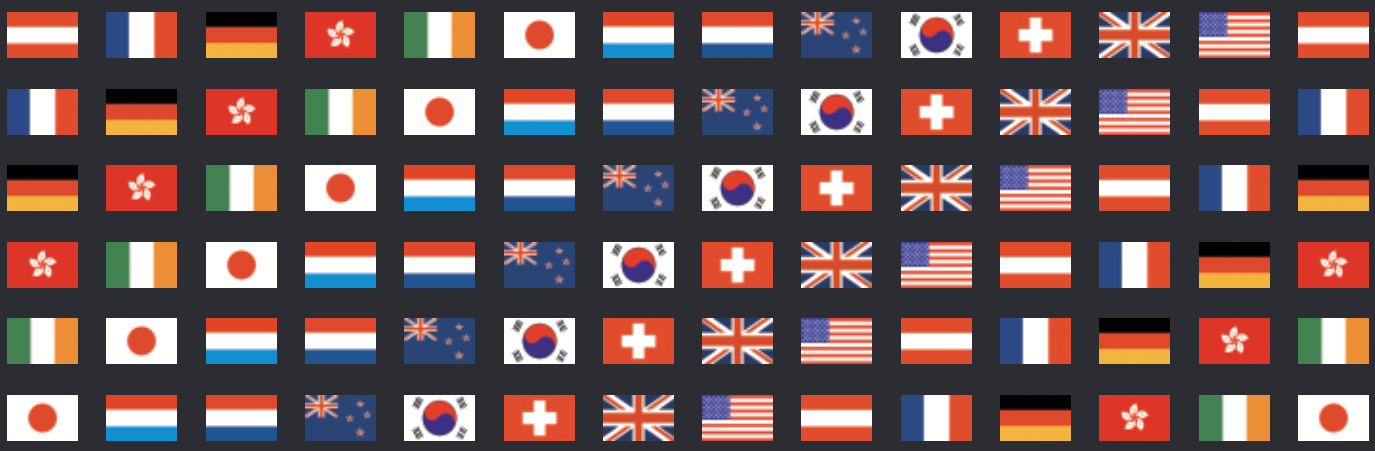
Shareholder Activism & Engagement 2020

Contributing editors
Willem Calkoen and Stefan Wissing



LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Shareholder Activism & Engagement 2020*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Willem Calkoen and Stefan Wissing of NautaDutilh, for their continued assistance with this volume.

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Introduction

Willem Calkoen and Stefan Wissing
NautaDutilh

Shareholder activism activity remained high in 2019, albeit somewhat down from 2018's record. Activism is increasingly a global phenomenon: in 2019, activism against non-US companies accounted for approximately 40 per cent of campaigns, with Japan being the most targeted non-US jurisdiction. Although the United Kingdom remained the most-targeted jurisdiction in Europe, 2019 showed a relative decline of UK campaigns and an increase in activity in France, Germany and Switzerland.

Seasoned activist funds continue to be responsible for most of the high-profile activist campaigns, but the number of new firms entering the activist space continued to grow, reflecting the continued expansion of activism as a tactic. Elliott Management stands out as it continued to be the most prolific and, in many cases, aggressive activist in 2019, publicly targeting 14 companies with a market capitalisation in excess of US$500 million and having the largest market value of current activist positions (as reported by Lazard).

As in previous years, activist campaigns targeted companies in a range of industries. Although some individual managers target companies in specific sectors, activist investors as a whole do not display any clear preference for any particular sector (with many activist funds remaining industry generalists). Activists remain focused more on characteristics such as undervaluation based on corporate fundamentals, lagging stock performance relative to the market generally, low leverage or strong cash positions and announced or potential M&A than the industry in which the company operates.

The list of companies targeted by activist campaigns in 2019 or in which activists acquired a significant stake, spans a variety of sectors and includes large cap companies and national champions, such as Accor, AT&T, Bristol-Myers Squibb, CNH Industrial, CVS Health, Deutsche Bank, Dollar Tree, eBay, Emerson, EssilorLuxottica, HP, Hyundai, Just Eat, Marriott, Occidental Petroleum, Renault, SAP and Sony.

The year 2019 showed a sustained prominence of M&A-related activism, ranging from instigating deal activity by pressing splits, spins and sales to activists intervening in announced transactions by pushing for a price increase (bumpitrage) or, more recently, by opposing the transaction (eg, Starboard Value's opposition against Bristol-Myers's acquisition of Celgene and Carl Icahn's opposition to Occidental Petroleum's acquisition of Anadarko Petroleum). In addition, hedge fund activism and private equity continued to converge, with some private equity funds taking a more activist approach as the private equity space becomes more crowded and with some activist funds embracing private equity strategies and becoming bidders themselves (eg, the take-private of LogMeIn by Elliott's private equity affiliate, Evergreen Coast Capital and Francisco Partners).

The number of board seats won by activists in 2019 was down from the record number in 2018, but in line with the five-year average and continued to be secured mostly through negotiated settlements rather than protracted public campaigns culminating in a shareholder vote. In many cases, settlements involved adding new independent directors with public company director experience rather than adding activist employees. The number of activist board seats that went to female directors (20 per cent) significantly lagged behind the rate for all new Standard & Poor's 500 (the S&P 500) director appointees (46 per cent), as reported by Lazard and Spencer Stuart's 2019 Board Index. The addition of 'activist-minded' directors to a board has an ongoing impact on companies after a campaign as it changes the dynamics within the board and may cause changes in a company's strategy that may culminate in M&A activity.

The concepts of stakeholder governance and corporate purpose beyond profits, which have since long prevailed in certain jurisdictions such as the Netherlands, are also taking hold in the United States. In August 2019, the Business Roundtable released a Statement on the Purpose of a Corporation, signed by 181 CEOs (including the CEOs of BlackRock and Vanguard, the top two index funds collectively owning approximately 15 per cent of the S&P 500). It outlines a modern standard for corporate responsibility, moving away from the concept of shareholder primacy to a more stakeholder-oriented approach. The signatories commit to delivering value to their customers, investing in their employees (including fostering diversity), dealing fairly and ethically with their suppliers, supporting the communities in which they work (including embracing sustainable practices across their businesses) and generating long-term value for shareholders.

The growing interest in environmental, social and governance (ESG) investing is reflected in a strong growth in assets under management represented by signatories to the UN's Principles for Responsible Investment, committing to incorporating ESG considerations into their investment process. At the same time, ESG advocacy and activism are on the rise, with pressure coming not just from shareholders but a more diverse universe of stakeholders. This year's letter by BlackRock's Larry Fink to public company CEOs encouraged companies to publish a disclosure in line with industry-specific guidelines of the Sustainability Accounting Standards Board and disclose climate-related risks in line with the recommendations of the Task Force on Climate-related Financial Disclosures. Climate Action 100+, an investor initiative backed by a wide range of investors such as BlackRock and major pension funds, targets 100 systemically important carbon emitters to push them to improve transparency and disclosure. Pressure to face up to the risks of climate change is mounting not just on carbon-emitters but also on the financial sector. Unfriend Coal is pressuring global insurers to stop insuring coal projects and companies, divest from the coal industry, and insure and invest in the low-carbon economy.

