FEEDBACK STATEMENT

Consultation draft Eumedion position paper

'Position of minority shareholders in companies with a controlling shareholder'

1. Introduction

On 15 October 2015, Eumedion published the draft position paper 'Position of minority shareholders in companies with a controlling shareholder'. Eumedion invited stakeholders to comment on the draft position paper and the deadline for the submission of responses was 12 February 2016. Various parties used this opportunity by providing written or oral comments. In addition, a number of speakers at the Eumedion symposium of 18 November 2015 on the business and investment climate in the Netherlands discussed draft position paper and the same happened at the 'Van der Heijden Congress' on the theme of *The Netherlands as Europe´s Delaware*, which was held on 20 and 21 November 2015. Parliamentary questions were asked about the draft position paper in October 2015 and these were answered by the Minister of Security and Justice on 20 November 2015. On 12 February 2016, Eumedion also organised a closing round table meeting where representatives of investors, the stock exchange, law firms, the legislature, the judiciary and academics discussed the draft proposals put forward by Eumedion.

The most important comments made during these gatherings, as well as those contained in the 32 written and oral commentaries, are summarized in this feedback document. Furthermore, the conclusions proposed by Eumedion in view of the comments are formulated.

2. Process

Eumedion received praise from various sides for the process of first inviting stakeholders to respond to a draft before the position paper is finally adopted by the Eumedion board. The Dutch Minister of Security and Justice, for example, found it commendable that Eumedion was actively addressing recent developments and wished first to enter into discussions with stakeholders concerning its proposals.

In response to these positive experiences, Eumedion will more often publish a position paper first in future, before finally adopting a position. It should be emphasised, however, that a Eumedion position paper is always a reflection of the views of Eumedion members, who are institutional investors.

3. Developments in the period between publication of the concept position paper and adoption of the conclusions of the consultation

At least two developments are relevant when drawing conclusions from the consultation period:

1. The Minister of Security and Justice stated on 20 November 2015 in his answers to parliamentary questions concerning the draft position paper that he was cautious about introducing new procedural rules with respect to the protection of minority shareholders. He also writes that the position paper constitutes a good reason to follow up the previous undertaking given by the Minister that a number of aspects connected to public bids would be considered in greater detail.

2. The Dutch Corporate Governance Code Monitoring Committee also refers to the draft position paper in its proposals for revision of the Dutch Corporate Governance Code that were published in February 2016 and seized on the opportunity provided by the paper and a number of other developments to conclude that it is still too early to introduce radical substantive changes affecting a company's relationship with the (general meeting of) shareholders. It is the Committee's opinion that concrete proposals for principles and best practice provisions cannot be fleshed out until the present discussions and developments have crystallised further.

4. Responses to the proposed conclusions with regard to the proposals for reinforcement of the checks and balances at companies with a controlling shareholder

4.1 Transparency

Eumedion's first proposal was to require listed companies to disclose the most important elements of the relationship agreements between the company and major shareholders.

This proposal was supported by all respondents. It would be a good thing if all companies that have a controlling shareholder were to draw up relationship agreements. A relationship agreement sets out reciprocal rights, obligations and expectations, such as possible representation on the Supervisory Board or one-tier board, that transactions between the company and the controlling shareholder are concluded at arm's length and on normal commercial terms, and contains safeguards against insider trading. It is already customary for all the important elements in a relationship agreement to be made public and some

listed companies, such as ABN AMRO, ASR Nederland and Philips Lighting, even disclose the contents of the whole agreement. We consider this to be a best practice.

Conclusion

It is proposed to maintain this proposal, which would be ideal for inclusion as a best practice provision in the Code. Until that time, Eumedion will propagate it as a best practice of its own.

4.2 Sufficient independent supervisory directors and non-executive directors

Eumedion proposed in the draft position paper that at least a majority of the members of the Supervisory Board of a company with a controlling shareholder should also consist of independent persons or, if the controlling shareholder does not consider this to be advisable, that the minority of independent supervisory directors should have a power of veto over all matters that could have a detrimental effect on the position of minority shareholders. Eumedion also expressed the opinion that the independent Supervisory Board members in question should be appointed by both the plenary general meeting and the general meeting consisting only of independent shareholders not affiliated with the controlling shareholder.

