Position Paper

Position of minority shareholders in companies with a controlling shareholder

DRAFT: AN INVITATION TO COMMENT

1. Introduction

The shareholder structure at Dutch listed companies has become increasingly concentrated in recent years. The number of Dutch listed companies with a controlling shareholder (defined as a party that holds more than 30% of the voting rights) has almost doubled in fact, in comparison with ten years ago. In a number of cases the dominant position of the controlling shareholder is reinforced by direct or indirect representation of this shareholder on the supervisory board or on the one tier board. The company and the controlling shareholder have a special duty of care with respect to minority shareholders in situations of this kind, although the precise implications of this special duty of care with respect to minority shareholders in listed companies have not been crystallized. Points of reference may be found, however, in the position of minority shareholders after a public offer for the shares in a listed company has been declared unconditional by the bidder, who becomes the majority shareholder, but has not (yet) acquired complete control. A special duty of care with respect to minority shareholders applies in this situation as well. It is extremely important to the bidder /majority shareholder to ultimately acquire full control over the target company. With increasing frequency other legal instruments, such as the legal (triangular) merger, the cross-border merger or the transfer of assets and liabilities followed by dissolution of the company, are consequently being employed to force minority shareholders out. A number of court cases have resulted in the development of jurisprudence over a period of years that has offered some clarity to the position and protection of minority shareholders following a public offer.

Eumedion believes that the protection of minority shareholders in companies where a controlling shareholder is present is lagging behind the protection offered to minority shareholders after a public offer has been declared unconditional. It is Eumedion's opinion that - at the very least - the protection for

minority shareholders in going concern situations should at least be equal to the protection provided in post-bid situations. In addition, Eumedion believes that the special duty of care that majority shareholders have with respect to minority shareholders needs to be worked out in more detail, in order to increase awareness of this duty and its clarity, as well as to prevent scandals and legal proceedings in the near future. Eumedion puts forward a number of proposals to this end in this draft position paper.

A. Possibilities for reinforcing the checks and balances in going concern situations

1. Disclosure of the main elements of the relationship agreements between the company and major shareholders and an annual report on the execution of these agreements.
2. The majority of the members of the supervisory board and of a one tier board shall be independent **or** the minority of independent persons shall have a right of veto over all matters that could have a detrimental effect on the position of minority shareholders.
3. The number of extra voting rights for one shareholder stemming from high voting stock or loyalty shares should not be allowed to exceed 5% of all voting rights.
4. When a company has a controlling shareholder, important decisions need AGM approval with at least a two-thirds majority of votes cast, that represents at least 50% of the issued capital.
5. When a company has a controlling shareholder, important the transactions subject to section 2:107a BW in which the controlling shareholder has a direct or indirect financial interest (also known as related party transaction) should require not only at least a two-thirds majority of the votes cast in the general meeting, but also a majority of the votes cast on the equity capital not affiliated to the controlling shareholder. This also applies to proposals to amend the articles of association in order to confer extraordinary or additional rights on the controlling shareholder.
6. When a company has a controlling shareholder , the appointment of the independent members of the supervisory board and non-executive directors should not require only a majority of the votes cast in a general meeting, but also a majority of the votes cast on the equity capital that is not affiliated with the controlling shareholder.

B. Possibilities for reinforcing the checks and balances in takeover situations

1. After the announcement of a public or private offer, the bidder should be prohibited from building up an interest in the target company (stake building) or the bidder should abstain from voting in the general meeting which is held before the bid is declared unconditional on approval of a legal or cross-border merger or of an asset sale transaction.
2. If a bidder is in a position to unilaterally declare his bid unconditional at a percentage lower than 95% of the issued capital and the bidder intends to use other legal instruments to squeeze out the remaining minority shareholders, proposals to this end should be placed on the agenda of the general meeting which is held before the bid is declared unconditional, to ensure that the (original) shareholders have the opportunity to vote on the intended squeeze-out measures.
3. A public offer may only be declared unconditional when at least two-thirds of the equity capital has been tendered (excluding any interest held by the bidder himself).
4. When the takeover is in the form of an asset sale transaction, the bidder should provide all material information on the rationale of this transaction and the management board and supervisory board of the target company should publish a position statement in which the management of the company states why the transaction is in the interests of the company, its enterprise and other stakeholders, and the minority shareholders in particular.
5. The in point 4 mentioned position statements from the board should be accompanied by a fairness opinion from a competent independent party.
6. The agreements between the target company and the bidder should not be so prohibitive (like a break fee) that it is not possible in practice for a third party that might be interested in launching a public offer to get around the table with the target company.