Outlook

Shareholder activism is expected to persist in 2020. Key trends that we see continuing are:

- a continued growth of the relative rate of activism outside the United States as activist hedge funds seek attractive opportunities across the globe;
- pension funds and other institutional investors remaining vocal on ESG issues in the broadest sense, including diversity, board

refreshment, environment, sustainability and climate change, and ESG-related disclosures;
- an increased embrace of diversity and ESG-issues by, and integration of such ESG themes into campaigns of, traditional activist hedge funds; and
- continued awareness within boards of the risk of becoming an activist target and the need to ramp up preparedness and effective engagement with major shareholders and other stakeholders.

Final note

Each jurisdiction has its own regulations and practices when it comes to shareholder activism and engagement. Although the chapters in this book show there is growing convergence in certain areas, important differences remain between countries. We hope the concise jurisdictional overviews offer the reader a helpful first look at key activist-related topics in the various countries, enable convenient comparisons between jurisdictions and give food for thought as reading about the issues, practices and solutions in other countries often offer new insights and understandings relevant to one's own laws and best practices.

We are thankful for having so many recognised thought leaders from around the globe contribute to this essential reference guide. We look forward to following future developments with great interest as the activist landscape continues to evolve.

Luxembourg

Margaretha Wilkenhuysen
NautaDutilh

GENERAL

Primary sources

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

Luxembourg's main statutes on corporate governance include the Act of 10 August 1915 on Commercial Companies (the Companies Act), which was revamped in 2016 to modernise Luxembourg corporate law, the Market Abuse Regulation and the Act of 24 May 2011 (the Shareholder Act).

Shareholder rights and governance in Luxembourg are statute-based, consisting primarily of the Civil Code, the Companies Act and, for listed companies, the Shareholder Act and the rules and regulations of the Luxembourg Stock Exchange (LuxSE).

The Shareholder Act came into force on 1 July 2011. It implemented Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies, aiming to increase shareholders' activism and setting out a number of shareholders' rights. It has been amended by the Act of 1 August 2019, transposing the Second Shareholders' Rights Directive (EU) 2017/828 into Luxembourg Law. The amended Shareholder Act sets out rules on, inter alia, say on pay, identification of shareholders, transmission of information and transparency of institutional investors, asset managers and proxy advisers.

As a supplement to the general statutory law, the LuxSE's 10 Principles of Corporate Governance, as modified in October 2009 and revised in March 2013 (third edition) and December 2017, provide guidelines on best practice in corporate governance for all companies listed on the LuxSE. Luxembourg companies listed abroad often find inspiration in these LuxSE. The rules and regulations of the LuxSE have been substantially updated in January 2020 to take into account recent developments, in particular the Act of 16 July 2019 on prospectuses for securities.

Moreover, in 2018, Luxembourg implemented Directive 2014/65/EU on markets in financial instruments, aiming at increasing transparency, better protecting investors, reinforcing confidence, addressing unregulated areas, and ensuring that supervisors are granted adequate powers to fulfil their tasks. In addition, as of the entry into force of the EU Regulation on Markets in Financial Instruments, the provisions of the regulation are directly applicable in Luxembourg.

Companies whose shares are admitted to trading on a regulated market in a member state of the European Union, including Luxembourg, may also be subject to the Act dated 19 May 2006 on Takeover Bids, as amended (the Takeover Bid Act). The Takeover Bid Act notably provides for minority shareholder protection, the rules of mandatory offers and disclosure requirements.

In 2008, the Transparency Directive (Directive 2004/109/EC) was transposed into Luxembourg legislation through the Act of 11 January 2008, as amended.

A breach of certain statutory provisions of the Companies Act and, for listed companies, the Shareholder Act qualifies as a criminal offence, although prosecution is rare.

Shareholder activism

2 How frequent are activist campaigns in your jurisdiction and what are the chances of success?

There are very few publicly available examples of shareholder activism in Luxembourg-listed companies. The most prominent example was the takeover of Arcelor by Mittal, which was only finally made possible following the pressure of the shareholders. This concrete example, however, is already almost 15 years old, since the takeover took place in 2006. A more recent example is Deer Park Road's investment in a Luxembourg-based company in 2017.

Furthermore, Deminor, a firm that is actively engaged in shareholder activism by representing minority shareholders and enforcing their claims accordingly, refers to a couple of Luxembourg companies on its website. Their names are redacted for obvious disclosure reasons, which makes it almost impossible to identify the companies concerned, but it is quite likely that they already have or will target Luxembourg-listed companies.

On a side note, Luxembourg hosts a number of funds that invest in companies worldwide and are active as shareholders in these entities. As an example, Active Ownership is a fund, based in Luxembourg, that managed to replace certain members in the supervisory board of STADA and recently became the most important shareholder in Agfa.

3 How is shareholder activism generally viewed in your jurisdiction by the legislature, regulators, institutional and retail shareholders and the general public? Are some industries more or less prone to shareholder activism? Why?

Luxembourg and EU company law reforms introduced new or strengthened shareholder rights around the turn of the 21st century. There is a trend in Luxembourg law for more transparency, accountability and increased shareholder rights, especially in listed companies. In this context, the transposition of the Shareholder Rights Directive (EU) 2017/828 into Luxembourg Law by the Act of 1 August 2019 must be mentioned. In addition, minority shareholders have additional rights further to the changes to the Companies Act in 2016.

It is hard to predict whether these changes will lead in practice to more public campaigns led by activist shareholders. It is certain that boards will, however, have to take into account the potential involvement and action from their shareholders, including minority shareholders.

In Luxembourg, no particular industry is more or less prone to shareholder activism. Activist campaigns against 'national champions' tend to face more backlash from the general public and politicians.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

Deminor, a firm that is actively engaged in shareholder activism by representing minority shareholders and enforcing their claims accordingly, refers to a couple of Luxembourg companies on its website. Their names are redacted for obvious disclosure reasons, which makes it almost impossible to identify the companies concerned, but it is quite likely that they already have or will target Luxembourg-listed companies.

5 What are the main operational governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Activist campaigns would typically be focused on a company sale or break-up, bumpitrage or return of capital. Long-term institutional investors tend to focus more on environmental, social and governance topics and executive compensation or say on pay.

Factors that tend to attract activists' attention include announced or potential M&A events, low leverage or strong cash positions, as well as perceived corporate governance issues, underperformance and inflated executive pay.

