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# SHAREHOLDER ACTIVISM IN THE COURTROOM: THE NETHERLANDS

PROF. DR. SVEN DUMOULIN

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## Corporate purpose and the U-turn of Dutch corporate law

- Historically, the Netherlands have a stakeholder-oriented governance model (e.g. 1960's introduction of the structure regime with mandatory employee participation at SB-level; WCA)
- Late 1990s – early 2000s brought a focus to enhancing shareholder rights (e.g. 1% shareholders right to table AGM/EGM resolutions)
- Listed companies then took similar measures, such as abolishing anti-takeover mechanisms (e.g. share certification, binding nomination rights, priority shares)
- Undesirable side-effects(?): ABN AMRO take-over (2007) and financial crisis (2008)
- Recently: legislator and Dutch Governance Code focus strongly on long term value creation
- Primacy of stakeholder model confirmed by Dutch Supreme Court:

*“In discharging their duties, directors must be guided by the interests of the corporation and its affiliated enterprise (cf. art. 2:239 (5) of the Dutch Civil Code). What that interest entails depends on the circumstances of the situation. If the corporation is operating a company, the corporation's interest is usually determined primarily by promoting the continued success of this enterprise. (... )” [DSC Cancun]*

## Central position of the Executive Board and Supervisory Board; shareholders have statutory rights

- Dutch Supreme Court over the years consistently developed the basic architecture of Dutch corporate governance:
  1. Executive board and supervisory board determine strategy and policy, and have discretionary powers doing so. What entails "strategy and policy" has been determined by case law
  2. AGM (only) has the powers attributed to it by law and articles, including right to appoint and dismiss directors
  3. Boards are accountable to the AGM. However, absent any statutory provision or provisions in the articles, boards have no obligation to consult AGM in advance of taking strategic decisions
  4. Articles typically do not grant the AGM of listed companies more than its statutory powers



## Dutch capital market and legal system are susceptible to shareholder activism

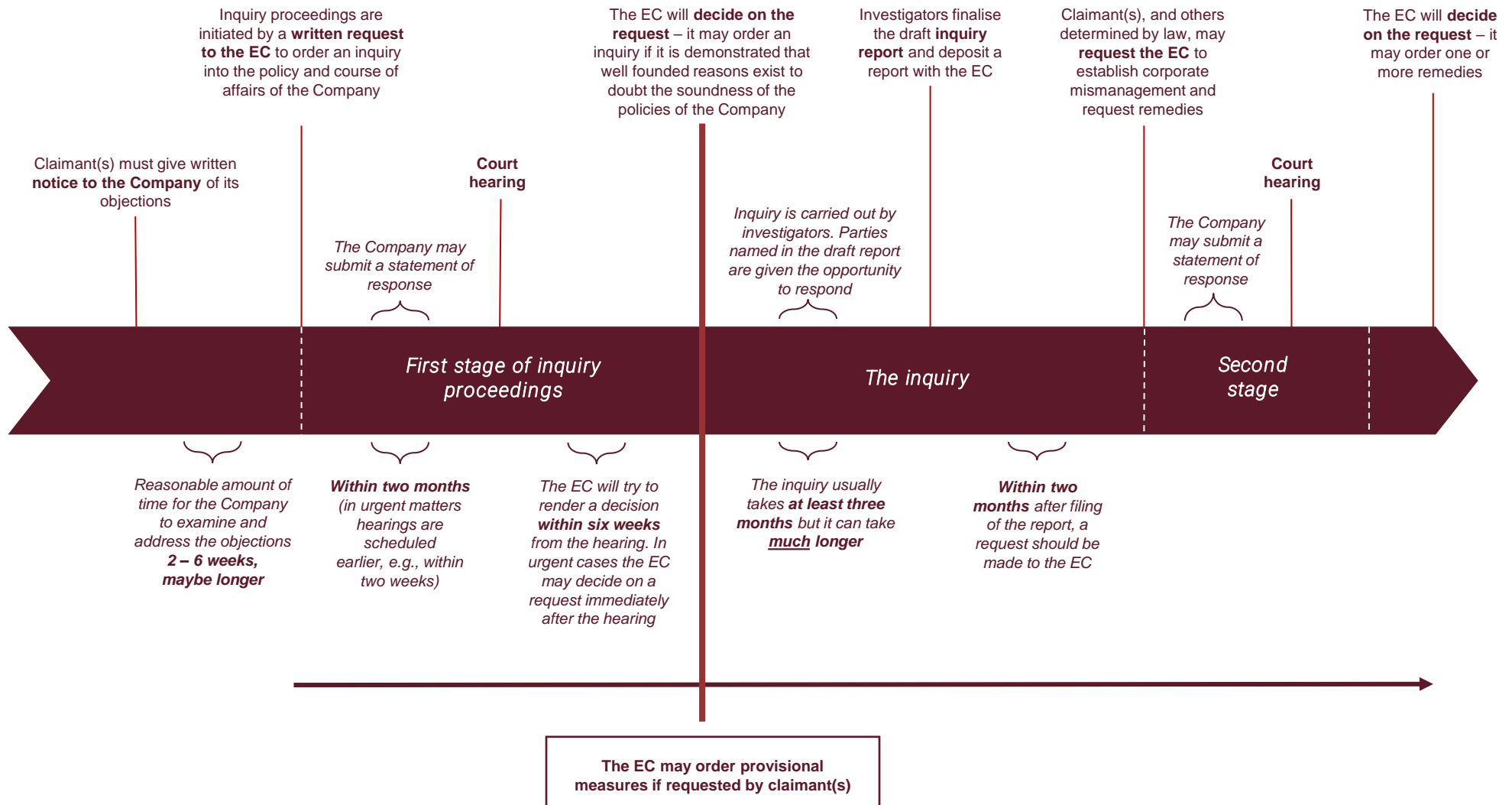
- Dutch listed companies traditionally have dispersed share ownership structures (NB. increasingly 'foreign' companies with more concentrated share ownership listed in the Netherlands, also as Dutch NV or BV)
- Dutch company law is traditionally based on open norms, such as mandatory but unwritten 'standards of reasonableness and fairness' and 'general principles of proper company management'
- Dutch court system is very open, with a pivotal role for the Enterprise Chamber
- Dispersed ownership, increased shareholder rights, open norms and enabling court system: a breeding ground for shareholder activism in the Netherlands, in the past as well as in more recent times. Some of this was / is visible, some undisclosed



