Position Paper dated 28 June 2016

Position of minority shareholders in companies with a controlling shareholder

1. Introduction

As a rule, the participants in Eumedion (Dutch and non-Dutch institutional investors) are 'merely' minority shareholders in Dutch listed companies. It is extremely important if institutional investors are to continue investing in these companies that they can be confident that their interests are properly considered when the companies' bodies – the management and supervisory boards and the general meeting of shareholders (AGM) – are making decisions.

Eumedion's participants have been concerned for some time about whether this is done sufficiently in situations where the remaining minority shareholders are faced with a new majority shareholder after a successful public bid has been made for shares. Increasingly often, public bids that have been recommended by the management and supervisory boards of the target company are structured so that shareholders have no alternative in practice than to tender their shares to the bidder since, as a rule, the bidder is given the opportunity to make the bid unconditional even if it has obtained less and sometimes much less than 95% of the issued capital under the bid. The target company then permits the party concerned to use other legal instruments, such as a legal merger, a legal triangular merger or sale of assets followed by liquidation of the company, than the statutory squeeze-out rules (at least 95% of the issued capital must have been tendered) to acquire full control over the target company (and ownership of the shares) and then delist it. Eumedion's participants feel that in many cases their interests are not properly considered by the management and supervisory boards of the target company either when recommending the bid or when taking 'post-closing restructuring measures' as referred to above.

In addition, in recent years there has been the phenomenon of originally foreign companies, such as Fiat Chrysler Automobiles NV, Ferrari NV and Altice NV, more frequently choosing to establish themselves in the Netherlands. One of their motives is the ability under Dutch corporate law to allocate founders/large shareholders additional voting rights by introducing different classes of shares with different voting rights ('dual-class shares') or granting loyalty voting rights. This gives the large shareholder an advantage at the expense of the minority shareholders. A number of Eumedion's participants have publicly expressed dissatisfaction with this. PGGM, for example, noted in a public statement on the introduction of dual-class shares at Altice that "permitting a [dual-share] structure

may contribute to the Netherlands sinking to a lower standard in respect of good corporate governance and shareholder rights. This may seriously damage the image of The Netherlands as a business location.'[1] Indignation was also clear in foreign media.[2]

Further to the above events, Eumedion has drawn up this position paper with proposals to better safeguard the interests of minority shareholders at companies with a controlling shareholder. It addresses situations where there has been a controlling shareholder since flotation or relocation and situations where a controlling shareholder is 'created' as a result of a successful public bid. The box below summarises the proposals in this paper.

A. Good practice for enhancing the checks and balances at listed companies with a controlling shareholder

1. The company and controlling shareholder draw up a relationship agreement which at least confirms that all transactions between them will be agreed on customary market terms, regulates any representation on the supervisory board and contains assurances that all appearance of insider trading will be combatted.
2. The majority of the members of the supervisory or one-tier board are independent.
3. Independent shareholder approval of major transactions between the company and controlling shareholder and of grants of additional rights to the controlling shareholder.
4. Sunset clause for any additional rights for the controlling shareholder on flotation, cross-border or domestic merger or demerger.

B. Good practice in takeover situations

1. The target company establishes a takeover committee.
2. On completion of a comprehensive due diligence review, the bidder does not buy shares in the target company privately or on the market.
3. The target company only co-operates with a post-closing restructuring measure if the bidder has obtained at least 80% of the shares.
4. One or more supervisory directors have special powers after the bid has become unconditional and as long as shares are listed.
5. The target company ensures that there is a real possibility of a competing bid.
6. More transparency and representative decision-making on asset transactions.

This version of the position paper was preceded by a draft with a consultation period from 15 October 2015 to 12 February 2016. The consultation led to 32 written and oral submissions. Separately from this position paper, Eumedion has issued a feedback statement which summarises the submissions and Eumedion's conclusions.

Eumedion will ask the government to take this position paper into consideration with regard to its commitments on i) 'the way in which the removal 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'[3] and ii) to evaluate the Management

[1] https://www.pggm.nl/wie-zijn-we/pers/Paginas/Statement-PGGM-over-corporate-governance-Altice.aspx.
[2] http://www.wsj.com/articles/mylans-leverage-to-resist-teva-deal-reveals-shift-in-rules-1438029585.
[3] 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 (Bulletin of Acts and Decrees 196).

and Supervision (Public and Private Companies) Act in 2016.[4] Eumedion also trusts that a number of proposals made will be taken into account by listed companies and their shareholders so that they develop into Dutch market practice over the next few years. If this has not happened after a number of years, Eumedion will call for the proposals to be incorporated in the Dutch Corporate Governance Code or in legislation.