The draft position paper is only a discussion document yet; Eumedion would first like to hear the opinions of all stakeholders on the possible proposals. After that Eumedion will adopt the position paper. Eumedion will subsequently request the Government to take the final position paper into consideration with regard to the following commitments given by the Government: i) "to consider in greater detail the way in which the squeezing out of and selling out by minority shareholders in Dutch listed companies takes place after a public offer has been launched, and the position of minority shareholders in general , as laid down in the Dutch Civil Code"[1] and ii) to evaluate the Management and Supervision (Public and Private Companies) Act in 2016.[2]

2. A more concentrated shareholder structure at Dutch listed companies: an analysis

In recent years we have seen an increased concentration of shares in AEX companies (table 1).

Table 1: overview of the interest of the largest shareholders in Dutch AEX companies (reference dates: 31 August of the year in question; excluding trust offices, on the basis of voting rights)

Largest shareholder	**2010**	**2015**
> 30% voting rights	19%	32%
10 to 30%	19%	36%
5 to 10%	52%	32%
< 5%	10%	0%

Source: own research based on the AFM Register substantial holdings and gross short positions

Table 1 shows that the number of AEX companies where there is a shareholder with substantial share-ownership (defined as an interest between 10% and 30% of the voting rights) has approximately doubled between 2010 and 2015. There has also been a strong rise in the number of companies with a controlling shareholder (defined as ownership greater than 30% of the voting rights). A total of more than two-thirds of the biggest Dutch listed companies have a shareholder who holds more than 10% of the voting rights; this figure was just above one-third in 2010.

Not only the AEX companies have more concentrated share ownership; the same also applies at the other Dutch listed companies. There is a controlling shareholder, in fact, at a large majority of the smaller listed companies whose shares are traded on the Amsterdam Stock Exchange and Dutch companies whose shares are only traded on a foreign stock exchange.

[1] P. 16 of the explanatory memorandum to the Decree of 9 March 2012 providing for amendment of the Public Takeover Bids (Financial Supervision Act) Decree, the Administrative Fines (Financial Sector) Decree and the Decree Implementing Article 10 of the Takeover Directive (Stb. 196; {Bulletin of Acts and Decrees (NL)} 196).
2 *Handelingen* (Proceedings) I /2010/11, no. 28, p. 25 and Kamerstukken (Parliamentary Papers) II 2011/12, 32 873, no. 22, p. 29.

Table 2: overview of the interest of the largest shareholder in Dutch companies (reference date: 31 August 2015, excluding trust offices; based on voting rights)

Largest shareholder	AEX (n=22)	AMX (n=20)	AScX (n=24)	Local (n=33)	Traded outside NL (n=55)	Total NL publicly traded companies
> 30% voting rights	32%	15%	8%	61%	64%	44%
10 to 30%	36%	65%	88%	36%	29%	45%
5 to 10%	32%	20%	4%	3%	7%	11%
< 5%	0%	0%	0%	0%	0%	0%

Source: own research based on the AFM Register substantial holdings, SEC registers and annual reports.

As is clear from table 2, controlling shareholders are altogether present at 44% of the listed companies with registered offices in the Netherlands. This percentage was 'only' 23 in 2005.[3] It can also be concluded that there is no longer a single Dutch listed company where share ownership is widely dispersed (defined here as a company whose largest shareholder has an interest of less than 5% of the total number of voting rights).

The increased number of listed companies with a controlling shareholder is rather unusual, in view of the fact that the mandatory bid rule came into force in the Netherlands on 28 October 2007: a party that acquires 30% of the voting rights in a listed company is obliged to launch a public offer for all the shares. This obligation does not apply, however, to a party that already holds an interest of more than 30% at the time of the initial public offering (IPO). There have been quite a lot of IPOs in recent years whereby selling shareholder(s) initially only sold a minority interest. It remains to be seen whether these controlling shareholders will relinquish their control in due course. Furthermore, a number of - originally foreign - companies have established themselves in the Netherlands in recent years. These companies relatively often have a controlling shareholder.

In most cases the voting interest of the controlling shareholder also reflects the capital contributed to the company by this shareholder. Recently, however, control has increasingly been artificially inflated by the issue of 'special voting shares' (loyalty voting rights: at CNH Industrial NV, Fiat Chrysler Automobiles NV and Cnova NV), or through the issue of dual class shares (Yandex NV and Altice NV). In case of both variants, it is mainly the founders who profit from these 'devices' (see table 3).