## Informal and powerful corporate legal proceedings at the Enterprise Chamber in Amsterdam

- Shareholders can request Enterprise Chamber to order an inquiry into company policy and affairs
- Cases are handled by three judges and two experts. Hearings can take place on (very) short notice, proceedings are very informal, matters can be decided immediately if necessary
- 'Interested parties' may join proceedings, e.g. boards, directors, works council, shareholders
- EC may order inquiry in case of "well-founded reasons to doubt soundness of company policy and/or conduct of business". Rich case law includes take-over battles, shareholder rights, governance conflicts, conflicts of interest, failures to provide information, not abiding by the law, operational and financial matters. EC has broad discretion in honoring requests
- When EC orders an inquiry, it appoints investigator(s) who may inspect company information and interview relevant individuals. EC can afterwards be requested to establish mismanagement
- During every stage of the proceedings, even before ruling on the inquiry request, the EC may order all conceivable immediate measures "in the interest of the company or the investigation", incl. (i) setting aside corporate resolutions, (ii) appointment, suspension and dismissal of executive or supervisory directors, (iv) deviation from articles and law, (v) temporarily transfer of shares

# Annex I – EC inquiry proceedings – indicative timeline



## During PPG's take-over attempt of Akzo Nobel NV in 2017, Elliott sought to influence strategy

- PPG made three offers for AkzoNobel, all rejected by the boards who concluded they were not in the interest of AkzoNobel and its stakeholders. Elliott et al. then requested the boards to convene an EGM to vote on the resignation of the Supervisory Board chair
- Elliot et al. brought the case before the EC. The EC ruled, in short:
  - Company response to take-over proposal is part of strategy and thus prerogative of the boards
  - Board to act in company interest, taking into account interests of all stakeholders
  - Boards can reject take-over proposal, even if it generates superior shareholder value
  - At prima facie no reason to doubt correctness of company policy, requests rejected
- Elliot then adjudicated District Court, to obtain EGM authorization. Court rejected the request:
  - Akzo Nobel had itself called an EGM where the Boards would hold themselves accountable
  - Standards of reasonableness and fairness required to first await that EGM
- These judgments are seen to have bridged the gap between the Dutch stakeholder model, where the boards are to act in the interest of the company and all its stakeholders, and the rights of shareholders to determine the composition of the boards



- In 2008, one year after ABN AMRO, the Dutch Governance Code introduced a 'response time'.
- Shareholders (3% or 1%, depending on the articles) proposing an AGM/EGM proposal that could result in a change of strategy (e.g. director dismissal) need to observe a period of up to 180 days if the executive board so requests. This allows the Board time for deliberation and discussion. The response time has been tested and upheld by the EC (EC Cryo-Save case)
- In 2021, after take-over attempts at Akzo Nobel and Unilever, the law introduced a 'reflection time'.
- The executive board can invoke this reflection time of max 250 days in case i) a shareholder makes a proposal to appoint, dismiss or suspend an executive director or supervisory director or ii) an unsolicited take-over offer is presented, *and* these proposals are, in the view of the executive board, "substantially at odds with the interest of the company". The reflection period should be used for deliberation and discussion, and during it the item those not have to be put on the AGM/EGM agenda as a *voting* item. If shareholder disagrees with the boards, he can adhere to the EC to seek lifting of the reflection time. The statutory reflection time so far has not been tested in court
- Also, Dutch law now mandates that setting of strategy and policies of listed companies is the prerogative of the executive board

## Overview; from financially driven shareholder activism to ESG-related activism?

- Dutch capital markets and corporate legal system have traditionally been open to shareholder activism. The Dutch legislature and courts have, however, over time enhanced the powers of the executive board and the supervisory board with respect to setting strategy and policies
- There then was a "gap to be closed" in protecting the stakeholder model against the ousting of directors, and both the courts and the legislator have filled this gap by limiting shareholder rights
- "Traditional" shareholder activism is continuing but now with less court cases
- Recently, attention for ESG has been rising, illustrated a/o by calls for a shareholder say-on-climate and an advisory vote on ESG reporting (EU CSRD)
- And the Shell/Milieudefensie case sheds a new light on the responsibilities of corporate boards and the interpretation of broad legal concepts and open norms
- Is ESG shareholder activism the next phase? Are shareholders the new protagonists of the stakeholder-model (with the one constant being that the boards always find themselves in the middle between financially and ecologically driven shareholders)?
- NB. ESG is a fluid and broadly-defined concept



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