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

6 What common strategies do activist shareholders use to pursue their objectives?

Depending on the type of activist, its goals and the company's takeover defences, activists may use a number of different tactics to pursue their objectives, such as:

- privately engaging through informal discussions or 'dear board' letters (the starting point of most activist campaigns and the preferred tool of most institutional investors);
- publicly criticising a company's strategy, governance or performance or calling for a sale, break-up, return of capital or increased offer price (bumpitrage);
- short-selling stock and starting a public campaign to drive down stock prices;
- stakebuilding to build up pressure on the boards and signal seriousness;
- partnering with a hostile bidder;
- participating in and voting at general meetings;
- orchestrating a 'vote no' campaign;
- making a shareholders' proposal or requesting an extrardinary general meeting be convened; and
- initiating litigation

Processes and guidelines

7 What are the general processes and guidelines for shareholders' proposals?

Shareholders representing individually or collectively at least 5 per cent of a Luxembourg company's capital request for listed entities falling within the scope of the Shareholder Act or 10 per cent for other entities, as the case may be, have the right to amend a notice to the shareholder meeting and add additional items to the agenda. The company may refuse to put an item on the agenda as a voting item (rather than a discussion item), if it concerns a matter that falls outside the power of the general meeting. In addition, shareholders representing 10 per cent of a company's share capital may force the board to postpone a general meeting of shareholders for a period of up to four weeks.

8 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Even if director nomination is typically made via the company's nomination committee, any shareholder holding at least 5 per cent for listed entities falling within the scope of the Shareholder Act or 10 per cent for the other entities, as the case may be, has the right to amend a notice to the shareholders' meeting and add the nomination of a director for election.

9 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Shareholders representing individually or collectively at least 10 per cent of a Luxembourg company's capital (or a lower percentage as prescribed in the company's articles) may request of the board that a general meeting be convened. The request must set out in detail the matters to be discussed. If the board has not taken the steps necessary to hold a general meeting within one month (if the company's shares are not listed on a regulated market within the European Economic Area) of the request, the requesting shareholders may be authorised by the district court in preliminary relief proceedings to convene a general meeting provided that they have a reasonable interest in holding the meeting.

No written resolutions can be taken.

Litigation

10 What are the main types of litigation shareholders in your jurisdiction may initiate against corporations and directors? May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? Are there methods of obtaining access to company information?

Shareholders can seek nullification of corporate resolutions (arguing, for instance, that the resolution is contrary to the company's interest) or bring wrongful act claims against companies or its directors (arguing that a particular conduct of the company or its directors constituted a tort against the claimant).

Derivative actions do not exist under Luxembourg law. The law does not provide for class actions.

During the annual general meeting, the shareholders can question the board on all aspects of the company's management, accounting and so forth throughout the year, and may withhold the granting of discharge.

The right of shareholders to ask questions during the meeting and to receive answers to their questions is legally enshrined.

Under the Shareholder Act, in addition to the right to ask questions orally during a meeting, shareholders may have the right to pose written questions about the items on the agenda before the meeting is held. If provided for in a company's articles of association, questions may be asked as soon as the convening notice for the general meeting is published. The company's articles of association will furthermore provide the cut-off time by which the company should have received the written questions.

Apart from several specific circumstances (eg, in the case of confidential information), the company must answer any questions addressed to it. Should several questions relate to the same topic, the company may publish a detailed questions and answers document on its website, in which case the chair should draw the shareholders' attention to the publication.

The Companies Act also allows shareholders to submit questions to management outside a meeting. Any shareholder representing at least 10 per cent of the company's share capital or voting rights, or both, can ask the board of directors or management body questions about the management and operations of the company or one of its affiliates, without the need for extraordinary circumstances. If the company's board or management body fails to answer these questions within one month, the shareholders may petition, as in summary proceedings, the president of the district court responsible for commercial matters to appoint one or more independent experts to draw up a report on the issues to which the questions relate.

Certain matters must also be reported to the shareholders, such as any director's conflict of interest relating to voting on a resolution.

Although the concept of discovery does not exist under Luxembourg law, a party with a legitimate interest may submit a motion to the court demanding the production of specified documents pertaining to a legal relationship to which the requesting party or its legal predecessor is a party.

SHAREHOLDERS' DUTIES

Fiduciary duties

11 | Do shareholder activists owe fiduciary duties to the company?

Under Luxembourg law, shareholders may, in principle, give priority to their own interests.

Compensation

12 | May directors accept compensation from shareholders who appoint them?

There is no Luxembourg law that prohibits a director of a Luxembourg company from accepting compensation from a shareholder who nominated or appointed him or her. Irrespective of whether a director is nominated, appointed or compensated by a specific shareholder, Luxembourg corporate law requires all directors to be guided by the corporate interests of the company and its business in performing their duties and to consider with due care the interests of all stakeholders. If any such compensation creates, in respect of a particular board matter, a direct or indirect personal interest for the director that conflicts with the interests of the company and its business, the director may not participate in the deliberations and decision-making of the board on such matter.

Mandatory bids

13 | Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction? When are shareholders deemed to be acting in concert?

The Luxembourg mandatory offer rules only apply to Luxembourg public companies whose shares or depositary receipts for shares are listed on a regulated market within the Eureopan Economic Area. Pursuant to the CSSF and subject to limited exemptions, a mandatory offer requirement is triggered if a person, or a group of persons acting in concert, obtains the ability to exercise at least 33.3 per cent of all outstanding voting rights in a company (predominant control).

Concert parties refers to natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, and either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid.

Disclosure rules

14 | Must shareholders disclose significant shareholdings? If so, when? Must such disclosure include the shareholder's intentions?

Pursuant to the Transparency Act, any person who acquires or disposes of shares or voting rights of a Luxembourg company whose shares are listed on a regulated market within the European Economic Area, must forthwith (generally, the next trading day) notify the issuer of the proportion of voting rights of the issuer held by the shareholder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5, 10, 15, 20, 25, 33.3, 50 and 66.6 per cent. It is not needed to include the shareholders' intentions.

At a few listed Luxembourg companies, the articles of association impose additional notification obligations on shareholders.

15 | Do the disclosure requirements apply to derivative instruments, acting in concert or short positions?

Depositary receipts for shares are taken into account for purposes of calculating the percentage of capital interest and voting rights.

For purposes of calculating the percentage of capital interest and voting rights held by a person, shares and voting rights held by the person's controlled entity, by a third party for the person's account or by a third party with whom the person has concluded an agreement to pursue a sustained joint voting policy, are taken into account.

Insider trading

16 | Do insider trading rules apply to activist activity?

Yes, the insider rules apply with respect to Luxembourg companies whose shares or other financial instruments are listed on a regulated market within the European Economic Area. No person may:

- engage or attempt to engage in insider dealing;
- recommend that another person engage, or induce another person to engage, in insider dealing;
- unlawfully disclose inside information; or
- engage, or attempt to engage, in market manipulation.

COMPANY RESPONSE STRATEGIES

Fiduciary duties

17 | What are the fiduciary duties of directors in the context of an activist proposal? Is there a different standard for considering an activist proposal compared to other board decisions?

Luxembourg corporate law requires all directors to be guided by the corporate interests of the company and its business in performing their duties. If the company has a business, the interests of the company generally are particularly defined by the interest of promoting the sustainable success of the company's business (ie, a focus on long-term value creation). Boards must weigh all relevant aspects and circumstances and must consider with due care the interests of all stakeholders, including shareholders, employees, creditors and business partners. Boards have a lot of discretion on how to weigh the various stakeholders' interests against each other, although the duty of care may require boards to prevent unnecessary or disproportionate harm to the interests of specific stakeholders. The board is responsible for determining and implementing the strategy of the company.