2. A more concentrated shareholder structure at Dutch listed companies;[5] an analysis

In recent years, we have seen increased concentration of share ownership in Dutch AEX companies (table 1).

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

Largest shareholder	**1 October 2010**	**27 June 2016**
> 30% voting rights	19%	29%
10% to 30%	19%	33%
5% to 10%	52%	38%
< 5%	10%	0%

Source: own research based on the AFM register of 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 a holding of between 10% and 30% of the voting rights) has increased by approximately 50% between 2010 and 2016. There has also been a strong rise in the number of companies with a controlling shareholder (defined in this paper as ownership of more than 30% of the voting rights). Almost two-thirds of the largest 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 AEX companies have more concentrated share ownership; the same applies at other Dutch listed companies. There is, in fact, a controlling shareholder at a large majority of the smaller Dutch listed companies whose shares are traded on the Amsterdam Stock Exchange and Dutch companies whose shares are only traded on a foreign stock exchange.

Table 2: overview of the holding of the largest shareholder in Dutch companies (reference date: 16 June 2016, excluding trust offices; based on voting rights)

Largest shareholder	**AEX (n=21)**	**AMX (n=22)**	**AScX (n=23)**	**Local (n=33)**	**Trading outside NL (n=56)**	**Total NL publicly traded companies**
> 30% voting rights	29%	27%	17%	70%	63%	48%
10% to 30%	33%	41%	61%	27%	32%	37%
5% to 10%	38%	32%	17%	0%	5%	14%
< 5%	0%	0%	4%	3%	0%	1%

Source: own research based the AFM register of 'substantial holdings, SEC registers and annual reports.

[4] Proceedings I/2010/11, no. 28, p. 25 and Parliamentary Papers II 2011/12, 32 873, no. 22, p. 29.
[5] A Dutch listed company is defined in this position paper as a company registered in The Netherlands whose shares are traded on a stock exchange in the Netherlands or elsewhere.

As is clear from table 2, there are controlling shareholders in 48% of the listed companies with registered offices in the Netherlands. This was 'only' 23% in 2005.[6] It can also be concluded that there are only two Dutch listed companies where share ownership is widely dispersed (defined here as a company whose largest shareholder has a holding of less than 5% of the voting rights).

The increase in the number of listed companies with a controlling shareholder is notable 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 Dutch listed company whose shares are traded on a stock exchange in the European Union is obliged to launch a public offer for all the shares. This obligation does not apply, however, to a party that already held a holding of more than 30% at the time of the initial public offering (IPO). There have been several IPOs in recent years in which the selling shareholder(s) initially only sold a minority holding. 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. Relatively often, these companies have a controlling shareholder.

In most cases the voting power of the controlling shareholder reflects the capital contributed to the company by that shareholder, but recently voting power has often been artificially inflated by the issue of 'special voting shares' (loyalty voting rights at CNH Industrial NV, Fiat Chrysler Automobiles NV, Ferrari NV and Cnova NV) or through the issue of shares with enhanced and diminished voting tights (Yandex NV and Altice NV). In both variants, it is mainly the founders who profit from these 'devices' (see table 3).

Table 3: overview of Dutch companies where voting rights are not in line with capital contribution (not counting possible differences between voting rights and capital contribution on financing preference shares)

Company	**Founder's capital holding**	**Founder's voting rights**
Yandex NV: issue of Class A (1 vote) and Class B (10 votes) shares	10.8% (Arkady Volozh)	47.2%
CNH Industrial NV (special voting rights)	29.7% (Agnelli family)	44%
Fiat Chrysler Automobiles NV (special voting rights)	31.3% (Agnelli family)	46.7%
Ferrari NV (special voting rights)	32.7% (Agnelli and Ferrari families)	47.8%
Cnova NV (special voting rights)	94.0% (Jean-Charles Naouri)	96.9%
Altice NV: issue of Class A (1 vote) and B Class (25 votes) shares	52.9% (Patrick Drahi)	63.4%

Source: own research using the AFM register of substantial holdings and gross short positions and annual reports of the companies concerned.

