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Dutch Ministry of Finance
Attn. Mr. Wopke Hoekstra, Minister of Finance
Postbus 20201
2500 EE The Hague

Submitted via web-portal

4 July 2019

Dear Mr. Hoekstra,

AIMA response to the Dutch Ministry of Finance consultation on the draft legislative proposal for a 2% threshold for substantial shareholdings

The Alternative Investment Management Association Limited (AIMA)¹ appreciates the opportunity to provide feedback in response to the consultation on the draft legislation proposing to introduce an additional threshold of 2% for disclosure of control and capital of listed corporates that will co-exist alongside the current initial notification threshold of 3% (the 'proposal').

Members of AIMA are asset managers operating at a global level and serving the interests of a broad investor base in the EU, United States and elsewhere. Our members have long considered the Netherlands to provide one of the most attractive European investment environments, based on a flexible, pro-business and sound regulatory framework.

We understand the political context in which this proposal was drafted but remain concerned with the overall adverse consequences it could have on the general attractiveness of the country for foreign investment. In particular, we would also respectfully raise the Minister's attention on the impact such measure might have on the Capital Market Union project, which we understand the Netherlands support, given the effect this measure will have on the free flow of capital coming from the EU.

¹ AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than \$2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 100 members that manage \$350 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org.

We therefore would like to provide a few considerations that we believe should be carefully thought through before deciding whether such a draft bill should go forward.

A link between lowering initial notification thresholds and an improved relationship with investors has not been established

In the Explanatory Memorandum published together with the proposal, the argument is made that lowering of the registration threshold will help prevent short term investors from putting pressure on listed companies. We feel that this argument is not fully developed, and it is difficult to understand how lowering the initial notification threshold will contribute to a more “sustainable relationship between a company and its shareholders”. The Explanatory Memorandum provided few details regarding this mechanism, other than the fact that the board will be able to communicate with shareholders “in a more targeted manner”. However, the board can already do so via other legislative provisions, such as Securities Giro Transactions Act (Wge) (article 49(b)(2)) which is being improved via the implementation of the second Shareholder Rights Directive (SRD II) (see below). We would therefore respectfully recommend to carefully analyse the relationship between a lower initial notification threshold and an improved communication with shareholders, which could be compared, for example, to the promotion of a better use of the Wge by corporate boards, before adopting any significant changes to corporate law.

A lower initial notification threshold deviates from other EU Member States’ customary thresholds

The European Transparency Directive 2004/109/EC article 9(1) requires that Member States of the European Union should at least have a 5% notification threshold in place. The current threshold in the Netherlands, which is 3%, is already below the European requirement and aligns the Netherlands only with the UK and Germany. Lowering the threshold to 2% would bring the Netherlands in an even smaller minority, as only the Czech Republic and Portugal have thresholds lower than 3% (1% and 2% respectively). Most other Member States follow the minimum requirement of the Transparency Directive (see overview of Member States’ thresholds in annex I below). In addition, all the main global marketplaces apply the 5% threshold (United States, Hong Kong, Singapore, Japan). We therefore support the AFM position as presented in its letter dated 12 June 2019 in which the AFM advocates for a level playing field in the EU and considers this proposal as “a prelude to more fragmentation within the EU”.

The proposed initial notification threshold is unrelated to any securities or company law rights, unlike the 3% threshold

The 3% threshold, although lower than the initial notification threshold required by the EU Transparency Directive, was in part chosen because it aligns with the UK and Germany but also because it is linked to the right to request items to be put on the agenda of a general meeting. This mechanism also exists in other Member States, including those where the initial notification threshold is lower than 3%. For example, in the Czech Republic and Portugal, the respective 1% and 2% thresholds are tied to the right to request agenda items, as well as, in Portugal, to the right to request the chairman to call a general meeting. In the current proposal, the 2% number seems arbitrary and does not seem to reflect its proposed “substantial” condition as it is not accompanied with the related shareholders rights.



The proposed initial notification threshold could be redundant with the Securities Giro Transfer Act

As already mentioned above, identification of shareholders with an interest of at least 0.5% is already possible on the basis of the Securities Giro Transactions Act (Wge). Such identification will even be made easier by the implementation of the second Shareholders Rights Directive which is currently being dealt with by the Dutch Senate.

We believe the identification mechanism granted by the Wge already gives sufficient insights into the shareholder base and is a useful tool to enable a listed company to build a long-term relationship with its investors. We would recommend relying on and promoting the use of this targeted mechanism rather than lower the initial notification threshold which will impose significant compliance costs to many investors in Dutch corporates, which may result in decreasing the attractiveness of investments in those companies.

A lower initial notification threshold is a restriction to the free movement of capital as a result of the increase of disclosure costs

As per Article 63 of the Treaty of the Functioning of the European Union (TFEU), any restriction to the free movement of capital and payments among Member States is prohibited. The measures mentioned in the proposal and Explanatory Memorandum are either covered by other existing laws or have no concrete effect, as mentioned above. Furthermore, the proposal will result in a significant increase of paperwork for investors in Dutch-listed corporates. Lowering thresholds will exponentially increase both the number as well as the frequency of disclosures which have to be supported by complex IT systems as a lot of the trading or investing is currently done on a quantitative and automated basis. Overall, this measure will significantly impact such processes and it will become more expensive to trade on Dutch markets. Therefore, lowering the notification thresholds will certainly discourage many international investors to invest in, or trade, Dutch-listed companies, thus impacting the free flow of capital from within, but also from outside, the EU and going against the EU founding principles.

In conclusion, we would strongly recommend that the Ministry of Finance carefully assess the impact the proposal may have at various levels against the potential benefits before deciding to go ahead with such measure.

We would be happy to elaborate further on any of the points raised in this letter. For further information please contact Marie-Adelaide de Nicolay, Head of AIMA Brussels (madenicolay@aima.org).

Yours sincerely,

Jiří Król
Deputy CEO, Global Head of Government Affairs
AIMA

Annex

Austria	3/4 ²
Belgium	5
Bulgaria	5
Croatia	5
Cyprus	5
Czech Republic	1 ³
Denmark	5
Estonia	5
Finland	5
France	5
Germany	3 ⁴
Greece	5
Hungary	5
Iceland	5
Ireland	3/5 ⁵
Italy	3
Latvia	5
Lithuania	5
Luxembourg	5
Malta	5
Netherlands	3
Norway	5
Poland	5
Portugal	2
Romania	5
Slovakia	5
Slovenia	5
Spain	3
Sweden	5
United Kingdom	3/5 ⁶

Source: ESMA, May 2018⁷

² In Austria, the threshold of 3% applies only to issuers which have stipulated this threshold value in their articles of association. A special condition for this to become effective is the publication of the relevant clause of the articles of association on the issuer's website and a notification to the FMA.

³ The 1% threshold only applies to holdings in companies with share capital > 500m CZK.

⁴ The 3% threshold applies only for notifying voting rights (TD Art. 9/10), but not for positions arising out of financial instruments (TD Art. 13) or aggregated positions (TD Art. 13a).

⁵ For closed-ended collective investment schemes and non-Irish issuers: 5%. For all other issuers: 3%.

⁶ For non-UK issuers: 5%. For UK issuers: 3%.

⁷ ESMA, May 2018, National rules on notifications of major holdings under the Transparency Directive.