Responding to an unsolicited approach or activist proposal seeking to change the company's strategy (including by means of efforts to change the board composition) forms part of the company's strategy

and, as such, falls within the domain of the board. There is no shift of fiduciary duties: the directors must continue to act in the best interests of the company and its business with a view to long-term value creation, taking into account the interests of all stakeholders. Boards should ensure that they have all relevant information to make an informed decision, and the proposal should be carefully reviewed, without bias, and assessed against all available alternatives. Shareholders do not have to be consulted prior to the company's response; the board is (retrospectively) accountable to the shareholders.

Preparation

18 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

Although the absolute number of activist campaigns in Luxembourg is limited, no company is immune to activism, and preparedness is key. While recommended advance preparations depend on the specifics of the company, a few useful preparations are:

- continuously monitoring market activity, financial performance (particularly relative to peers) and the company's industry and competitors;
- setting up a small defence team of key directors and officers plus legal counsel, an investment banker and a public relations firm that meets periodically;
- 'thinking like an activist', routinely assessing the company's strengths and weaknesses and its takeover defences and exploring available strategic alternatives (consider red teaming);
- building relationships and credibility with shareholders and other stakeholders before activists emerge and maintaining regular contact with major shareholders, the marketplace generally and key stakeholders; and
- communicating clearly and consistently on environmental, social and governance or corporate social responsibility matters, the company's long-term strategy, its implementation and the progress in achieving it.

Defences

19 What defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

Some listed Luxembourg companies have adopted one or more structural takeover defences, often in their articles of association. Examples include:

- priority shares with certain control rights; and
- listing of depositary receipts for shares rather than the shares itself.

In addition, Luxembourg companies may use a variety of other tactics, such as:

- engaging with shareholders and other stakeholders (eg, convince major shareholders with compelling long-term plans, mobilise employees and customers);
- exploring strategic transactions that make the company a less desirable target;
- issuing new shares (under existing authorisations) or selling treasury shares to a friendly third party (white knight); and
- issuing bonds with a mandatory redemption at a higher value in case of a change of control.

Proxy votes

20 Do companies receive daily or periodic reports of proxy votes during the voting period?

It depends on the listing venue. Luxembourg companies with a US listing often (choose to) receive regular updates on the vote tally, especially in contested situations, consistent with market practice in the United States. Historically, this has been less so at Luxembourg companies with an EU listing.

Settlements

21 Is it common for companies in your jurisdiction to enter into a private settlement with activists? If so, what types of arrangements are typically agreed?

Private settlements with activists are not common in Luxembourg but do occur from time to time.

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

Organised shareholder engagement outside of general meetings and earnings calls – through investor days, road shows, presentations at conferences or bilateral contacts – has increased in recent years but tends to vary considerably from company to company. Larger issuers, in particular, tend to organise structured shareholder engagement. Engagement efforts tend to be elevated when the company is faced with a crisis or shareholder discontent (eg, an unsolicited approach or activist campaign, a negative recommendation from proxy advisory firms or poor voting results on say on pay or discharge of directors).

23 Are directors commonly involved in shareholder engagement efforts?

Depending on the company and the topic and shareholder concerned, shareholder engagement efforts may be led by a company's investor relations department or one or more managing or executive directors – in particular, the CEO or CFO. Non-executive or supervisory directors are less frequently involved in shareholder engagement, though non-executive or supervisory directors may lead conversations with investors regarding the performance or remuneration of managing or executive directors.

Disclosure

24 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Certain listed Luxembourg companies have published a policy on bilateral contacts. Companies are not required to disclose shareholder engagement efforts. It is recommended that presentations to institutional or other investors and press conferences be announced in advance, that all shareholders be allowed to follow these meetings and presentations in real time and that the presentations be posted on the company's website after the meeting.

Selective disclosures by a Luxembourg company whose shares are listed on a regulated market within the European Economic Area, must

comply with the requirements under the Transparency Act. In addition, Luxembourg companies must ensure equal treatment of all shareholders who are in the same position.

Communication with shareholders

25 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders? Are there systems enabling the company to identify or facilitating direct communication with its shareholders?

For listed companies, according to the Luxembourg Stock Exchange's 10 Principles of Corporate Governance, companies should 'establish a policy of active communication with the shareholders' and allow shareholder dialogue with the board and the executive management. In addition, one of the main objectives of the amended Shareholder Act 2019 is to give listed companies the right to identify their shareholders and, in the end, improve the communication between the companies and their shareholders. Intermediaries, even those in third countries, are required to provide the company with information on shareholders' identities to communicate with them directly with a view to facilitating the exercise of shareholder rights and shareholder engagement with the company.

The explanatory notes to the agenda for a general meeting set out the company's position with respect to the agenda items. The meeting materials are posted on the company's website. Other public communications often take the form of press releases. Listed Luxembourg companies may decide to engage proxy solicitation firms or investor relations specialists to actively reach out to shareholders (in particular, Luxembourg companies with a US listing do so in line with US market practice).

Notified major shareholdings (more than 5 per cent) can be found in the online registers. The statutory provisions on identification of shareholders must be amended to bring them in line with the amended Shareholder Act.

Access to the share register

26 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership, or submit to their shareholders information prepared by a requesting shareholder? How may this request be resisted?

The Act of 13 January 2019 established a Luxembourg register of beneficial owners (the RBE Act). The RBE Act applies to entities registered with the Luxembourg Trade and Companies Register, including civil and commercial companies, branches of foreign companies, Luxembourg common investment funds, and other types of investment funds, such as the undertakings for the collective investment in transferable securities, risk capital investment companies, reserved alternative investment funds and specialised investment funds. There is, nevertheless, an exception for companies whose securities are admitted to trading on a qualifying regulated market (qualifying listed entities). The register is, except with regard to sensitive information such as the private address, accessible to everyone.

If a shareholder so requests, the (management) board must provide the shareholder, free of charge, with an extract of the information in the company's share register concerning the shares registered in the shareholder's name. Luxembourg companies are not required to provide access to or a copy of the full shareholders' register.

If an identification has occurred and shareholders holding 5 per cent of the issued share capital have been identified, the company must disseminate to its shareholders (and publish on its website) any information prepared by the requesting shareholders that relates to an agenda item for the general meeting. The company may refuse the request if the information:

- is received less than five days prior to the meeting;
- sends, or may send, an incorrect or misleading signal regarding the company; or
- is of such a nature that the company cannot reasonably be required to disseminate it (criticism of the company's policy or affairs is in itself no valid ground for refusal).

NautaDutilh

Margaretha Wilkenhuysen
greet.wilkenhuysen@nautadutilh.com

2 rue Jean Bertholet
1233 Luxembourg
Tel: +352 261 22 91
Fax: +352 26 68 43 31
www.nautadutilh.com

UPDATE AND TRENDS

Recent activist campaigns

27 Discuss any noteworthy recent, high-profile shareholder activist campaigns in your jurisdiction. What are the current hot topics in shareholder activism and engagement?