[6] C.F. van der Elst, A. de Jong and M.J.G.C. Raaijmakers, 'Een overzicht van juridische en economische dimensies van de kwetsbaarheid van Nederlandse beursvennootschappen'; *Onderzoeksrapport ten behoeve van de SER Commissie Evenwichtig Ondernemingsbestuur*, 2007. These academics only analysed companies with registered office in The Netherlands and whose shares are listed on Euronext Amsterdam. If only this group of Dutch listed companies is taken into account, the total number of Dutch listed companies with a controlling shareholder in June 2016 is 39%.

Increased concentration of share ownership not only has consequences for the decision-making process in AGMs but in practice it also influences the membership of the supervisory or one-tier board. More and more large shareholders are demanding seats on the supervisory or one-tier board. At present, more than one-third of the Dutch listed companies whose shares are traded on the Amsterdam Stock Exchange directly or indirectly have one or more representatives of the large shareholders on the supervisory or one-tier board. The rights and obligations of the large shareholder and the company are usually set out in what is referred to as a relationship agreement. In itself, this does not necessarily pose a problem from the position of minority shareholders, since those representatives can provide a positive impulse to the quality and professionalism of internal supervision. It becomes a potential problem, however, when these representatives constitute a majority of the members of the supervisory or one-tier board or are granted additional voting rights or a veto in board meetings. There is no majority of independent members on the supervisory or one-tier board at seven companies whose shares are traded on the Amsterdam Stock Exchange (Altice NV, Flow Traders NV, Amsterdam Commodities NV, Kiadis Pharma NV, AND International Publishers NV, IEX Group and NedSense enterprises NV). In addition, four companies have provisions in their articles of association that the shareholder representative can veto any decision or specific decisions taken by the supervisory 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 of whether, as a result, the checks and balances function properly at AGMs and meetings of the executive and supervisory boards and whether the independent operation of the company is assured in these circumstances.

3. Existing 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, there is also a risk that the interests of the controlling shareholder may conflict with those of the minority shareholders in some situations. As a result, additional 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) and case law 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 discharging their roles, the management board and supervisory board members shall be guided by the interests of the company and its affiliated enterprise, taking into consideration the interests of the company's stakeholders (Sections 2:129(5) and 2:140 2 BW and principles II.1 and III.1 of the Dutch Corporate Governance Code).
- A management and supervisory board member may not participate in the adoption of board resolutions (including deliberations in respect of these) if he or she has a direct or indirect

personal interest that conflicts with the interests of the company and its affiliated enterprise (Sections 2:129(6) and 2:140(5) BW).

- All those associated with the company are required to behave towards one another in a manner that is reasonable and fair (Section 2:8 BW). It is generally assumed that actions that conflict with reasonableness and fairness also imply misuse of control and abuse of power.
- A company that has a majority shareholder has a special duty of care with respect to its minority shareholders (case law: 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 must treat all shareholders who are in the same position equally (Section 2:92(2) BW). Consequently, shareholders should not be treated disproportionately or arbitrarily.
- The right of shareholders to obtain information at the AGM (insofar as this does not conflict with a substantial interest of the company) (Section 2:107 BW)).
- The right of shareholders who have a certain capital interest in a company to apply to the Enterprise Chamber of the Court of Appeal in Amsterdam for an investigation into the affairs of a company and to take immediate measures (Section 2:345 BW). One of the purposes of this right is the protection of minority shareholders against (possible) abuse of power by the majority (HR 11 April 2014, NJ 2014/296 (Slotervaartziekenhuis).
- The obligation of a party that acquires 30% of the voting rights in a Dutch listed company to make a public bid for the shares of that company for a fair price (Section 5:70 of the Financial Supervision Act (Wft)).
- No 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 be independent non-executive directors (best practice provision III.8.4 of the Dutch Corporate Governance Code). The chairman of the one-tier board may not also be an executive director (Section 2:129a(1) BW).
- Shareholders shall act in relation to the company, the organs of the company and their fellow shareholders in keeping with the principle of reasonableness and fairness. (principle IV.4.4 of the Dutch Corporate Governance Code). It is generally accepted that the greater a shareholder's holding in the company, the greater its responsibility becomes, including towards the company's minority shareholders and other stakeholders (Corporate Governance Code Monitoring Committee, 2008).