[3] C. van der Elst, A. de Jong, T. Raaijmakers, 'Een overzicht van juridische en economische dimensies van de kwetsbaarheid van Nederlandse beursvennootschappen'; *Onderzoeksrapport ten behoeve van de SER Commissie Evenwichtig Ondernemingsbestuur*, 2007.

Table 3: overview of Dutch companies where the voting rights are not in line with capital contribution (financial preference shares not taken into account)

Company	Capital interest founder	Voting interest founder
Yandex NV: issue of Class A shares (1 vote) and Class B shares (10 votes)	10.84% (Arkady Volozh)	39.81%
CNH Industrial NV (loyalty voting rights)	29.7% (Agnelli family)	44%
Fiat Chrysler Automobiles NV (loyalty voting rights)	31.3% (Agnelli family)	46.7%
Cnova (double voting rights)	94.0% (Jean-Charles Naouri)	96.9%
Altice: issue of Class A shares (1 vote) and Class B shares (25 votes)	60.6% (Patrick Drahi)	Potentially 92%

Source: own research based on the AFM Register substantial holdings and gross short positions, annual reports of the relevant companies, SEC filings, prospectuses and merger documents.

The increased concentration of share ownership does not only have consequences for the decision making process in general meetings, but in practice it also influences the composition of the supervisory board or of the one tier board. Increasing numbers of major shareholders are demanding seats on the supervisory board or on the one tier board. At present approximately one-third of the Dutch listed companies whose shares are traded on the Amsterdam Stock Exchange have directly or indirectly incorporated one or more representatives of the major shareholders in the supervisory board or in the one tier board. The rights and obligations of the major shareholder and the company are usually set out in what is referred to as a Relationship Agreement. This does not, in itself, necessarily pose a problem from the position of minority shareholders, since the representatives can provide a positive impulse to the quality and professionalism of the internal supervision. It potentially becomes a problem, however, when these representatives constitute the majority of the members of the board of supervisory directors or of the one tier board, or when these representatives are assigned extra voting rights or a right of veto in the meetings of the supervisory board or one-tier board. No majority of independent persons exists on the supervisory board or one tier board at eight companies whose shares are being traded on the Amsterdam stock exchange (Altice NV, IMCD NV, Refresco-Gerber NV, Flow Traders NV, Amsterdam Commodities NV, Kiadis Pharma NV, Mota-Engil Africa NV and AND International Publishers NV). In addition, four companies have included provisions in their articles of association that the shareholder representative has a right of veto over every decision or a specific number of decisions taken by the supervisory board or one tier board (GrandVision NV and Heineken NV and Heineken Holding NV respectively), or is always entitled to cast as many votes as the total number of votes of the other members of the one tier board (Altice NV). This gives rise to the question whether the checks and balances function well at general meetings and at the meetings of (supervisory) boards under these circumstances.

3. Present safeguards for the protection of the interests of minority shareholders

Although controlling shareholders can be strong long-term partners for minority shareholders in many cases, the risk also exists that the interests of the controlling shareholder may conflict with those of the minority shareholders in some situations. As a result ddditional consideration for the position and protection of minority shareholders is required. Current legislation and regulations (Book 2 of the Dutch Civil Code [BW] and the Dutch Corporate Governance Code) in addition to the jurisprudence already provide minority shareholders with a certain degree of protection against controlling shareholders. The most important ‘protective measures’ are as follows:

- The obligation of management board members to perform their duties properly (section 2:9 BW).
- In the performance of their duties the members of the management board and the members of the supervisory board must be guided by the interests of the company and its affiliated enterprise, taking into consideration the relevant interests of the company's stakeholders (section 2:129 paragraph 5 BW, section 2:140 paragraph 2 BW and principles II.1 and III.1 of the Dutch Corporate Governance Code).
- Members of the management board and members of the supervisory board are not permitted to participate in the deliberations and decision making process, if they have a direct or indirect personal interest in this respect that conflicts with the interests of the company and its affiliated enterprise (section 2:129 paragraph 6 and section 2:140 paragraph 5 BW).
- All those associated with the company must conduct themselves in accordance with the standards of reasonableness and fairness (section 2:8 BW). It is generally assumed that actions that conflict with reasonableness and fairness also imply misuse of controlling powers and misuse of power.
- A company that has a majority shareholder has a special duty of care with respect to its minority shareholders (jurisprudence: HR (Supreme Court of the Netherlands) 1 March 2002, NJ (Dutch Law Reports) 2002/296 (Zwagerman), HR 12 July 2013, NJ 2013/461 (KLM) and HR 4 April 2014, NJ 2014/286 (Cancun)).
- A company shall treat the shareholders who are in the same position, in the same way (section 2:92 paragraph 2 BW). Shareholders should therefore not be treated disproportionate or arbitrary.
- The right of shareholders to ask questions related to items on the agenda of the general meeting. The company shall answer the questions put to it by shareholders (in so far as this does not conflict with a substantial interest of the company) (section 2:107 BW).