In line with the developments in EU law, there is a trend in Luxembourg law for more transparency, accountability and increased shareholder rights, especially in listed companies. Time will tell whether the changes in Luxembourg law, in particular the amended Shareholder Act, will lead to more public campaigns led by activist shareholders. It is certain that boards will, however, have to be aware of potential involvement and action from their shareholders, including minority shareholders.

Netherlands

Leo Groothuis, Frans Overkleeft, Paul van der Bijl and Stefan Wissing
NautaDutilh

GENERAL

Primary sources

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The primary source of corporate law is Book 2 of the Dutch Civil Code (DCC). Its provisions are applicable to all companies organised under Dutch law, regardless of their listing venue, and are generally enforced through the civil court system or in proceedings before a specialised court (the Enterprise Chamber of the Amsterdam Court of Appeals).

The primary sources of securities laws are the Dutch Financial Supervision Act (DFSA) and directly applicable EU regulations such as the Market Abuse Regulation (MAR) and the Short Selling Regulation. The DFSA provisions relating to takeovers of listed companies and disclosure obligations for listed companies and major shareholders apply to all Dutch companies whose shares or depositary receipts for shares are listed on a regulated market within the EEA. The MAR and the Short Selling Regulation apply to (Dutch companies whose) shares or other financial instruments are listed on a regulated market within the EEA. The Dutch Authority for the Financial Markets is the competent authority for supervising compliance with the DFSA and, to the extent these regulations allocate competence to the competent authority in the Netherlands, the MAR and the Short Selling Regulation.

A breach of certain statutory provisions of the DCC, the DFSA and the MAR qualifies as a criminal offence, though prosecution is rare.

The revised EU Shareholders Rights Directive, as implemented in Dutch law since 1 December 2019, sets out rules on – inter alia – say on pay, identification of shareholders, transmission of information and transparency of institutional investors, asset managers and proxy advisers.

The above statutory requirements are supplemented by the Dutch Corporate Governance Code (DCGC), which contains principles and best practice provisions regulating relations between the board and shareholders. The DCGC applies to listed Dutch companies, even if the shares are only listed on a stock exchange outside the EEA. While the DCGC applies on a 'comply or explain' basis, certain principles and best practices may be considered part of the statutory requirement for boards and shareholders to act as regards each other in keeping with the principles of reasonableness and fairness and may as such be binding.

The Dutch Stewardship Code, developed by pension funds, insurers and asset managers participating in Eumedion, has applied since 1 January 2019. It sets out guiding principles for institutional investors with a view to constructive engagement with listed companies on strategy, risk, performance and environmental, social and governance (ESG) aspects, transparency regarding voting policies and their implementation and voting in a well-informed manner with a view to long-term value creation.

Proxy advisory firms, such as ISS and Glass Lewis, have issued proxy voting guidelines that also cover Dutch listed companies. These voting guidelines are regularly updated to reflect (what proxy advisory firms perceive as) evolving best practices and market practice for listed Dutch companies.

Shareholder activism

2 How frequent are activist campaigns in your jurisdiction and what are the chances of success?

Activist campaigns can play out publicly or privately. Private campaigns can have a significant impact on companies as the considerable pressure put on boards may cause them to change the company's strategy to appease the activist and prevent a public campaign.

The year 2019 was quiet for public activist campaigns in the Netherlands. However, several public activist campaigns played out in 2017 and 2018, including Elliott's campaign against AkzoNobel, the campaign by the Charity Investment Asset Management (CIAM) against Ahold Delhaize and a 'vote no' campaign of four pension funds against Mylan. In addition, there were several court cases about the position of shareholders in listed companies, notably *Talpa/TMG* (2017) and *Boskalis/Fugro* (2015–2018), which are relevant to the position of activist shareholders.

The results were mixed: Elliott and Boskalis lost their court battles. The 'vote no' campaign against reappointment of Mylan's directors failed; only the non-binding advisory say-on-pay vote was rejected. CIAM did not succeed in getting Ahold to seek shareholder approval for the extension of its takeover defence. Qualcomm raised its offer for NXP following a push by Elliott for a higher price, but ultimately called off the deal. After AkzoNobel successfully fended off the unsolicited approach by PPG and prevailed in litigation initiated by Elliott, it entered into a standstill agreement with Elliott and appointed two new supervisory directors supported by Elliott; in the meantime, it had already announced it would sell off its specialty chemicals business.

3 How is shareholder activism generally viewed in your jurisdiction by the legislature, regulators, institutional and retail shareholders and the general public? Are some industries more or less prone to shareholder activism? Why?

Owing to Dutch and EU company law reforms introducing new or strengthened shareholder rights around the turn of the 21st century, shareholder activism in the Netherlands rose sharply. After 2007, corrective measures to curb shareholder activism were implemented in the Dutch Civil Code (increased threshold for shareholders to put items on the agenda), the DFSA (lower threshold for notification by major shareholders), the Dutch Corporate Governance Code (response time), case law (strategy falls within the domain of the board) and by listed companies themselves (renewed appreciation for takeover defences available under Dutch law).

In the Netherlands, no particular industries are more or less prone to shareholder activism. Activist campaigns against 'national champions' tend to face more backlash from the general public and politicians.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

Historically, activist campaigns have predominantly originated from well-known international activist funds with a global or European investment focus such as Centaurus, Elliott, Hermes, JANA Partners, Knight Vinke, Paulson and TCI. In recent years, fuelled by calls from politicians to take a more active role, Dutch pension funds and other long-term institutional investors have become more vocal.

5 What are the main operational governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

High-profile activist campaigns at Dutch companies by activist hedge funds are typically focused on a company sale or break-up, increased offer price (bumpitrage) or return of capital. Long-term institutional investors tend to focus more on ESG topics and executive compensation or say-on-pay.

Factors that tend to attract activists' attention include announced or potential M&A events, low leverage or strong cash positions, as well as perceived corporate governance issues, underperformance and inflated executive pay.

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

6 What common strategies do activist shareholders use to pursue their objectives?

Depending on the type of activist, its goals and the company's takeover defences, activists may use a number of different tactics to pursue their objectives, such as:

- privately engaging through informal discussions or 'dear board' letters (the starting point of most activist campaigns and the preferred tool of most institutional investors);
- publicly criticising a company's strategy, governance or performance or calling for a sale, break-up, return of capital or bumpitrage;
- short-selling stock and starting a public campaign to drive down stock prices;
- stakebuilding to build up pressure on the boards and signal seriousness;
- partnering with a hostile bidder;
- participating in and voting at general meetings;
- orchestrating a 'vote no' campaign;
- making a shareholders' proposal or requesting an extraordinary general meeting be convened; or
- initiating litigation.

Processes and guidelines

7 What are the general processes and guidelines for shareholders' proposals?

Items requested by shareholders that individually or collectively represent at least 3 per cent of a Dutch company's capital must be included in the convening notice or announced by the company in the same manner if the company has received the substantiated request or a draft resolution no later than on the 60th day before the day of the general meeting. The company's articles may provide for a lower minimum percentage (eg, 1 per cent, the former statutory threshold) or a shorter period.