We see, in particular, that the Code's provisions which deal specifically with the membership of supervisory and one-tier boards and the independence of the members of these boards can, however,

easily be set aside by companies with controlling shareholders. The ‘apply or explain’ rule applies to the Code’s provisions: listed companies are not obliged to apply them if an explanation is provided.

The statutory provisions and the provisions of the code make it possible for large shareholders who are also represented on the management or supervisory boards to arrange that:

- a member may cast more than one vote (Sections 2:129(2) and 2:140(4) BW). That number of votes is limited by law to the number of votes that may be cast jointly by the other executive or supervisory directors.
- dual-class shares are issued or loyalty shares or loyalty voting rights are granted to the large shareholder in question (Section 2:118 BW).

The combination of these two abilities has a detrimental effect on the functioning of the checks and balances within the management or supervisory board and at the AGM. It is extremely doubtful whether it is then possible to comply with an important principle of the Dutch Corporate Governance Code, which is that the AGM should be able to exert such influence on the policy of the management and supervisory boards 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 doubtful 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 if there is complete transparency concerning the governance structure, a shareholder can consciously decide whether or not to buy or sell shares in the company in question. While this may well be the case, the possibility of setting up a governance structure of this kind under a legal system can have repercussions for investor confidence in a given jurisdiction. When investors start to have doubts about the degree of protection in such a jurisdiction, 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 they in particular also continue to trust the Dutch system of corporate governance and checks and balances and can be confident that these things are well regulated in the Netherlands without having to carry out excessively complicated research into these matters.

It is Eumedion’s opinion, therefore, that checks and balances, particularly at concentrated listed companies, must be reinforced. We set out a number of proposals in this respect in the following section.

4. Proposals to enhance the checks and balances at listed companies with a controlling shareholder

4.1 Relationship agreement between the company and controlling shareholder

To show the outside world that the company has sufficient independence from the controlling shareholder in day-to-day operations, the company is expected to enter into a relationship agreement with that shareholder setting out each party's rights, obligations and expectations. The relationship agreement is expected to include at least the following elements:

- Confirmation that all transactions between the company and the controlling shareholder are conducted at arm's length and on customary commercial terms (best practice provision III.6.4 of the Dutch Corporate Governance Code).
- Any representation of the controlling shareholder on the supervisory or one-tier board and committees, stating whether that representation will be ended or reduced if the controlling shareholder's holding falls below certain limits.
- Safeguards to prevent any appearance of insider trading.

At least the main elements of the relationship agreement should be published, and preferably the entire agreement should be placed on the company's website. The companies concerned are expected to report on the implementation of the relationship agreement each year in the management report.

It is Eumedion's opinion that this proposal is suited to be a best practice provision in the Dutch Corporate Governance Code. Until that time Eumedion will apply it as its own best practice.

4.2 Adequately number of independent supervisory or non-executive directors

It is expected that at least half of the members of the supervisory or one-tier board meet the independence criteria as defined in the Dutch Corporate Governance Code. The supervisory or one-tier board must act collectively and so it is inappropriate for a large shareholder's representatives on the supervisory or one-tier board to have additional rights, such as specific rights of approval or direct or indirect vetoes.

It is Eumedion's opinion that this proposal is suited to be a best practice provision in the Dutch Corporate Governance Code. Until that time Eumedion will apply it as its own best practice.

4.3 Independent shareholder approval of major transactions between the company and the controlling shareholder and of grants of additional rights to the controlling shareholder

Section 4.1 proposes that institutional investors expect that the agreement between the company and the controlling shareholder ensures that all transactions between them are conducted at arm's length and on customary commercial terms. This is in accordance with best practice provision III.6.4 of the

Dutch Corporate Governance Code. By law, management board or supervisory board memberss may not take part in the discussions and decision-making on such a transaction if they have a conflict of interest.