- The right of shareholders who represent a certain capital interest to submit an application to the Enterprise Chamber of the Court of Appeal in Amsterdam for an inquiry to be instituted and to take immediate measures (section 2:345 BW).

- The obligation of a party that acquires 30% of the voting rights in a listed company to make a public bid for the shares of the company in question for a fair price (section 5:70 Wft [Act on Financial Supervision]).

- Not more than one non-independent person may be a member of the supervisory board; the others must be independent within the meaning of the criteria used in the Dutch corporate governance code (best practice provision III.2.1 in conjunction with III.2.2 of the Dutch Corporate Governance Code).

- In the case of a one tier board, the majority of the board members must consist of independent, non-executive directors (best practice provision III.8.4 of the Dutch Corporate Governance Code). The director who leads the (committee of) executive directors may not also be the chair of the whole board (section 2:129a paragraph 1 BW).

- The conduct of shareholders in relation to the company, the organs of the company and their fellow shareholders must be in keeping with the standards of reasonableness and fairness (principle IV.4.4 of the Dutch Corporate Governance Code). It is generally accepted in this context that the greater the interest that a shareholder holds in the company, the greater his responsibility becomes, also with respect to the minority shareholders and other stakeholders of the company (Corporate Governance Code Monitoring Committee, 2008).

What we see, however, is that the code provisions which deal specifically with the composition of the supervisory board and of the one tier board and with the independence of the members of these boards are quite readily pushed aside by companies with controlling shareholders. The “comply or explain” rule applies to the provisions of the code: non-compliance with the code provisions is permitted on the part of listed companies, if an explanation is provided for doing so.

The statutory provisions and the provisions of the code do not mean that it is impossible for major shareholders who are also represented on the management board or supervisory board to arrange that:

- the person in question may cast more than one vote (section 2:129 paragraph 2 BW and section 2:140 paragraph 4 BW). The number of votes is subject to a legal maximum of the number of votes that may be cast jointly by the other members of the management board or the members of the supervisory board.

- dual class shares are issued, or that loyalty shares and loyalty voting rights are conferred on the major shareholder in question (section 2:118 BW).

The combination of these two possibilities has a detrimental effect on the functioning of the checks and balances within the management board/supervisory board and at the general meeting. It is extremely dubious whether it is then possible to comply with an important principle of the Dutch Corporate Governance Code, which is that the general meeting should be able to exert such influence on the policy of the management board and supervisory board of the company that it plays a fully-fledged role in the system of checks and balances in the company (principle IV.1). It is also dubious whether a combination of this kind is in keeping with the special duty of care that a company/majority shareholder has with respect to minority shareholders.

It is sometimes argued that when there is complete transparency concerning the governance structure, a shareholder can consciously decide for himself whether or not to buy or sell shares in the company in question. This may well be the case, but the possibility of setting up a governance structure of this kind on the grounds of a legal system can have repercussions for investor confidence in a certain jurisdiction. When investors start to have doubts about the degree of protection in a jurisdiction of this kind, this ultimately has implications for all the listed companies with registered offices in that jurisdiction. What is more, an average of more than 80% of the shares in Dutch listed companies are held by foreign investors. It is extremely important that foreign investors in particular also continue to trust the Dutch system of corporate governance and checks and balances and are able to be confident that these things are well regulated in the Netherlands, without having to carry out too much complicated research into these matters.

It is Eumedion's opinion, therefore, that checks and balances - at concentrated listed companies above all - must be reinforced by law. We will set out a number of possible proposals in this respect in paragraph 5.