The company may refuse to put an item on the agenda as a voting item (rather than a discussion item) if it concerns a matter that falls outside the power of the general meeting. Exceptionally, a company may refuse to put an item on the agenda if it contravenes the principles of reasonableness and fairness.

The Dutch Corporate Governance Code (DCGC) provides that a shareholder should only exercise its right to put items on the agenda after consultation with the (management) board.

8 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Some listed Dutch companies are subject to the large company regime, in which case the following applies by default. The members of the management board are appointed by the supervisory board (instead of the general meeting) and members of the supervisory board are appointed by the general meeting upon a nomination by the supervisory board. If the nomination is not overruled by the general meeting, the person is appointed; if the nomination is overruled, the supervisory board shall make a new nomination.

The articles of association of many listed Dutch companies that are not subject to the large company regime provide that the general meeting can only appoint directors upon a binding nomination by the (supervisory) board or that the (supervisory) board may elect to make a binding nomination. The binding nomination can typically be overruled either by absolute majority of the votes cast representing at least one-third of the issued share capital (maximum under the DCGC) or by two-thirds of the votes cast representing more than half of the issued share capital (statutory maximum).

If the appointment of a director is not subject to a binding nomination, a nomination can be made by shareholders in accordance with the procedure for submitting a shareholders' proposal or convening a general meeting.

9 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Shareholders representing individually or collectively at least 10 per cent of a Dutch company's capital (or a lower percentage as prescribed in the company's articles) may request the board(s) to convene a general meeting. The request must set out in detail the matters to be discussed. If the board(s) have not taken the steps necessary to hold a general meeting within eight weeks (or six weeks, if the company's shares are not listed on a regulated market within the EEA) after such request, the requesting shareholder may be authorised by the district court in preliminary relief proceedings to convene a general meeting provided that they have a reasonable interest in holding such meeting. As part of the reasonable interest test, the court will weigh the interests of the requesting shareholders against the interests of the company.

See below for the (management) board's right to invoke a 180-day response time.

While shareholders of a Dutch public company may pass resolutions outside a meeting if the company's articles of association so allow, such written resolutions can only be passed by a unanimous vote of all shareholders with voting rights.

Litigation

10 What are the main types of litigation shareholders in your jurisdiction may initiate against corporations and directors? May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? Are there methods of obtaining access to company information?

Shareholder litigation regarding listed Dutch companies mostly takes place in inquiry proceedings before the Enterprise Chamber. Inquiry proceedings allow shareholders (above a statutory share ownership threshold) of a Dutch company to request the Enterprise Chamber to appoint experts to conduct an investigation into the policy and affairs of the company and to impose certain measures of a definitive or preliminary nature. Depending on the capital structure of the company (ie, low nominal value of the shares), the threshold for an activist to have standing in inquiry proceedings can be very high. The Enterprise Chamber may order an inquiry if the applicant demonstrates that there are well-founded reasons to doubt the soundness and propriety of the company's policy and affairs (eg, deadlock situations; unacceptable conflicts of interest; disturbed relationships; and unjustified use of take-over defences). Based on the reported findings of the court-appointed investigators, the applicant may file a petition for a declaratory judgment that mismanagement occurred. At any point during the inquiry proceedings, the Enterprise Chamber may be requested to impose (far-reaching) interim measures by way of injunctive relief (eg, enjoining the execution of board resolutions, appointing one or more independent directors to the board, suspending voting rights of a shareholder or delaying a shareholder vote).

In addition to inquiry proceedings, shareholders can seek nullification of corporate resolutions (arguing for instance that the resolution is contrary to the principles of reasonableness and fairness to be observed) or bring wrongful act claims against a company or its directors (arguing that a particular conduct of the company or its directors constituted a tort against the claimant).

Derivative actions do not exist under Dutch law. The Dutch Civil Code does provide for a collective action, initiated by a foundation or association whose objective is to protect the rights of a group of persons having similar interests. Previously, such action could only result in a declaratory judgment; to obtain compensation for damages, individual claimants had to file follow-on suits based on such declaratory judgment to obtain compensation for damages or petition the Amsterdam Court of Appeal to declare a settlement binding upon all injured parties (with an individual opt-out choice). As of 2020 and provided that the action relates to events that occurred on or after 15 November 2016, the restrictions on seeking monetary damages on a collective basis have been removed. At the same time, additional requirements have been imposed on collective action organisations regarding their governance, funding and representation, and there must be a sufficiently strong connection between the collective claim and the jurisdiction of the Netherlands to be admitted. Under the new regime, the court judgment will be binding on all injured parties domiciled in the Netherlands who have not opted out and on all non-Dutch residents who have opted in; the action can also result in a court-approved settlement with binding effect on the aforementioned injured parties, save those who opt out from the settlement.

At general meetings of Dutch companies, boards are required to provide the shareholders with all the information requested by them, unless doing so would be contrary to an overriding interest of the company. Although the concept of discovery does not exist under Dutch law, a party with a legitimate interest may submit a motion to the court demanding the production of specified documents pertaining to a legal relationship to which the requesting party or its legal predecessor is a party.

SHAREHOLDERS' DUTIES

Fiduciary duties

11 Do shareholder activists owe fiduciary duties to the company?

Under Dutch law, shareholders may – in principle – give priority to their own interests. However, they must act vis-à-vis each other and the board(s) in keeping with the principles of reasonableness and fairness. Courts apply an 'all facts and circumstances' test to determine whether an act was in keeping with such principles. The Dutch Corporate Governance Code (DCGC) adds that this includes a willingness to engage with the company and fellow shareholders, and that the greater the interest of the shareholder in a company, the greater is his or her responsibility to the company, fellow shareholders and other stakeholders.

Compensation

12 May directors accept compensation from shareholders who appoint them?

There is no Dutch law that prohibits a director of a Dutch company from accepting compensation from a shareholder who nominated or appointed him or her. Irrespective of whether a director is nominated, appointed or compensated by a specific shareholder, Dutch corporate law requires all directors to be guided by the corporate interests of the company and its business in performing their duties and to consider with due care the interests of all stakeholders. To the extent that any such compensation creates, in respect of a particular board matter, a direct or indirect personal interest for the director that conflicts with the interests of the company and its business, the director may not participate in the deliberations and decision-making of the board on that matter.

The DCGC considers a director non-independent if it is a representative of a 10 per cent-shareholder. Being a shareholder representative generally involves receiving compensation from such shareholder. Therefore, compensation received by a director from a 10 per cent-shareholder is indicative of being a shareholder representative and is a relevant factor in determining that director's independence.

Mandatory bids

13 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction? When are shareholders deemed to be acting in concert?

The Dutch mandatory offer rules only apply to Dutch public companies whose shares or depositary receipts for shares are listed on a regulated market within the European Economic Area. Pursuant to the Dutch Financial Supervision Act (DFSA) and subject to limited exemptions, a mandatory offer requirement is triggered if a person, or a group of persons acting in concert, obtains the ability to exercise at least 30 per cent of all outstanding voting rights in a company (predominant control).