Many respondents were not in favour of these proposals. Among other things, they argued that all supervisory directors have a statutory obligation to be guided by the interests of the company and its affiliated enterprise in the fulfilment of their tasks; a supervisory director is not permitted, therefore, to serve exclusively the interests of the controlling shareholder or of the minority shareholder. One respondent stated that a supervisory director is not the “Head of Minority Affairs”; a supervisory director must not be used as a “joker card” to solve a corporate governance dilemma. In addition, a number of respondents pointed out that a supervisory director with a power of veto is in a difficult position, because a construction of this kind undermines the collegiality of the decision-making process. Efforts are always made to reach a consensus among the members of a Supervisory Board. Some respondents referred to a power of veto for a supervisory director as ‘a monstrosity’. Finally, reference was made to the provision in the Dutch Corporate Governance Code which states that only one non-independent supervisory director is allowed to have a seat on a Supervisory Board, so that the independence of the majority of the supervisory directors has already been guaranteed as a consequence. Furthermore, it was stated that the legislation and the jurisprudence already contain sufficient safeguards to protect the position of minority shareholders.

Conclusion

Eumedion has taken the comments to heart and has been convinced by these arguments. As a consequence, Eumedion will not propose in the final version of the position paper that, under "normal circumstances",[1] supervisory directors with specific powers of veto should be appointed to monitor the interests of minority shareholders. This means, of course, that companies that have already granted powers of veto to the representatives of controlling shareholders should withdraw these. Eumedion will open a dialogue with these four companies and request them to evaluate the existing powers of veto. Furthermore, Eumedion has expressed reservations with regard to the Monitoring Committee´s proposal to actually encourage more (representatives of) major shareholders to become members of supervisory boards. What Eumedion wonders, in fact, is whether the checks and balances within a supervisory board would still function well if that proposal were to be implemented.

4.3 Qualified voting and quorum requirements

Eumedion proposed in the draft position paper that the thresholds for decisions of the general meeting (AGM) 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 of the Civil Code of the Netherlands (BW), i.e. decisions on legal mergers, winding up, amendments to the articles of association and the disapplication of pre-emptive rights would 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.

Mainly legal experts responded to the proposal in the first sentence. They were generally of the opinion that the law should not prescribe what voting and quorum requirements should apply. "One size fits all does not fit with the characteristics of our company law," according to one respondent. Most of the comments referred to the last sentence of this proposal. Commentators stated that a proposal that has been approved by the Management Board and the Supervisory Board – both of which must serve the interests of the company – can be 'taken hostage' by a relatively small number of shareholders who put short-term interests first, before the long-term interests of the company.

[1] See paragraph 5.2 for specific situations after a public offer has been declared unconditional.

Conclusion

Eumedion sticks to its proposal that the AGM thresholds that apply to the decision-making process involving what are known as 2:107a BW resolutions should be aligned with the AGM thresholds that apply to decisions with regard to legal mergers. No convincing arguments were put forward as to why different thresholds should be observed for these important decisions. Furthermore, equalization of the thresholds provides the Management Board of a listed company with an incentive to do its best to ensure the degree of participation of shareholders in the decision-making process at the AGM is as high as possible. Eumedion would like to see this subject provided for in Book 2 of the Civil Code of the Netherlands.

Eumedion is sensitive, however, to the argument that if the thresholds were to be raised further, even when there is a high degree of participation by shareholders in the decision-making at the AGM, the company will become susceptible to 'event-driven' hedge funds that accumulate a large interest within a short time, with a view to blocking a transaction if their demands are not met. Eumedion will consequently not include this proposal in the final version of the position paper.