Eumedion does not believe that these safeguards are sufficient for major transactions between the company and the controlling shareholder[7] as defined in Section 2:107a BW. The controlling shareholder may have such a large personal and financial stake in a transaction going ahead that there is a risk that the management and supervisory boards of the company feel the pressure of the controlling shareholder (for example the possibility of dismissal on the initiative of the controlling shareholder) to nevertheless agree to such a transaction even if the controlling shareholder or its representatives do not directly influence the decision-making by the management and supervisory boards. The same applies with respect to any resolution to amend the articles of association to grant the controlling shareholder special or additional rights, such as additional voting rights or a veto.

Consequently, Eumedion proposes stronger safeguards on fair decision-making on such resolutions. Specifically, Eumedion proposes that the controlling shareholder (and parties related to it) may not participate in the decision-making on such proposals in the AGM. A majority of the minority shareholders should be required to approve the resolution in these cases. Votes only by independent shareholders[8] are not unusual in The Netherlands: a controlling shareholder may not vote in an AGM which resolves to exempt him from making a mandatory bid.[9] In addition, executives and other employees of banks may not vote in an AGM which resolves to grant them a bonus higher than 100% of their fixed salary.[10] Furthermore, the European Council's compromise proposal to amend the Shareholder Rights Directive (draft Section 9c(2)) explicitly allows Member States to exclude conflicted shareholders from votes. A few Dutch listed companies, such as Kardan NV, already have included a rule as suggested above in their articles of association.

Eumedion believes that the Code is not a strong enough instrument for this proposal and calls for a statutory basis. Given the overlap with the proposal to amend the Shareholder Rights Directive, Eumedion calls for the proposal to be included in the Bill to implement this Directive.

4.4 Sunset clause for any additional rights for the controlling shareholder on flotation, cross-border or domestic legal merger or demerger

Section 4.3 includes a proposal that an amendment of the articles of association to grant additional voting or other rights to the controlling shareholder requires a resolution of the AGM which the controlling shareholder does not take part in. This proposal will not be effective if these additional rights are granted shortly before flotation or ahead of a cross-border or domestic legal merger or demerger. Consequently, Eumedion proposes that if a cross-border or domestic legal merger or

[7] Including transactions with other companies which are also controlled by the controlling shareholder or companies managed or controlled by the controlling shareholder or his family.
[8] Shareholders not related to the controlling shareholder and/or not acting in concert with the controlling shareholder.
[9] Section 2 of the Decree providing for Exemptions in respect of Take-over Bids.
[10] Section 1:121(4) of the Wft in conjunction with Section 94(1)(g)(ii) CRD IV.

demerger materially alters the nature of a company's shareholding structure, for example by the introduction of a departure from the 'one share, one vote, one dividend' principle with the aim of benefitting the controlling shareholder (such as dual-class or loyalty shares), the resolution to alter the shareholding structure is put to a separate vote, independently of other amendments of the articles of association arising for example from a cross-border or domestic legal merger or demerger. If the advantage to the controlling shareholder is brought about by an IPO, the supervisory board should evaluate such a shareholding structure and set out the outcome of the evaluation in its report each year. The company's articles of association must also include a sunset clause that provides for that shareholding structure to lapse automatically after a given period – three to five years.

It is Eumedion's opinion that this proposal is suited to be a best practice provision in the Dutch Corporate Governance Code. Until that time Eumedion will apply it as its own best practice.

5. Takeover situations

Takeover situations are a specific source of 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[11] and the remaining shareholders can be squeezed-out (Sections 2:92a and 2:359c BW). The target company is then no longer under an obligation to hold separate AGMs or prepare separate, company financial statements and it can be included with the bidder in a fiscal unity for corporate income tax purposes. In order to exert more pressure on shareholders to tender their shares, 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 of the share capital has been tendered is usually kept open and the holding of the remaining shareholders is subsequently reduced to less than 5% of the issued capital by means of a legal merger, triangular legal merger or sale and transfer of all, or substantially all, of the assets and liabilities or if the target company is liquidated followed by the distribution of proceeds. This strategy has a very good chance of success as the AGM which has to decide on the legal merger or 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 allowed that a bidder may acquire complete control over a target company through legal instruments other than the squeeze-out proceedings, such as a legal merger, demerger, sale of assets or liquidation, subject to the condition that the use of these legal instruments is not contrary to general standards of reasonableness and fairness. It is generally assumed from case law that the bidder is operating within the limits of the standards of reasonableness and fairness when:

