

Georgeson

A YEAR TO REMEMBER

An overview of the 2011 General Meeting
Season in the Netherlands

Contents

Section	Title	Page
1	Foreword	2
2	Voting in the Netherlands in 2011	4
2.1	AEX and AMX quorum overview	4
2.2	Contested Agenda items	7
2.3	Capitalisation issues	8
2.4	Remuneration	9
2.5	Discharge of Board of Directors	11
3	Resolutions with 'Against' recommendations by Proxy Advisors	13
4	Share blocking and voting	15
4.1	Impact of the new record date law	15
5	Developments in Regulation	17
5.1	Recommendations of the Commission Frijns	17
5.1.1	Status update	17
5.2	Recommendations of the Commission Streppel	18
5.3	EU Green Paper on Corporate Governance	19
5.4	EU development CSD and SL	21
5.5	Consultation Eumedion	21
6	Contact us	23

1. Foreword

This year, Georgeson has worked on one third of the AEX AGMs in the Dutch market, in what proved to be a very long proxy season. Now is the time to look back and reflect on this season's activities.

The comparatively late start to the season was due to legislative changes surrounding the Shareholders Rights Directive. The big questions for this year were whether the implementation of a record date in the law (28 days before an AGM) would make a difference; whether custodians and other intermediaries would incorporate the new law and as a result, no longer be blocking shares.

Based on the quorum results of the 2011 proxy season, we can confidently say yes; this did make a difference in the AEX. Average quorum levels of the AEX are up by almost ten percent, one of the biggest increases seen at ASML (23.9% up compared to 2010). This further strengthens the case we made last year that one or more custodians were not able to process their votes on time. Looking at the AMX, the results continue to be lower than those of the AEX and we see only a marginal increase in quorum levels. This can be attributed to several factors, including the spread in ownership and the reduced levels of foreign ownership.

The content of the AGMs was mostly standard and straightforward, but we saw an increasing number of shareholders voting against share issuances (with or without pre-emptive rights). Anglo-Saxon and French institutional investors have different voting guidelines with respect to this and will automatically vote against share issuances which go above the 15 percent threshold, while most proposals are 20 percent.

Remuneration was proposed nine times in the AEX and on three occasions lead to extremely heated debates. Heineken, Aegon and ING received strong shareholder opposition against their remuneration proposals. The Executive Board of ING decided not to accept the Supervisory Board proposed bonus after strong criticism by their Dutch shareholders. The Supervisory Board of ING apologised to its shareholders at the AGM, but could not avoid that more than 20% of the shareholders voted against this item (including the ING Trust Office).

TNT shareholders made a clear statement at the AGM, by voting against giving discharge to the TNT supervisory board. The soon to be formed TNT Express NV would be equipped with more than average protective mechanisms, so the leading Proxy Advisor ISS decided to give an 'Against' recommendation and institutional shareholders decided to follow this recommendation with more than 60%, demonstrating their dissatisfaction with this resolution.

The Euro crisis has subjected the European Union to significant strains. As a result, a lot of legislation has been emerging from the European Commission relating to the securities market. Most noteworthy are the Green Papers on Corporate Governance, Central Securities Depository (CSD) Law and the Securities Law Directive (discussed in section 5 of this document). The landscape is changing and it is becoming increasingly important for issuers to respond to the different consultations at European level.

We are proud to present our second annual review of the Dutch AGM season, addressing market changes, ownership structure, governance, and EU changes. Due to these developments we anticipate an increase in shareholder influence in coming years. Higher voter turnout means that Dutch Issuers need to keep track of a wider universe of voting policies.