4.4 Safeguards for decision-making with regard to related party transactionss

Eumedion also proposed that when a company has a controlling shareholder, the transactions subject to section 2:107a BW regarding which the controlling shareholder has a direct or indirect financial interest should require not only a two-thirds majority of the votes cast in the general meeting, but also a majority of the votes cast by the share capital not affiliated to the controlling shareholder. This should also apply to proposals to amend the articles of association in order to confer special or additional rights on the controlling shareholder.

This proposal too led a number of commentators to point out that the section 2:107a BW transactions can only be initiated by the Management Board and approved by the Supervisory Board. The proposal is then already in the company´s interest. Should a member of the Management Board or a supervisory director have a conflicting interest as regards the transaction or the draft resolution, the person involved is excluded by law[2] from the discussion and decision-making concerning a transaction of this nature. Furthermore, the articles of association of most listed companies include the provision that the articles of association may only be amended on the basis of a proposal of the Management Board that has been approved by the Supervisory Board.

[2] Section 2:129 paragraph 6, BW and section 2:140, paragraph 5, BW.

Conclusion

Eumedion is not completely convinced by the comments. By means of the possibility of dismissal on the initiative of the controlling shareholder for example, the Management Board and/or the Supervisory Board may still feel the pressure of the controlling shareholder to conclude a transaction with this controlling shareholder, or to grant additional advantages to the said controlling shareholder, even if the controlling shareholder has no direct influence on the decision-making process within the Management Board and the Supervisory Board. Eumedion therefore wishes to go one step further than its previous proposal. If the company wishes to conclude a section 2:107a BW transaction with the controlling shareholder, or if the company wishes to submit a proposal for amendment of the articles of association that makes provisions for special or additional rights to be conferred on the controlling shareholder (such as the granting of extra voting rights or a power of veto), the controlling shareholder should not then be allowed to take part in the vote on this proposal in the AGM. A majority of the minority shareholders would have to agree to the proposal in that case. A vote by independent shareholders alone[3] is also nothing strange in the Netherlands: a controlling shareholder is not allowed to participate in the voting at an AGM in which it may be decided to exempt him from the obligation to make a public bid if he passes the mandatory bid threshold.[4] Furthermore Management Board members and other bank employees are not permitted to vote in an AGM in which it is to be decided whether to grant these persons a bonus that is higher than 100% of their base salaries.[5] What is more, the compromise proposal from the European Council regarding the proposed amendment of the Shareholder Rights Directive explicitly offers Member States the possibility of excluding shareholders with a conflicting interest from the voting (draft article 9c, paragraph 2).

4.5 Restriction of special voting rights

Eumedion also proposed in the draft position paper that the number of extra voting rights for one shareholder on account of high-voting stock in the case of dual class shares or loyalty shares should be restricted to no more than 5% of all voting rights.

This proposal produced many mixed reactions. Many legal advisers of listed companies want to retain the present highly flexible situation unchanged, while many investors would like a total ban on shares of this kind or that companies which issue dual class shares or loyalty shares should not be included on a

[3] Shareholders who are not affiliated to the controlling shareholder and/or are not acting in concert with him.

[4] Section 2 Vrijstellingsbesluit overnamebiedingen Wft (Exemption decree takeover bids Netherlands Financial Supervision Act).

[5] Section 1:121, paragraph 4, Wft (Netherlands Financial Supervision Act) in conjunction with section 94, first paragraph, subparagraph g, under ii, CRD IV.

leading index of a stock market. A number of respondents put alternative suggestions forward, such as the temporary allowance of dual-class shares or loyalty shares that are consequently subject to a sunset clause of five years for example, or a stipulation that the introduction of such shares should be an explicit voting item at the AGM and not part of a complete package in a comprehensive merger proposal that is submitted to the AGM. In that case, the shareholder who benefits from the loyalty shares or high voting stock in question could possibly be excluded from the right to vote on a decision of this kind.