Concert parties are natural persons, entities or companies collaborating under an agreement with the purpose to acquire predominant control in a company or, if the target company is one of the collaborators, to thwart an announced public offer for such target. Persons, entities and companies are in any event deemed to act in concert with entities that are part of the same group and their subsidiaries or other controlled entities. Enforcement of the obligation to make a mandatory bid rests with the Enterprise Chamber, which – as an independent judicial authority – is not bound by the European Securities and Markets Authority's white list on acting in concert.

Disclosure rules

14 | Must shareholders disclose significant shareholdings? If so, when? Must such disclosure include the shareholder's intentions?

Pursuant to the DFSA, any person who acquires or disposes of shares or voting rights of a Dutch company whose shares are listed on a regulated market within the EEA, must forthwith (generally, the next trading day) notify the Dutch Authority for the Financial Markets (AFM) if the percentage of capital interest or voting rights reaches, exceeds or falls below any of the following thresholds: 3, 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 and 95 per cent. Notifications are published in the AFM's online registers. The DFSA does not require shareholders to disclose their intentions.

At a few listed Dutch companies, the articles of association impose additional notification obligations on shareholders.

15 | Do the disclosure requirements apply to derivative instruments, acting in concert or short positions?

Depositary receipts for shares, convertible bonds, options for acquiring shares, cash settled instruments of which the value is at least in part dependent on the value of shares (eg, contracts for difference and total return swaps) and any other contracts creating a similar economic position are taken into account for purposes of calculating the percentage of capital interest and voting rights.

For purposes of calculating the percentage of capital interest and voting rights held by a person, shares and voting rights held by such person's controlled entity, by a third party for such person's account or by a third party with whom such person has concluded an agreement to pursue a sustained joint voting policy, are taken into account.

Any person who acquires or disposes of financial instruments as a result of which such person's gross short position reaches, exceeds or falls below the thresholds of 3, 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 and 95 per cent, must forthwith notify the AFM. Notifications are published in the AFM's online registers. In addition, the EU Short Selling Regulation requires any person holding a net short position to privately notify the relevant competent authority the next trading day if the position reaches or falls below 0.2 per cent (and each 0.1 per cent above that) of the issued share capital of a Dutch listed company. Notifications for a net short position of 0.5 per cent or above are made public.

Insider trading

16 | Do insider trading rules apply to activist activity?

Yes, the Market Abuse Regulation (MAR) applies with respect to Dutch companies whose shares or other financial instruments are listed on a regulated market within the EEA. Pursuant to the MAR, no person may:

- engage or attempt to engage in insider dealing;
- recommend that another person engage, or induce another person to engage, in insider dealing;
- unlawfully disclose inside information; or
- engage, or attempt to engage, in market manipulation.

COMPANY RESPONSE STRATEGIES

Fiduciary duties

17 | What are the fiduciary duties of directors in the context of an activist proposal? Is there a different standard for considering an activist proposal compared to other board decisions?

Dutch corporate law requires all directors to be guided by the corporate interests of the company and its business in performing their duties. If the company has a business, the interests of the company generally are particularly defined by the interest of promoting the sustainable success of the company's business (ie, a focus on long-term value creation, as also expressed in the Dutch Corporate Governance Code (DCGC)). Under Dutch law, there is no duty to maximise shareholder value at all costs. Instead, boards must weigh all relevant aspects and circumstances and shall consider with due care the interests of all stakeholders, including shareholders, employees, creditors and business partners. Boards have a large discretion on how to weigh the various stakeholders' interests against each other, although the duty of care may require boards to prevent unnecessary or disproportionate harm to the interests of specific stakeholders. The (management) board is responsible for determining and implementing the strategy of the company (in a two-tier board structure: under the supervision of a supervisory board).

Responding to an unsolicited approach or activist proposal seeking to change the company's strategy (including by means of efforts to change the board composition) forms part of the company's strategy and, as such, falls within the domain of the board. There is no shift of fiduciary duties: the directors must continue to act in the best interests of the company and its business with a view to long-term value creation, taking into account the interests of all stakeholders. Boards should ensure that they have all relevant information to make an informed decision, and the proposal should be carefully reviewed, without bias, and assessed against all available alternatives. Shareholders do not have to be consulted prior to the company's response; boards are (retrospectively) accountable to the shareholders.

Dutch case law confirms the absence of a general obligation for boards to engage with a bidder or activist to discuss the proposal. While boards may 'just say no', they should do so only after careful consideration of a serious proposal on its merits, and boards should consider whether some form of interaction with the bidder or activist is needed to make sure the directors have all relevant information to make an informed decision.

Preparation

18 | What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

Although the absolute number of activist campaigns in the Netherlands is limited, the increase in (high-profile) activist campaigns in recent years has made shareholder activism and engagement a discussion topic in the boardroom of many listed Dutch companies. No company is immune to activism, and preparedness is key. While recommended advance preparations depend on the specifics of the company, a few useful preparations are:

- continuously monitoring market activity, financial performance (particularly relative to peers) and the company's industry and competitors;
- setting up a small defence team of key directors or officers plus legal counsel, investment bankers and public relations firm that meets periodically;
- 'thinking like an activist', routinely assessing the company's strengths and weaknesses and its takeover defences and exploring available strategic alternatives (consider red teaming);
- building relationships and credibility with shareholders and other stakeholders before activists emerge and maintaining regular contact with major shareholders, the marketplace generally and key stakeholders; and
- communicating clearly and consistently on environmental, social and governance (ESG) and corporate social responsibility (CSR) matters, the company's long-term strategy, its implementation and the progress in achieving it.

Defences

19 What defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

Most listed Dutch companies have adopted one or more structural take-over defences, often in their articles of association. Examples include:

- binding nomination rights and supermajority requirements for appointment and involuntary dismissals of directors;
- staggered boards;
- evergreen call option for preference shares to an independent Dutch foundation whose purpose is to safeguard the interests of the company and its stakeholders and resist any influences that might adversely affect or threaten the company's strategy, independence or continuity in a manner contrary to such interests, pursuant to which the foundation can effectively acquire up to 50 per cent of the votes;
- loyalty voting shares providing for additional voting rights for 'loyal' shareholders;
- priority shares with certain control rights; or
- listing of depositary receipts for shares rather than the shares itself.

In addition, Dutch companies may use a variety of other tactics such as:

- engaging with the activist, which may result in some form of agreement;
- engaging with shareholders and other stakeholders (eg, convince major shareholders with compelling long-term plans or mobilise employees, customers or politicians);
- invoking a response time under the DCGC, pursuant to which the (management) board may stipulate a reasonable period of up to 180 days if shareholders seek to convene an extraordinary general meeting or put items on the agenda that may result in a change in the company's strategy (eg, dismissal of directors) and during which the board should deliberate, consult stakeholders and explore alternatives (according to case law, such response time must be respected by shareholders absent an overriding interest);
- invoking the put-up-or-shut-up rule under the Dutch public offer rules;
- exploring strategic transactions that make the company a less desirable target;
- issuing new shares (under existing authorisations) or selling treasury shares to a friendly third party (white knight); or
- issuing bonds with a mandatory redemption at a higher value in the event of a change of control (macaroni defence).