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

a. the bidder's intentions are transparent and set out in the offer document;[12]
b. it has been documented that decisions to take a concrete restructuring measure require the approval of a supervisory board which does not consist entirely of members related to the bidder and where the votes of the independent members are decisive;[13]
c. if a legal merger is chosen as a restructuring measure, the valuation is executed by specialists.[14] Furthermore, the remaining minority must share in synergy benefits. It is not acceptable to deliberately set the exchange ratio such that the minority shareholders do not receive shares in the acquiring company but cash only.[15]

An alternative to the public offer for shares is a direct bid for the company's assets, as happened in 2015 in the takeover of the Roto Smeets Group,[16] when six large shareholders representing almost 87% of the issued capital made a request to place an offer they themselves were intending to make for all the assets of the subsidiary on the agenda. Despite the provision in the articles of association that a proposal of this nature may only be submitted to the general meeting after it had been approved by the management and supervisory boards, the management board of the Roto Smeets Group agreed to this request and recommended the shareholders to vote in favour. Apart from the question of whether the nature of the collaboration between these majority shareholders was such that this would have required them to launch a public offer for the shares in the Roto Smeets Group, there are no special rules for takeovers in the form of an asset transaction.

In view of the above, Eumedion believes that the position of minority shareholders in takeover situations must be strengthened.

6. Specific proposals on takeovers (public bid, asset transaction, legal merger, cross-border merger)

6.1 The target company establishes a takeover committee

In the case of a pending takeover, institutional investors expect that the company will establish a special committee comprising one or more management board members and/or a number of independent supervisory directors. If an executive or supervisory director decides to participate in the bid (in legal terms, becomes part of the bidder), he must immediately withdraw from the takeover committee. The same applies if special arrangements are agreed for certain executive and/or supervisory directors related to the success of the takeover.[17]

[12] Court of Amsterdam 11 June 1999, JOR 1999/174 (Leyinvest/KBB).
[13] Supreme Court 14 September 2007, NJ 2007, 612 (Versatel).
[14] Enterprise Chamber 24 March 2006, JOR 2006/98 (Versatel).
[15] Enterprise Chamber 20 December 2007, JOR 2008/36 (Shell).
[16] And earlier (2009) also during the takeover of Super de Boer by Jumbo. Companies including Equant, New Skies Satellites, EVC International, SBS and Qurius were also delisted in this way.
[17] This does not, therefore, apply to 'rolling over' normal share and option schemes to the 'new' company.

It is Eumedion's opinion that this proposal is suited to be a best practice provision in the Dutch Corporate Governance Code. Until that time Eumedion will apply it as its own best practice.

6.2 On completion of a comprehensive due diligence review, the bidder does not buy shares in the target company privately or on the market

When the bidder has carried out a comprehensive due diligence review at the target company, Eumedion expects that it will refrain from buying shares in the target company privately or on the market. It follows that after a comprehensive due diligence review, the bidder will have more and in any event competitive and commercially-sensitive information on the target company than an 'ordinary' shareholder. If it then buys shares in the target company on the market, there is likely to be the appearance of insider trading. Furthermore, the target company creates a situation of information asymmetry between shareholders which, from the position of minority shareholders, is very undesirable.

Eumedion wants to see a Dutch market practice developing that the target company only allows a potential bidder to perform due diligence subject to the condition that it subsequently does not buy its shares on the market, at least during the term of the bid. That market practice is suited to be a best practice provision in the Dutch Corporate Governance Code.

6.3 The target company only co-operates with a restructuring measure if the bidder has obtained at least 80% of the shares

Eumedion proposes that the management and supervisory boards of the target company only co-operate with putting a restructuring measure on the AGM agenda if the bidder holds at least 80% of the shares or, if it opts to place a restructuring measure on the AGM agenda pursuant to Section 18 of the Public Offers (Financial Supervision Act) Decree, that it makes this a condition for the eventual execution of the restructuring measure.

Eumedion is currently assuming that this rule will develop into Dutch market practice.[18] Eumedion will also bring its position to the attention of the main proxy advisors. If after a year or two the '80% condition' has not developed into Dutch market practice, Eumedion will ask the legislature or Corporate Governance Code Monitoring Committee to include it in the takeover rules or in the corporate governance code.