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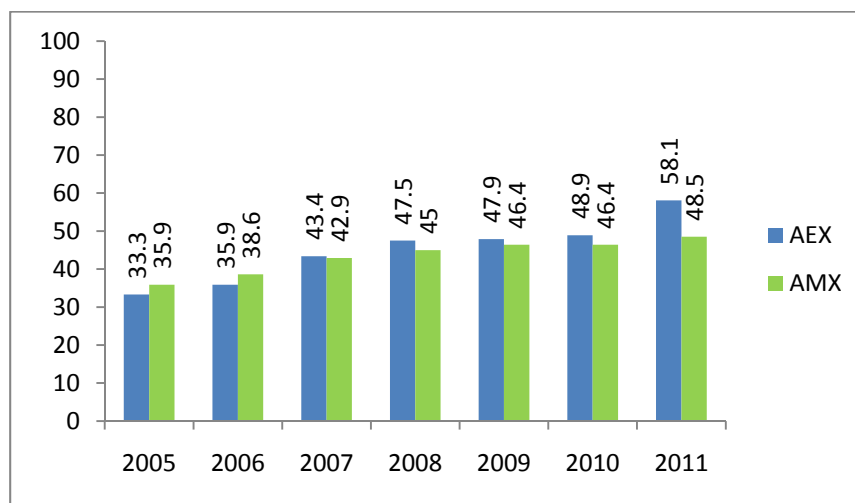
Manager Benelux

2. Voting in the Netherlands in 2011

2.1 AEX and AMX quorum overview

This year has seen another increase in quorum levels. The average quorum significantly increased, with a further 10% over 2010 levels. In the graph below an average is taken of the quorum levels from companies who have their statutory seat in the Netherlands. These numbers are also reported by Eumedion in their annual AGM review.¹

Graph 1. Attendance levels AGM's AEX and AMX



One of the main drivers for this participation increase is the change in law. A full overview of all the changes in the law regarding voting in the Dutch market will be further discussed in section 4. The most important changes related to the AGM are:

- > An AGM must be announced 42 days prior to the meeting;
- > The uniform record date is set at 28 days prior to the meeting;
- > The voting deadline is seven days prior to the meeting;
- > Voting results must be published within 15 days of the meeting.

Article 2:120, paragraph five of the Dutch Civil Code prescribes a uniform record date to be a minimum of 28 days prior to the AGM. Blocking of shares as a condition to participate at the AGM can no longer be required by a listed company. The new record date is widely accepted by custodians and therefore shareholders have a reduced risk of having their accounts frozen if they decide to vote at the AGM. Eumedion sent out a letter to local custodians to inform them proactively about the legal changes. Georgeson also had ongoing active communication with the underlying custodians to mitigate problems in the voting chain.

¹ http://eumedion.nl/page/downloads/Evaluatie_AVA-seizoen_2011_DEF.pdf

Where last year ASML Holding had the largest decrease, this year with 23.96% of the ISC they had the largest increase. This only strengthens the assumption that last years' significant decrease was caused by lost votes at some stage in the custodian chain or by some of the larger shareholders changing their holding position and failing to get their vote processed on time. Shareholders' participation is the main tool to influence company activity. Voting chains can get very complex and consist of many layers, especially when foreign investors are involved. For this reason it can be very difficult for shareholders to exercise their voting rights. The more complex the voting chain gets, the greater the risk that votes will get lost somewhere in the process and therefore not lodged at a company's AGM. If we look at the difference in numbers at ASML, this could potentially mean a different outcome on the voting resolutions. This problem is real and has potentially serious repercussions for shareholder meetings. When can a shareholder challenge the outcome of a meeting or the resolutions passed at a meeting?

Four companies in the AEX 25 had a decrease in quorum: Randstad, Reed Elsevier, Royal Dutch Shell and TomTom. With 3.19% of the Issued Share Capital (ISC), Royal Dutch Shell had the largest decrease. In the AMX only two companies had a decrease in quorum: CSM and Vopak. With 10.12% of the ISC, Vopak had the largest decrease. Attendance levels highly depend on the shareholder base. Most Dutch listed companies have a shareholder base which comprises 75% foreign shareholders.² Changes in the shareholder base can lead to variations in voting levels. A new foreign shareholder who is not familiar with the local market or the issuer may decide not to vote.