4. Takeover situations

Takeover situations are a source of specific concern for minority shareholders. It is very important for a bidder to acquire at least 95% of the issued capital of the target company. When this threshold is reached, the stock exchange listing can be cancelled[4] and the remaining shareholders can be squeezed out (section 2:92a and 359c BW). The target company is then no longer under an obligation to hold separate general meetings, nor does it have to prepare separate annual accounts any more, and the target company can be included with the bidder in a tax entity for corporation tax purposes. In order to step up the pressure on shareholders to offer shares for sale, it increasingly happens that the bidder does not wait until 95% of the shares have been tendered before declaring a public offer unconditional (see appendix 1). The option of declaring the bid unconditional when 80%, two-thirds or even a simple majority

[4] Euronext Announcement 2004-041 of 8 April 20014 'Policy on delisting shares or depositary receipts".

of the equity capital has been tendered is usually kept open and the interest of the remaining shareholders is subsequently reduced to less than 5% of the issued capital by means of a legal (triangular) merger or the transfer of assets and liabilities, or the target company is wound up and the surplus distributed. This strategy has a very good chance of success. The fact is that the general meeting which has to decide on the legal merger or the transfer of assets and liabilities is dominated by the bidder who has become the majority shareholder after the offer has been declared unconditional.

In recent years the Enterprise Chamber of the Amsterdam Court of Appeal and the Supreme Court of the Netherlands have sanctioned that a bidder may acquire complete control over a target company through instruments other than the buy out proceedings, such as a legal or cross-border merger, division, sale of assets and winding up, subject to the condition that the use of these instruments is not contrary to the general standards of reasonableness and fairness. It is generally assumed on the grounds of the jurisprudence that the bidder is operating within the limits of the standards of reasonableness and fairness when he:

a. provides transparency in the offer memorandum as regards the steps he is able to take and which legal instruments he is able to use in order to acquire complete ownership of the target company;

b. appoints or retains no less than two members in the supervisory board of the target company who are independent of the bidder and who are specially tasked in the restructuring and integration phase with monitoring the protection of the interests of the (current) minority shareholders, from which point of view these independent members of the supervisory board have a right of veto over a number of non-financial covenants, such as the issue of new shares, the sale of assets, the winding up of the company, a legal merger and instances of non-compliance with the Dutch Corporate Governance Code.

c. does not, in the case of a merger, determine the exchange ratio in such a way that the minority shareholders receive no shares in the acquiring company, but a sum of money instead.

With regard to mergers and transfers of assets and liabilities as restructuring instruments, currently in practice as often as possible the choice is made to entitle the ‘original’ shareholders to state an opinion on the use of such instruments. Furthermore, a transfer of assets and liabilities is usually supported by one or more fairness opinions from competent and independent parties (generally investment banks). In the case of a (legal or cross-border) merger, it is prescribed by law (section 2:328 BW) that an external auditor must assure that the proposed exchange ratio is reasonable in his opinion.

A variant on the public offer for the shares is a direct bid for the company's assets, as recently happened in connection with the takeover of the Roto Smeets Group.[5] In the case of the Roto Smeets Group, six major shareholders representing almost 87% of the issued capital made a request to place on the agenda t an offer they themselves were intending to make for all the assets of the subsidiary. Despite the provision in the articles of association that a proposal of this nature may only be submitted to the general meeting after it has been approved by the management board and the supervisory board, the management board of the Roto Smeets Group agreed to this request and recommended shareholders to vote in favour. Apart from the question of whether the nature of the cooperation between these majority shareholders was such that it would have been mandatory for them to launch a public offer for the shares in the Roto Smeets Group, no special rules apply for takeovers in the form of an asset transaction.

5. Synthesis and proposals for improving the checks and balances

Paragraphs 2 and 3 have made it clear that controlling shareholders have become dominant at increasing numbers of listed companies in recent years. The checks and balances have to be reinforced in this situation. Paragraph 4 has shown that jurisprudence has developed in the last few years that has already improved the position of minority shareholders in takeover situations to some extent. There is certainly no reason why the protection enjoyed by minority shareholders after a takeover bid should not also be extended to apply to minority shareholders who are in a practically identical situation without a takeover bid. The possibilities of reinforcing the checks and balances at Dutch listed companies are summarized below.

Possibilities for reinforcement of the checks and balances

Transparency

1. Companies must disclose the main elements of relationship agreements between the company and major shareholders, including a discussion of the safeguards put in place for the protection of the interests of the minority shareholders. It should be compulsory for companies to report on the execution of agreements of this kind on an annual basis in the directors' report.