Conclusion

Eumedion proposes withdrawing this proposal and maintaining its existing policy on antitakeover measures, which is to allow a listed company to have no more than one takeover defence that comes into operation temporarily. Permanent forms of protection, such as the granting of extra voting rights and/or shares to founders/ major shareholders, or the introduction of high- and low-voting stock, do not fit with this policy. In the unlikely event that a listed company nevertheless wants to introduce a construction that is in permanent operation, Eumedion suggests that the company always puts a proposal of this nature to a separate AGM vote and therefore independently of the other amendments to the articles of association that are the consequence of a legal or cross-border merger or a split-off.[6] If a takeover defence that is in permanent operation is included in the articles of association in the case of an IPO, the use of this defence should be evaluated by the Supervisory Board on an annual basis and the results of this evaluation should be included in the report of the Supervisory Board. Furthermore, the articles of association should contain a sunset clause providing for the automatic lapse of the relevant takeover defence after a specified and foreseeable period (of three to five years).

5. Reactions to and proposed conclusions regarding the specific proposals relating to takeovers

5.1 Independent decision-making

The options explored by Eumedion included the possibility of prohibiting a bidder from building up an interest in the target company (‘stake building’) after the announcement of a public or private offer, or of the bidder abstaining from voting in the general meeting pursuant to section 18 of the Public Takeover Bids (Financial Supervision Act) Decree, pursuant to section 2:107a BW or to section 2:330 BW.

[6] See in this same context the interpretation of 27 October 2015 from the SEC, the US stock market regulator, with regard to Exchange Act Rule 14a-4(a)(3) (http://www.sec.gov/divisions/corpfin/guidance/exchange-act-rule-14a-4a3.htm).

The responses to this proposal were mixed. One respondent proved to be in favour of a ban on stake building as from the moment when the buyer himself has decided to launch a public bid on the shares of a company. Another respondent was only in favour of banning stake building if the minimum percentage for declaring the offer unconditional has been set at lower than 80%. Others showed no enthusiasm for a ban on stake building. There was also little support for excluding the bidder from the right to vote in the relevant AGM, if the bidder has already become a shareholder. This was fundamentally incorrect in the opinion of some respondents and in conflict with the 'one share, one vote' principle, while others contended that it issued an open invitation to event-driven hedge funds to build up minority interests and subsequently to threaten to block the transaction if their requirements were not met.

Some respondents suggested the alternative of appointing a special committee, if the company is the subject of a transaction involving the controlling shareholder or a majority of the members of the Management Board. The members of a committee of this kind should not have conflicting interests. Others wanted guarantees for the independence of supervisory directors and Management Board members without conflicting interests.

Conclusion

Eumedion has studied the Monitoring Committee's proposal to form a special committee in the event of a takeover bid or proposed takeover bid for shares and in the event of a public bid for an important business unit or an important participating interest (draft provision 2.7.4). This special committee must consist of members of the Management Board and supervisory directors. If one or more dependent members of the Supervisory Board have a seat on the Supervisory Board or on the special committee, the chairman of the Supervisory Board should carefully weigh the involvement of these dependent supervisory directors in the decision-making process in connection with the bid (draft provision 2.7.5). Eumedion supports this proposal put forward by the Monitoring Committee, subject to the condition that only independent supervisory directors are permitted to sit on the special takeover or transaction committee in addition to members of the Management Board. Furthermore, Eumedion believes that a member of the Management Board or a supervisory director who decides to become a part of the bidding consortium in the legal sense must withdraw immediately from the takeover or transaction committee and that this should also apply if special arrangements are agreed on for members of the Management Board and supervisory directors that are linked to the success of the takeover.[7] This stance is included in Eumedion's comments on the proposals from the Monitoring Committee.

[7] This does not apply, therefore, to the rolling forward of the customary share (option) schemes to the 'new' company.

Moreover, Eumedion considers it to be best practice if, when the bidder has carried out an extensive due diligence investigation at the target company, he were to refrain from buying up shares in the target company. It is logical to assume that, following an extensive due diligence investigation, the bidder will be in possession of more information about the target company than a 'normal' shareholder and this certainly applies to competitively sensitive information. If he then starts buying up shares in the target company on the stock exchange already, this will obviously be suggestive of insider trading. What is more, the target company will then be creating a situation of information asymmetry between shareholders, which is inadvisable. Eumedion would, therefore, like to see the development of a Dutch market practice whereby the target company only allows the (potential) bidder to carry out due diligence subject to the condition that he does not subsequently buy any shares in the target company on the stock exchange.