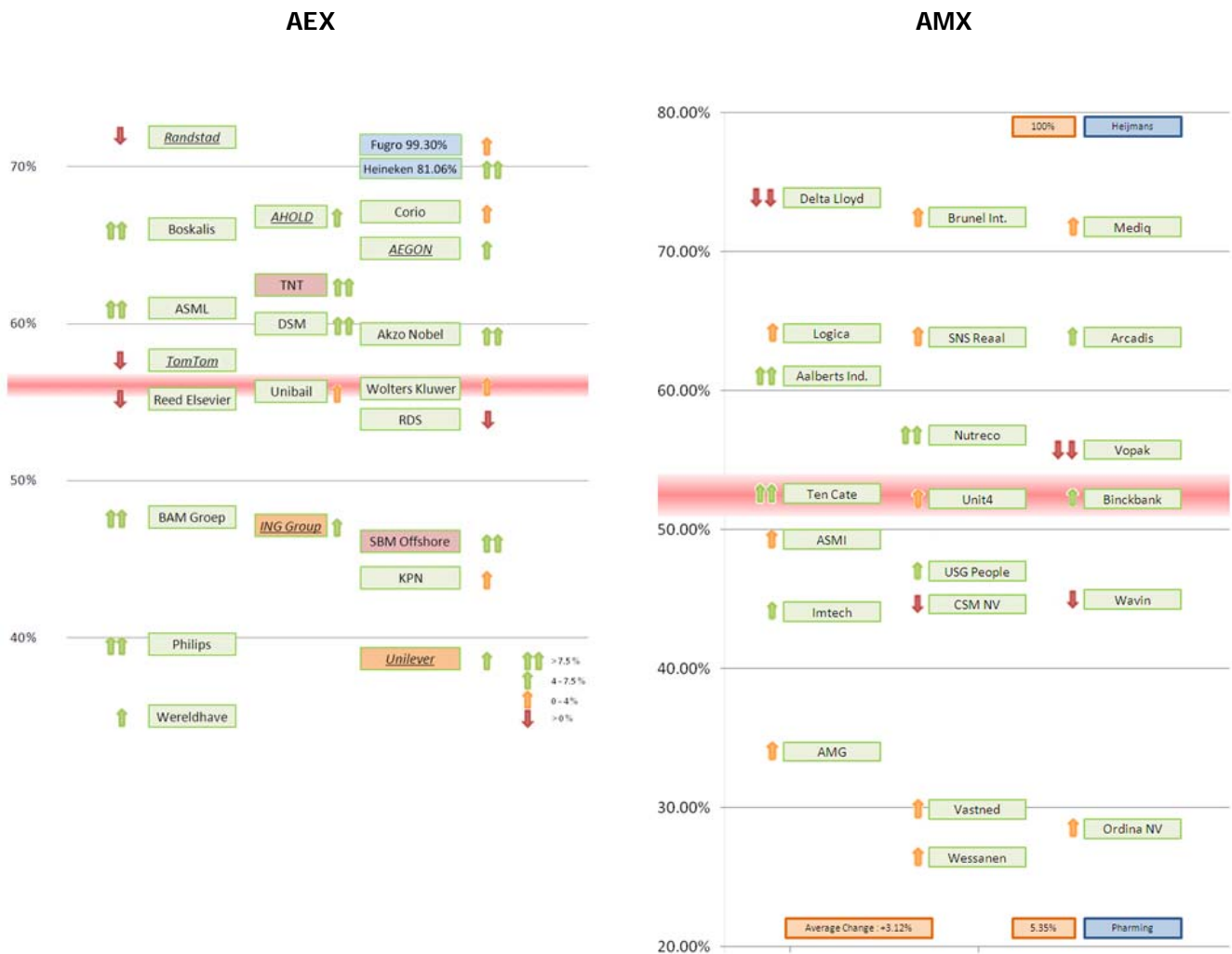
This year the average quorum levels of AEX companies increased to 58% of the ISC, which strongly suggests that the voting process has become somewhat easier due to the introduction of a record date. During previous years the average quorum levels of AEX companies were around 50%. In the AMX we have noticed a small increase in quorum levels. The average went up from 46.4% in 2010 to over 48% in 2011.

The retail community in AEX 25 companies is roughly around 5-10%. From this community we saw a decrease in votes coming in at meetings but there was an increase in the number of participants. Most banks now offer their retail shareholders the option to register online to vote at a meeting and this encouraged retail shareholder participation.

The graphs below shows the attendance levels over the last two years for Dutch listed companies in the AEX and AMX. These figures also include companies who have their statutory seat outside the Netherlands.