Sufficient number of independent supervisory directors

2. The majority of the members of the supervisory board and of a one tier board should be independent (**option 1**), or the minority of independent persons should have a right of veto over all matters that could have a detrimental effect on the position of minority shareholders, including approval of

[5] And previously (2009) during the takeover of Super de Boer by Jumbo as well. Companies including Equant, New Skies Satellites, EVC International, SBS and Qurius were also delisted in this manner.

important management decisions pursuant to section 2:107a BW and the issue of shares without pre-emptive rights, the dividend policy, a proposal for amendment of the articles of association and instances of non-compliance with the Dutch Corporate Governance Code (**option 2**).[6]

3. When a company has a controlling shareholder[7], the appointment of the independent members of the supervisory board and non-executive directors should not require only a majority of the votes cast in a general meeting, but also a majority of the votes cast on the equity capital that is not affiliated with the controlling shareholder.[8] The relevant supervisory board members and non-executive directors should also report on the implementation of the supervision of the fulfilment of their responsibilities with respect to all stakeholders, including the minority shareholders.

Super-majority voting and quorum requirements

4. The thresholds for decisions that lead to the fundamental change of the company or will have a detrimental effect on the position of shareholders should at least be equalized. This means that decisions subject to section 2:107a BW, decisions on legal mergers, winding up, amendments to the articles of association and the disapplication of pre-emptive rights require at least a two-thirds majority of votes in the event that less than half of the issued capital is present or represented at the meeting. When a company has a controlling shareholder, the two-thirds majority of votes should represent at least 50% of the issued capital (**alternative is point 5 below**).

5. When a company has a controlling shareholder, the transactions subject to section 2:107a BW in which the controlling shareholder has a direct or indirect financial interest (also known as related party transaction) should require not only at least a two-thirds majority of the votes cast in the general meeting, but also a majority of the votes cast on the equity capital not affiliated to the controlling shareholder. This also applies to proposals to amend the articles of association in order to confer extraordinary or additional rights on the controlling shareholder.

[6] **For consideration**: the Evaluatiecommissie Nationalisatie SNS Reaal reached the conclusion in 2014 that the government-appointed supervisory directors at SNS Reaal, who also had a right of veto over certain decisions (major takeovers, remuneration policy, the issue and purchase of shares), were ineffective in their representation of specific interests (government interests in this case). According to the evaluation committee, supervisory directors of this kind are in an impossible position. The fact is that supervisory directors must be guided by the interests of the company and its affiliated enterprises in the performance of their supervisory duties and not (solely) by a particular interest, such as the government. After all, the objective in practice is always to reach consensus.

[7] Defined as anyone who is (acting alone or in concert with other persons) is able to exercise at least 30% of the voting rights in a general meeting, either directly or indirectly.

[8] Comparable with the situation in the United Kingdom; see appendix 2.

Limited number of special voting shares

6. The number of extra voting rights for one shareholder stemming from high voting stock or loyalty shares should not be allowed to exceed 5% of all voting rights. This prevents a too great concentration of power in the major shareholder and the drying up of liquidity in the relevant shares.[9]

Possible specific proposals with regard to takeovers (public offer, assets transaction, legal merger, cross-border merger)

Independent decision-making process

1. After the announcement of a public or private offer, the bidder should be prohibited from building up an interest in the target company (stake building) (**option 1**)[10] or the bidder should abstain from voting in the general meeting pursuant to section 18 of the Public Takeover Bids (Financial Supervision Act) Decree[11], pursuant to section 2:107a BW or section 2:330 BW (legal merger and cross-border merger) (**option 2**).

2. If a bidder is in a position to unilaterally declare his bid unconditional at a percentage lower than 95% of the issued capital and the bidder intends to use other legal instruments to squeeze out the remaining minority shareholders, proposals to this end should be placed on the agenda and be decided on in the general meeting pursuant to section 18 of the Public Takeover Bids (Financial Supervision Act) Decree, to ensure that the (original) shareholders have the opportunity to vote on the intended squeeze-out measures.

Higher threshold for declaring a public bid unconditional

3. A public offer may only be declared unconditional when at least two-thirds of the equity capital has been tendered (excluding any interest held by the bidder himself).