Proxy votes

20 Do companies receive daily or periodic reports of proxy votes during the voting period?

It depends on the listing venue. Dutch companies with a US listing often (choose to) receive regular updates on the vote tally, especially in contested situations, consistent with market practice in the United States. Historically, this has been less so at Dutch companies with an EU listing. In recent years, the practice in the Netherlands has shifted more towards the US practice of companies receiving updates on the vote tally prior to the general meeting.

Settlements

21 Is it common for companies in your jurisdiction to enter into a private settlement with activists? If so, what types of arrangements are typically agreed?

Although private settlements with activists are not common in the Netherlands, they do occur from time to time. A company may seek to enter into a pure standstill agreement to reach a truce with an activist shareholder in return for, for instance, a commitment to consult the activist (and other major shareholders) on new director nominations. In case of activists with a significant shareholding, a settlement may take the form of a relationship agreement wherein the company and the shareholder agree on topics such as strategy and governance and wherein the company may give one or more (supervisory) board seats to the activist.

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

Organised shareholder engagement outside of general meetings and earnings calls, through investor days, road shows, presentations at conferences or bilateral contacts, has increased in recent years but tends to vary considerably from company to company. Especially larger issuers tend to organise structural shareholder engagement. Engagement efforts tend to be elevated when the company is faced with a crisis or shareholder discontent (eg, an unsolicited approach or activist campaign, a negative recommendation from proxy advisory firms or poor voting results on say on pay or discharge of directors).

In line with the recommendation of the Dutch Corporate Governance Code (DCGC), most listed Dutch companies have formulated an outline policy on bilateral contacts with shareholders and posted such policy on their website. Mostly, such policies leave large discretion to the company to decide whether to enter into, continue or terminate any dialogue and to determine the company participants for such meetings.

23 Are directors commonly involved in shareholder engagement efforts?

Depending on the company and the topic and shareholder concerned, shareholder engagement efforts may be led by a company's investor relations department or one or more managing or executive directors, in particular, the CEO or CFO. Non-executive or supervisory directors are less frequently involved in shareholder engagement, though non-executive or supervisory directors may lead conversations with investors regarding the performance or remuneration of managing or executive directors.

Disclosure

24 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Most listed Dutch companies have published a policy on bilateral contacts. Companies are not required to disclose shareholder engagement efforts. The DCGC does recommend that presentations to institutional or other investors and press conferences be announced in advance, that all shareholders be allowed to follow these meetings and

presentations in real time and that the presentations be posted on the company's website after the meeting.

Selective disclosures by a Dutch company whose shares are listed on a regulated market within the EEA must comply with the requirements under the Market Abuse Regulation. In addition, Dutch companies must ensure equal treatment of all shareholders who are in the same position.

Communication with shareholders

25 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders? Are there systems enabling the company to identify or facilitating direct communication with its shareholders?

The explanatory notes to the agenda for a general meeting set out the company's position with respect to the agenda items. The meeting materials are posted on the company's website. Other public communications often take the form of press releases. Listed Dutch companies may decide to engage proxy solicitation firms or investor relations specialists to actively reach out to shareholders (particularly Dutch companies with a US listing do so in line with US market practice).

Notified major shareholdings (greater than 3 per cent) can be found in the online Dutch Authority for the Financial Markets registers. In addition, a listed Dutch company whose shares trade in book-entry form through Euroclear Nederland can – at its own initiative or upon a timely request by shareholders representing at least 10 per cent of the company's capital – run a process in the lead-up to a general meeting to identify its shareholders holding 0.5 per cent or more of the company's capital. The company may approach Euroclear Nederland and relevant intermediaries to provide certain information on the identity of the company's shareholders. The company must keep such information confidential. The company may use such information to disseminate information to its shareholders, provided it also posts such information on its website. The statutory provisions on identification of shareholders will be amended with effect from 3 September 2020 as part of the Dutch implementation of the revised Shareholders Rights Directive.

Access to the share register

26 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership, or submit to their shareholders information prepared by a requesting shareholder? How may this request be resisted?

If a shareholder so requests, the (management) board must provide the shareholder, free of charge, with an extract of the information in the company's share register concerning the shares registered in the shareholder's name. Dutch companies are not required to provide access to or a copy of the full shareholders register.

If an identification of shareholders has occurred and shareholders holding 1 per cent of the issued share capital or shares with a value of at least €250,000 so request, the company must disseminate to its shareholders (and publish on its website) any information prepared by the requesting shareholders relating to an agenda item for the general meeting. The company may refuse the request if the information:

- is received less than seven business days prior to the meeting;
- sends, or may send, an incorrect or misleading signal regarding the company; or
- is of such a nature that the company cannot reasonably be required to disseminate it (criticism of the company's policy or affairs is in itself no valid ground for refusal).

NautaDutilh

Leo Groothuis
leo.groothuis@nautadutilh.com

Frans Overkleeft
frans.overkleeft@nautadutilh.com

Paul van der Bijl
paul.vanderbijl@nautadutilh.com

Stefan Wissing
stefan.wissing@nautadutilh.com

Beethovenstraat 400
1082 PR Amsterdam
Netherlands
Tel: +31 20 71 71 000
Fax: +31 20 71 71 111
www.nautadutilh.com

UPDATE AND TRENDS

Recent activist campaigns

27 Discuss any noteworthy recent, high-profile shareholder activist campaigns in your jurisdiction. What are the current hot topics in shareholder activism and engagement?

In recent years, high-profile unsolicited approaches and increasing pressure from activists have prompted a public debate in the Netherlands on the dangers of short-termism and the effectiveness of defence measures available to listed Dutch companies.

In December 2019, the Dutch government submitted draft legislation to the Lower House that, if enacted in its current form, introduces a statutory cooling-off period of up to 250 days that the board may invoke in the event of an unsolicited takeover bid or when faced with activists proposing to dismiss, suspend or appoint board members, if such bid or proposal materially conflicts with the interests of the company and its business (as reasonably determined by the board). During the cooling-off period, the general meeting cannot validly resolve on the dismissal, suspension or appointment of board members or the amendment of the company's articles of association on these topics, unless proposed by the board itself.

Shareholders representing 3 per cent or more of the company's capital must be consulted by the board during the cooling-off period. Moreover, they may request the Enterprise Chamber for early termination of the cooling-off period. The Enterprise Chamber grants the request if (1) the board, in view of the circumstances at hand when the cooling-off period was invoked, could not reasonably have come to the conclusion that the bid or proposal constituted a material conflict with the interests of the company and its business or (2) the board can no longer reasonably hold that the continuation of the cooling-off period can contribute to a careful decision-making. The cooling-off period also ends early if the hostile bid is declared unconditional.

The cooling-off period is aimed at taking some of the (short-term) pressure off target boards to allow for a careful decision-making process in which – in accordance with the Dutch stakeholder model – the interests of all stakeholders are considered and weighed with a view to long-term value creation.

The legislation would apply to all Dutch companies whose shares or depositary receipts for shares are listed on a regulated market or multilateral trading facility in the European Economic Area (EEA) or any similar stock exchange outside the EEA (eg, Nasdaq and the New York Stock Exchange).

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