5.2 Safeguards regarding taking restructuring measures

Eumedion also proposes that, when 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 submitted to the AGM pursuant to section 18 of the Public Takeover Bids (Financial Supervision Act) Decree to be decided on, in order to ensure that the original shareholders have the opportunity to vote on the intended squeeze-out measures.

Respondents stated that a proposal of this nature would not serve any purpose. In the event of there being little resistance to a bid, a proposal like this would be carried with a large majority of votes. When there is considerable resistance, however, such a proposal would not be adopted. Various shareholders in particular suggested that more safeguards should be introduced to protect shareholders who do not wish to tender their shares. Great reticence should be exercised in the use of "coercive measures" such as a transfer of assets and liabilities. They would like to see the prolongation of the current practice, whereby one or more independent supervisory directors have the power to veto a decision of the Supervisory Board relating to restructuring measures being put to a vote at the AGM.

Conclusion

Eumedion would like to propose that the Management Board and the Supervisory Board of the target company should only cooperate with the inclusion on the agenda of a restructuring measure to be decided on at an (extraordinary) AGM, if the bidder has acquired at least 80% of the shares, or - if the target company decides to place a restructuring measure on the agenda for the AGM pursuant to section 18 of the Public Takeover Bids (Financial Supervision Act) – to include this as a condition for the

subsequent implementation of the restructuring measure. Eumedion will assume for the time being that this rule will develop into Dutch market practice[8] and will also bring its position to the attention of the most important proxy advisory firms. Should it become clear after one or two years that the "80% condition" has not developed into market practice, Eumedion will ask the legislature or the Corporate Governance Code Monitoring Committee to include the condition in the takeover rules or in the Dutch Corporate Governance Code.

Furthermore, it should be ensured that as long as the shares in the target company continue to be listed on the stock exchange - and there are still minority shareholders as a consequence – there must still be at least one or two independent supervisory directors who meet the independence criteria contained in the Dutch corporate governance code, hold no shares in the 'combined' company and have no conflicting interests where the target company is concerned. These supervisory directors should give their explicit approval to transactions with parties affiliated with the company and to restructuring measures, should monitor compliance with the non-financial covenants (including the measures for the protection of any remaining minority shareholders) and supervise the balanced distribution of the synergy benefits between the bidder and the target company when a cooperation agreement been concluded. By putting forward this proposal, Eumedion's position is aligned with the present market practice, which is also enshrined in jurisprudence.

5.3 Raising the minimum threshold for declaring a public offer unconditional

In the draft position paper Eumedion proposed that the statutory minimum threshold for declaring a public offer unconditional should be raised from a simple majority to two-thirds of the issued capital (excluding any interest held by the bidder himself).

The reactions to this proposal were sharply divided. A large number of respondents, mostly legal advisers to listed companies, rejected this idea. A single respondent did not believe the two-thirds majority was advisable if the bidder's 'own' shares could not be taken into account. Investors who responded to this proposal generally believed that the proposed threshold of two-thirds of the equity capital was not high enough. They were more in favour of a figure of 80%.

Some respondents suggested introducing a ban on partial offers, i.e. public offers for a substantial quantity of the shares, but less than 30% of the voting rights. If a partial offer is successful, the party making the offer has a significant influence on the decision-making at the AGM, while no control premium

[8] This also offers flexibility for exceptional circumstances, when a target company is in serious financial difficulties for example (see paragraph 5.3). The reasons for departing from the "80% condition" should be made transparent in circumstances of this kind.

is paid. These respondents do not consider this to be a desirable situation and would be in favour of it not being allowed, so that only a full offer is permitted.