[9] See also J.M. de Jongh, Privatisering, bescherming en algemeen belang; De voorgenomen beursgang van ABN AMRO, *WPNR* (2015), 7048, p. 118-124 and B. Bootsma, 'Loyaliteitsstemrecht naar Italiaans recht en bij Fiat Chrysler Automoblies NV', *Ondernemingsrecht* 2015/5, p. 32-43

[10] **For consideration**: it was agreed in relation to the takeover of Tele Atlas by TomTom in 2008 that the bidder would refrain from stake building. Competitor Garmin, which was not bound by a restriction of this kind, was able to conclude stake building transactions, however, and consequently built up an interest of more than 5% in Tele Atlas. When an increased offer was announced, TomTom was also allowed to build up an interest. Immediately following the announcement of the higher offer, TomTom acquired an interest of more than 28% in Tele Atlas by means of buying shares on the stock exchange.

[11] Although at one time this was intended to be an 'informative' general meeting at which the public offer would be discussed with the shareholders, draft resolutions – such as restructuring measures and the discharge of the members of the management board and members of the supervisory board who are stepping down – are currently often placed on the agenda for this meeting.

Disclosures

4. When the takeover is in the form of an asset transaction, the bidder should provide all material information on the rationale of this transaction and the management board and supervisory board of the target company should publish a position statement in which the management of the company states why the transaction is in the interests of the company, its enterprise and other stakeholders, and the minority shareholders in particular.

5. Position statements from the board should be accompanied by a fairness opinion from a competent independent party.

Real possibility for launching a competitive bid

6. The agreements between the target company and the bidder should not be so prohibitive (like a break fee) that it is not possible in practice for a third party that might be interested in launching a public offer to get around the table with the target company.

Eumedion believes the proposals above deserve the attention of the legislator. It is Eumedion's opinion that the Dutch Corporate Governance Code is as an instrument too light for companies that have a controlling shareholder who is also affiliated with the (supervisory) board. The effectiveness of the 'comply or explain' rule depends on the extent to which shareholders call the management board and supervisory board to account concerning the application of the provisions of the code and the validity of the reasons provided for any instances of non-compliance. The general meeting cannot fulfil its role as the Code's ultimate watchdog when this meeting is dominated by a controlling shareholder who is also affiliated with the (supervisory) board.

Appendix 1: overview recent public offers

Target company	Bidder	Minimum percentage for unconditional declaration (without approval of target company)
Eriks (2009)	SHV	66.67%
Océ (2010)	Canon	50%+1
Smit (2010)	Boskalis	75%
Crucell (2010)	Johnson & Johnson	80%
Draka (2011)	Prysmian	66.67%
Gamma (2011)	Gilde	No minimum
TNT Express (2012)	UPS	50%+1 (bid was later withdrawn)
HITT (2012)	SAAB	75%
LBi (2012)	Publicis	75%
Octoplus (2012)	Dr. Reddy	No minimum
Mediq (2012)	Advent	66.67%
Wavin (2012)	Mexichem	66.67%
DE Master Blenders (2013)	JAB	80%
UNIT4 (2013)	Advent	75%
Ziggo (2014)	Liberty	65%
HES (2014)	Hestya	75%
Corio (2014)	Klepierre	80% (if cross-border merger was approved by AGM)
Nutreco (2014)	SHV	66.67%
Exact (2014)	Apax	85% (if asset transfer was approved by AGM)
Crown Van Gelder (2015)	Andlinger	80%
Grontmij (2015)	Sweco	80% (if cross-border merger was approved by AGM)
TNT Express (2015)	FedEx	80%
Ten Cate (2015)	Gilde c.s.	66.67%
Ballast Nedam (2015)	Renaissance Construction	50%+1

Appendix 2: Cross-border comparison

Protection for minority shareholders in listed companies with a controlling shareholder

New listing rules for companies with a controlling shareholder that are listed on the London Stock Exchange came into effect in the United Kingdom on 16 May 2014.[12] With effect from that date, the appointment of the independent non-executive directors must be approved by both the 'ordinary' general meeting and by the group of independent shareholders (and therefore without the influence of the controlling shareholder). The definition of 'control' is aligned with the UK mandatory offer threshold, which is holding an equity interest of at least 30% in a listed company. In such cases the company will also be obliged to draw up an agreement with the controlling shareholder, the provisions of which include that the controlling shareholder may not exert any influence on the company's operations and that all transactions between the enterprise and the controlling shareholder are conducted at arm's length and on normal commercial terms. The independent non-executive directors have the right of veto any related party transaction. The content of the agreement must be disclosed. Furthermore, a decision about possible cancellation of the stock exchange listing requires the approval of three-quarters of the votes cast in a general meeting, as well as a majority of the votes of the independent shareholders.[13]

In Delaware – the US state where most (large) US listed companies are incorporated – it is assumed that if a company has a controlling shareholder and the company is entering into a transaction with that shareholder, the risk of claims by minority shareholders is reduced if the transaction is negotiated and approved by a special committee of independent directors and approved by a majority of the minority shareholders.[14]

For a global overview of the protection of minority shareholders in listed companies with a controlling shareholder, we refer to the comprehensive report of the International Organization of Securities Commissions (IOSCO), *Protection of Minority Shareholders in Listed Issuers*, June 2009.

