

6 February, 2019

To: Ministerie van Justitie en Veiligheid

Re: Consultation on the proposed introduction of a thinking period for publicly listed companies.

Glass Lewis appreciates the opportunity to comment on the draft bill, proposed by the Ministry of Justice and Security, which would allow Dutch listed companies to invoke a statutory response time of up to 250 days if shareholders ask the company to put a change in the board composition on the agenda of a general meeting, or in the event of a hostile public offer.

About Glass Lewis

Founded in 2003, Glass Lewis is a leading, independent governance services firm that provides proxy research and vote management services to more than 1,300 clients throughout the world. While, for the most part, institutional investor clients use Glass Lewis research to help them make proxy voting decisions, they also use Glass Lewis research when engaging with companies before and after shareholder meetings.

Through Glass Lewis' Web-based vote management system, ViewPoint, Glass Lewis also provides investor clients with the means to receive, reconcile and vote ballots according to custom voting guidelines and recordkeep, audit, report and disclose their proxy votes.

From its offices in the UK and Europe, North America and Australia, Glass Lewis' 360+ person team provides research and voting services to institutional investors globally that collectively manage more than US\$35 trillion. Glass Lewis is a portfolio company of the Ontario Teachers' Pension Plan Board ("OTPP") and Alberta Investment Management Corp. ("AIMCo"). Glass Lewis operates as an independent company separate from OTPP and AIMCo. Neither OTPP nor AIMCO is involved in the day-to-day management of Glass Lewis' business. Moreover, Glass Lewis excludes OTPP and AIMCo from any involvement in the formulation and implementation of its proxy voting policies and guidelines, and in the determination of voting recommendations for specific shareholder meetings.

Background of the Proposed Legislation

In the preliminary design of this legislation, the Ministry proposes to implement a 250-day *bedenktijd* (“thinking period”). As stated in the explanatory notes of the law, the goal of the introduction of this period is to create a possibility for the board to make a substantively founded response to a shareholder proposal or imminent takeover bid in the following cases:

- Where one or more shareholders, holding at least 3% of the issued capital, request to appoint, suspend or terminate the term of a director, or amend the procedures for doing so; and
- A public hostile bid on the Company is either announced or in process.

The board can invoke the thinking period if the proposals are judged as to be in direct conflict with the interests of the Company and the decision to invoke the thinking period has been approved by the supervisory board.

As set out below, we note that Dutch companies already have substantial power to cripple shareholder actions and takeover bids. In recent history—such as in the case of KPN and América Móvil—Dutch companies proved well-equipped to block a takeover with existing mechanisms. The proposed legislation would grant management with yet another anti-takeover defense mechanism at the expense of shareholders’ fundamental right to elect or remove supervisory board members.

Response Time vs Thinking Period

We note that the Dutch Corporate Governance Code (“Code”) already contains a provision providing companies with the possibility to stipulate a response time, which should not exceed 180 days from the moment the board is informed by one or more shareholders that they intend to add an item on the agenda. Notably, the Code stipulates that this provision should not be used in cases in which a shareholder has successfully acquired three-quarters of the issued share capital following a public bid. It is unclear to us how an additional

statutory thinking period, on top of the 180 days response time stipulated in the Code, would improve the quality of debate around such significant issues.

Glass Lewis' View on the Proposed Legislation

In general, Glass Lewis believes that measures put in place to prevent or thwart a potential takeover of a company are not conducive to good corporate governance and can reduce management accountability by substantially limiting opportunities for shareholders. We note that Dutch companies already benefit from a unique and decidedly Dutch system of protection against takeovers in the form of protective preference shares and protective foundations: *Stichting Administratiekamer* and *Stichting Continuïteit*. Further, taking into account the very effective anti-takeover mechanisms already available to Dutch companies, we do not believe shareholders will be served well by any additional impediments to takeover bids. The legislation, as proposed, would certainly deepen the so-called “Dutch discount” by frustrating potentially value-accretive acquisitions.

In addition, we are particularly concerned about the failure to consider the rights of shareholders unaffiliated with the proposal or bid resulting in the invocation by management of a thinking period. At the very least, these shareholders should be offered a separate vote on whether to allow the management board to invoke the thinking period. Moreover, while we acknowledge the proposed requirement for engagement between certain stakeholders—shareholders holding above 3%, the supervisory board and works council—the potential lack of public disclosure available to all shareholders under the proposed legislative framework greatly concerns us.

Furthermore, we are very concerned that the current legislative proposal does not require any public disclosure by the company until the end of the thinking period. In our view, such important matters should not be negotiated exclusively behind closed doors for such an extended period of time. Transparency is crucial to ensure that all shareholders—including minority shareholders without direct access to management—have the opportunity to reflect on information provided by the company in a timely manner. Given the material effect of a potential change in control on all shareholders, any legislation that impedes the flow of information during such a crucial debate is likely to disenfranchise minority shareholders.

Comment on Additional Developments

We would like to highlight that several of the most recent changes to the proposed legislation are decidedly against shareholder interests. The initial legislative plan specified that the thinking period could be invoked only in the case of a significant alteration of the company's strategy. By expanding the scope under which the thinking period could be invoked to include the submission of a shareholder request to elect or remove a director, the proposed regulation would severely infringe on fundamental shareholder rights. Such a transfer of oversight responsibilities from shareholders to management is antithetical to the basic principles of corporate governance.

The original proposal also specified that a company could also not use other anti-takeover mechanisms during the thinking period. Corporate governance controls simply cannot be effective when a company's management is able to invoke protective measures while simultaneously reducing shareholders' rights to hold directors accountable for their actions.

While we fail to find any advantages of the proposed thinking period for shareholders in general, the removal of these two relative safeguards of shareholder interests is particularly concerning.

Summary

We believe certain shareholder interventions are warranted. In this case, the proposed legislation does not address what might attract investors to intervene in the first place: subpar company performance.

As a result, we are decidedly not in favour of the proposed legislation. Not only do we see these amendments as counter to shareholder interests but we strongly believe they are unnecessary. We urge the government not to move forward with this proposal, taking into account the strong anti-takeover mechanisms already available to Dutch companies.

Thank you in advance for your consideration and please do not hesitate to contact us if you would like to discuss any aspect of our submission in more detail.

Respectfully submitted,

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