Conclusion

Eumedion is withdrawing the proposal to raise the statutory minimum threshold for declaring a public offer unconditional to 66.67% of the issued capital. At the same time, Eumedion believes that, under normal circumstances, the minimum threshold for declaring a public offer unconditional should be higher than the statutory 50%+1. Eumedion thinks that a minimum threshold of 80% is justified under normal circumstances, but this does not have to be provided for by law. By raising this statutory threshold to 80%, the Netherlands would be out of step in an international context, would offer no custom-made options for a takeover that is able to guarantee continuity of the operational activities of a company that is in serious financial difficulties (see the recent case of Ballast Nedam), and could provoke more takeovers being realised by means of legal or cross-border mergers or asset transactions, certainly for as long as the decision-making thresholds at AGMs for transactions of this kind continue to be rather low and to vary widely (see paragraph 4.3). Furthermore, potential bidders might be put off if the statutory minimum threshold for declaring a public offer unconditional is 80%, which would not be to the advantage of the dynamics of the Dutch takeover market. The proposal in paragraph 5.2 states that the target company will not cooperate with the bidder on the implementation of a restructuring measure if the acceptance rate is lower than 80%. If this does develop into Dutch market practice, it will not then be necessary to raise the statutory threshold for declaring a public offer unconditional.

Eumedion is not in favour of a ban on partial offers. Supporting such a ban would actually imply that Eumedion was in favour of lowering the present mandatory bid threshold of 30%, which would put the Netherlands out of step with other countries. Moreover, it is more attractive from the shareholders´ perspective to accept a partial offer than that a party builds a stake until just below 30% of the issued capital by means of buying shares on the stock exchange.

5.4 Provision of information

Eumedion made two proposals regarding the provision of information:

1. When the takeover is in the form of an asset transaction, the bidder should provide all material information on the rationale for 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.

2. The position statements from the Board referred to in the previous paragraph should be accompanied by a fairness opinion from a competent independent party and these documents should be made public.

A number of responses were received to these proposals. One respondent suggested that shareholders should not only be able to assess the fairness of the bid price when forming an opinion on a bid, but also the fairness of the takeover process in itself. Another respondent expressed his disappointment with the content of fairness opinions from merchant banks and argued in favour of more substantive information in fairness opinions.

Conclusion

In response to these reactions, Eumedion would like to toughen the second proposal referred to above by asking the management of the target company to disclose any fairness opinions and the financial analyses (including the basic premises and long-term prognoses) on the grounds of which the Management Board or the transaction committee reached the conclusion that the intended bid is (also) in the interests of the shareholders in the target company, and to disclose this information no later than at the time of publishing the position statement.

5.5 Realistic possibility of a competing bid

Eumedion proposed that the agreements between the target company and the bidder should not be so prohibitive (as a break fee is, for example) 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.

This proposal was generally supported. Some respondents believed that the break fee should be subject to a maximum, while others were actually opposed to this. Several suggested that a target company in a takeover situation should only be allowed to agree on a break fee if this is reciprocal. One respondent would like to extend this proposal by imposing an obligation on a Management Board to enter into negotiations with potential competing bidders. Yet another respondent thought that, in the event of a public offer, companies should open a “restricted data room’ for parties who could be considering making a competing bid. The same respondent believed that the task of deciding whether the shareholders should be recommended to tender their shares should be transferred to the Supervisory Board as soon

as it is a fact that the Management Board of a target company is participating in the bid, or if the Management Board is to remain in office after the bid has been declared unconditional.

Conclusion

Eumedion is adhering to the proposed principle, with the additional requirement that a break fee should be reciprocal and that not only the amount of the break fee should not be prohibitive, but also the threshold for a competing bid price. Eumedion is cautious about forcing companies to very quickly offer potential bidders ‘a look behind the scenes’. A potential competitor would then quickly be able to gain an insight into sensitive commercial information, without finally making a bid for the shares in the target company. Eumedion also wishes to maintain the principle-based nature of the amount of the break fee. A maximum amount of 1% of the transaction sum is already observed in practice.