Issue of various types of shares with different voting rights (dual class shares)

The issue of dual class shares is prohibited by law in France, Germany, Italy, Spain, China and South Korea. It is possible in France and Italy, however, to offer loyalty shares to long-term shareholders.

[12] Financial Conduct Authority (FCA), 'Enhancing the effectiveness of the Listing Regime', April 2014.
[13] The London Stock Exchange listing rules contain an exemption for specific takeover situations. The exemption permits a cancellation of the stock exchange listing where 80% of the shares are held by the bidder regardless of whether a majority of the independent shareholders accepted the offer. In a recently published consultation paper, the FCA is considering the possibility to delete this provision.
[14] L.E. Strine jr., 'The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face', *Delaware Journal of Corporate Law*, 2005/ 3, p. 673-696.

Singapore also has a legal prohibition to which an exception applies for newspaper companies.[15] Swedish law allows the issue of dual class shares, but this is subject to the provision that the shares with high voting rights may not have more than ten times as many voting rights as other shares. Of the 262 Swedish listed companies, 122 have issued dual class shares. This phenomenon is becoming less popular for Swedish initial public offerings. The United Kingdom, the United States, Canada and Australia also have no legal prohibitions.

In some countries the issue of dual class shares is regulated via the listing rules. The Japanese stock exchange (Tokyo Stock Exchange) prohibits the issue of dual class shares. The Australian stock exchange regulations stipulate that a company is only allowed to have one class of shares, unless the Australian stock exchange approves the conditions relating to an additional class.

The most important American stock exchanges (NYSE, NASDAQ) permit the introduction of dual class shares, but only in connection with an IPO. This is no longer allowed after flotation.

The following is stated in the NYSE Listed Company Manual (Rule 313(A)):

Voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Exchange Act cannot be disparately reduced or restricted through any corporate action or issuance. Examples of such corporate action or issuance include, but are not limited to, the adoption of time phased voting plans, the adoption of capped voting rights plans, the issuance of super voting stock, or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer.

NASDAQ Stock Market Rule 5640 stipulates:

Under the voting rights rules, a Company cannot create a new class of security that votes at a higher rate than an existing class of securities or take any other action that has the effect of restricting or reducing the voting rights of an existing class of securities.

The issue of dual class shares is also regulated via the listing rules in the United Kingdom. The listing rules observed by the UK Listing Authority (UKLA; part of the Financial Conduct Authority) specify the following for premium listed shares:

Principle 4: Where a listed company has more than one class of equity shares admitted to premium listing, the aggregate voting rights of the shares in each class should be broadly proportionate to the relative interests of those classes in the equity of the listed company.

[15] The lifting of this legal prohibition is currently under discussion in Singapore.

The UKLA uses various criteria in order to assess whether the voting rights are broadly proportionate to the capital contribution:

(a) the extent to which the rights of the classes differ other than their voting rights, for example with regard to dividend rights or entitlement to any surplus capital on winding up;

(b) the extent of dispersion and relative liquidity of the classes; and/or

(c) the commercial rationale for the difference in the rights.

The listing rules of the Hong Kong Stock Exchange stipulate that it is only under exceptional circumstances that the stock exchange may permit companies listed there to deviate from the principle that the voting right on a share must be in line with the capital contribution. Not a single company listed on the Hong Kong Stock Exchange avails itself of this possibility. The Hong Kong Stock Exchange reached the following conclusion in June 2015, in response to consultations on the easing of the regime that were held in 2014: "We are considering proposing that, generally, "one share, one vote" should prevail but that WVR structures should be allowed *for certain companies in certain circumstances and with certain safeguards*". The stock exchange regulator has criticized the plans of the Hong Kong Stock Exchange. In light of this statement, the Hong Kong Stock Exchange recently decided not to proceed with finalising its draft proposal for easing the listing regime.