



Dutch Ministry of Finance
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Dear Prof. Dr. Schoenmaker,

PROPOSED NEW LAW TO IMPLEMENT THE FRIJNS COMMITTEE'S RECOMMENDATIONS

I am writing as the chair of the Shareholder Rights Committee of the International Corporate Governance Network (ICGN), which as you may know is a global membership organisation of institutional and private investors, corporations and advisors. Our membership spans over 40 countries and the investor members are responsible for global assets of \$15 trillion. The aim of the ICGN is to contribute to raising standards of corporate governance through the exchange of ideas and information across borders and the development of best practices. It is in this spirit of developing best practice that we submit to you our comments on the proposed new law to implement the recommendations of the Dutch Corporate Governance Code Monitoring Committee (also known as the Frijns Committee).

Duties of disclosure for shareholders

We welcome the Ministry's decision to set the threshold for requiring a shareholder to disclose his intentions at ten per cent of voting rights rather than five per cent as suggested by the Frijns Committee. However, it is not clear to us why such an obligation is being introduced. So-called activist investors are generally inclined to disclose their intentions at a very early stage of their engagement with a company. A legal obligation such as that proposed is, we expect, likely to result in little more than lawyers being retained to draft boilerplate texts for major shareholders such that all their activities would be implicitly covered by the disclosure. The new obligation will lead to an extra administrative burden for shareholders without an obvious information advantage to the company and goes beyond what is required by the Transparency Directive.

Moreover, the notes to the draft legislation are not clear as to what should be disclosed by shareholders. It seems to us that disclosure about intentions in relation to an investee company is fraught with the potential for miscommunication which would be detrimental to the market. In particular, that a shareholder is not required to notify a change of intention immediately seems to expose shareholders and companies alike to surprises. Given the sanctions that can be imposed we consider it important that there is no ambiguity about what the Authority for the Financial Markets (AFM) requires shareholders to disclose, in how much detail and in what time frame.

Similarly, we believe that it is important that guidance on acting in concert be made clearer. At present the interpretation of what it means to act in concert with other shareholders seems rather fluid. Whilst we recognise that a number of the measures that are likely to be introduced into law are intended to minimise unnecessary disruption to business, we are concerned that there is an emerging view that shareholders acting as responsible owners and engaging with companies and one another is somehow threatening to companies. We would be extremely concerned if the definition of acting in concert were to extend beyond the fact of shareholders co-operating to take control of a company. Shareholders discussing corporate governance matters and acting together to try to bring about change in governance practices at the companies in which they invest should be seen as an important market discipline on poor management and not a disruption to business.

Finally, we welcome the Ministry's decision not to introduce additional disclosure requirements for each one percent change after the first disclosure threshold for major shareholders.

Right to put items on the agenda

We believe that engagement between companies and shareholders on corporate governance and performance issues should normally be conducted in private and over a period of time. However, the ability of shareholders to put items on the agenda and thus to move an engagement into the public domain is, in our view, an important shareholder right.

We are disappointed that the Ministry is considering raising the threshold for shareholders to put items on the agenda of the shareholders meeting. For the very largest companies it is likely that shareholders would have to pool their holdings to reach the three per cent threshold. This once again points to the need for clarification around the rules on acting in concert.

Whilst we accept the Frijns Committee's argument that a three per cent ownership requirement brings the Dutch market into line with its European peers, it does seem like an erosion in shareholder rights. Further, the introduction in the Netherlands of the so-called response time provision will allow companies 180 days to address issues raised in resolutions that would potentially result in a change in company strategy, including changes to wither of the boards, and thus minimise disruption to the business from certain types of proposals. Raising the threshold and allowing companies six months grace to deal with shareholder concerns will make it more

difficult for responsible long-term share owners to exercise their rights and fulfil their responsibilities.

Identification of shareholders

We believe strongly that companies should be able to identify their underlying beneficial shareholders. Thus we are in principle supportive of mechanisms that enable companies to discover who is at the end of the complex chain of intermediaries. That said, we are concerned that the proposed two day time limit for banks to respond to such requests for information on underlying shareholders is unreasonable. Clearly, banks and others in the intermediary chain are better placed to comment on this point than are we. However, we would expect that a longer discovery period would ensure that the results were as accurate and informative as possible.

We agree with the principle that shareholders should have the possibility to communicate with other shareholders and we appreciate that the Ministry is willing to introduce such a facility. This may well minimise the dependence of some shareholder activists on the media to get their views across to other shareholders. However, we are of the opinion that the proposed facility will give the board of a company an advantage in 'proxy contests'. All the names and addresses of the shareholders would be known to the company, which can directly solicit those shareholders. The shareholder proposing the contested resolution must, firstly, ask the company to distribute to the entire shareholder base the relevant materials prepared by him in support of his case, and, secondly, the board has discretionary power to refuse not to send on the information to other shareholders. We are concerned that this has the potential to cause a great deal of frustration and litigation. A possible solution would be to set up an independent intermediary that administers the contact details of the shareholders, supervised by the AFM, and through which information can be channelled to shareholders.

We hope that you find these comments helpful. If you would like to discuss any of these points, please do contact our Executive Director, Anne Simpson, by telephone on either + 44 20 7612 6098 or by email at execdirector@icgn.org.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Michelle Edkins', with a long horizontal line extending to the right.

Michelle Edkins
Chairman

ICGN Shareholder Rights Committee