6.4 Supervisory directors with special powers as long as the shares are listed after a bid has become unconditional

There has to be assurance in a situation in which a public bid has been declared unconditional and the shares of the target company are still being traded on a stock market (and so there are still minority shareholders) that there are at least one or two supervisory directors who meet the independence

[18] This also offers flexibility for exceptional circumstances, such as a target company in serious financial difficulties. In such circumstances, the reasons for departing from the '80% requirement' must be made transparent.

criteria in the Dutch Corporate Governance Code, have not participated in the bid and do not have conflicts of interests with the target company. These supervisory directors must explicitly approve transactions with the company's related parties and restructuring measures, supervise compliance with non-financial covenants (including measures to protect any remaining minority shareholders) and supervise a balanced distribution of the synergies when a partnership has been agreed.

In this, Eumedion is in line with current market practice, which is also established in case law.

6.5 Real possibility of a competing bid

The merger agreement between the target company and the bidder may not be so prohibitive (e.g. a break fee or the level of the competitive bid price) that it is not possible in practice for a third party that might be interested in launching a public offer to negotiate with the target company.

It is Eumedion's opinion that this proposal is suited to be a best practice provision in the Dutch Corporate Governance Code. Until that time Eumedion will apply it as its own best practice.

6.6 More transparency and representative decision-making on asset transactions

A takeover does not have to be made only by a public bid on the shares but may de facto occur through a cross-border or domestic legal merger (with a surviving and disappearing company) or by the sale of all the assets to a specific party. In the case of a public bid, shareholders are protected by strict procedural and transparency requirements and can decide in all freedom whether or not to tender their shares. There are also strict procedural and transparency requirements for a domestic or cross-border legal merger and an AGM resolution has to be passed by a two-thirds majority of the votes if less than half of the issued capital is present or represented at the meeting. In the case of a takeover by an asset sale, a shareholder has only moderate protection, while the consequences may be far-reaching. If it is proposed to sell all the assets, shareholders who do not agree with the price for the assets but who in the end lose in the AGM have to deal with a distribution of the proceeds and subsequently an empty shell company. The Dutch Corporate Governance Code only states that such a proposal shall be explained in writing and that the management board shall address all the facts and circumstances relevant to granting approval (best practice provision IV.3.8). The AGM can approve the asset transaction by a simple majority of the votes cast.

Eumedion does not understand why shareholders in a company whose assets are sold should be in a worse position than those of a company disappearing as a result of a legal merger. Eumedion, therefore, proposes that the AGM resolution on an asset transaction also requires a two-thirds majority of the votes if less than half of the issued capital is present or represented at the AGM. This requirement should be embedded in Book 2 of the BW.

In addition, the information provided on an asset transaction must be improved. The bidder must provide all material information on the rationale of the transaction and the management and supervisory boards of the target company should publish a position statement in which the

management describes why the transaction is in the interests of the company, its business and other stakeholders, including the shareholders. The position statement should be accompanied by a fairness opinion issued by an independent expert party and the financial analyses (including the assumptions and long-term forecasts) on which the conclusion that the transaction is also in the interests of the shareholders of the target company rests.

It is Eumedion's opinion that this proposal is suited to be a best practice provision in the Dutch Corporate Governance Code. Until that time Eumedion will apply it as its own best practice.

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	No minimum
Smit (2010)	Boskalis	75%
Crucell (2010)	Johnson & Johnson	80%
Draka (2011)	Prysmian	No minimum
Gamma (2011)	Gilde	No minimum
TNT Express (2012)	UPS	No minimum (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	66.67%
UNIT4 (2013)	Advent	75%
Ziggo (2014)	Liberty	65%
HES (2014)	Hestya	75%
Corio (2014)	Klepierre	66.67%
Nutreco (2014)	SHV	66.67%
Exact (2014)	Apax	70%
Crown Van Gelder (2015)	Andlinger	80%
Grontmij (2015)	Sweco	66.67%
TNT Express (2015)	FedEx	65%
Ten Cate (2015)	Gilde c.s.	66.67%
Ballast Nedam (2015)	Renaissance Construction	50%+1
USG People (2016)	Recruit	80%
Reesink (2016)	Gilde c.s.	80%