² Discussed in:
http://commissiecorporategovernance.nl/page/downloads/2010_Rapport_Monitoring_Commissie_Corporate_Governance_Code.pdf

Graph 2. Shareholder Attendance Levels comparison 2010-2011 AEX and AMX



2.2 Contested Agenda items

Over the last few years we have seen an increase in the number of 'Against' votes at the AGMs. Last year we observed a number of resolutions receiving high numbers of 'Against' votes. This season, although still relatively a small proportion of the total, we have seen a significant increase in the number of agenda items with more than 5% 'Against' votes compared to 2010. The content of the agendas was, for the most part, straightforward and standard therefore the increase in 'Against' votes is most likely due to increase in shareholder activism.

The highest level of opposition at most of the AEX meetings was received for the proposal to issue shares and the authority of the board to restrict or exclude pre-emptive rights. Most companies who had the issuance of shares without pre-emptive rights on the agenda received high 'Against' votes for these resolutions. The reason why we see high 'Against' votes on this topic is because shareholders don't have an opportunity to prevent their stake being diluted by new issues. Despite elevated numbers of 'Against' votes at most of the meetings in the AEX, the resolutions did receive shareholder approval for all companies.

In the AEX, companies TNT and SBM Offshore had items on their agendas which didn't receive shareholder approval. With about 60% 'Against' votes, TNT didn't receive approval for the Discharge of the Supervisory Board and with about 83% 'Against' votes SBM Offshore didn't receive approval for the dividend payable on preference shares. At TNT, shareholders felt that the protection mechanism which TNT Express obtained was disproportionate and was not in the shareholders' best interest. TNT shareholders followed ISS recommendations. SBM Offshore wanted to raise the dividend payable on protection preference shares. They feel that keeping this protection construction would be a balanced approach to a possible takeover. This can be a possible threat for shareholders because preference shares have disproportionate voting rights in comparison to regular shares. Although SBM Offshore said that in the event that the call option (related to the preference shares) was exercised, the company would call an EGM to inform the shareholders in case of 'hostility', the resolution was still voted down by the shareholders.

In the AMX, only Wessanen had agenda items which were voted down by the shareholders. Both the authority to issue shares and the authority to exclude pre-emptive rights received about 65% 'Against' votes, despite having support from ISS. The proposal was to make the executive board, with supervisory board approval, the competent body to issue shares up to 10% of the issued share capital of the company, plus an additional 10% of the issued share capital of the company in connection with or on the occasion of mergers and acquisition and to authorise the executive board to restrict or exclude pre-emptive rights when issuing shares. A possible reason for Wessanen not receiving sufficient approval for this resolution could be the combination of the low quorum and the participation or non-participation of one large US shareholder (Delta Partners) who holds about 16% of the ISC. Generally, US shareholders do not support the issuance of shares without pre-emptive rights. In this case, were Delta Partners to have voted their whole holding, these resolutions would have already received more than 60% 'Against' votes.

Table 1. Overview of agenda items that received over 5% 'Against' votes in AEX companies

Agenda Items	Number of times Agenda items received over 5% 'Against' votes
Authority to issue shares	11
Authorisation to restrict or exclude pre-emptive rights	11
(Re) Election of board members	6
Remuneration of Management Board	5
Incidental Opposition:	
Discharge of Supervisory Board	2
Amendment Articles of Association	2
Discharge of Management Board	1
Re-election Management Board member	1
Remuneration of Supervisory Board	1
Dividend payable of preference shares	1
Share Unit Plan	1
Repurchase of shares	1
Use of English as the official language for financial statements	1

Table 2. Overview of agenda items that received over 5% 'Against' votes in AMX companies

Agenda Items	Number of times Agenda items received over 5% 'Against' votes
Authorisation to restrict or exclude pre-emptive rights	5
Authority to Issue shares	4
Remuneration	2
Incidental Opposition:	
Election of board members	1
Authority to call general meetings on not less than 14 clear days' notice	1

2.3 Capitalisation issues

This year capitalisation issues played a dominant role in the AGM agendas. Although it is a common agenda item in the Netherlands we are seeing further increases of 'Against' votes for the restriction and exclusion of pre-emptive rights. The biggest oppositions were seen at Wolters Kluwer (37.49% against), SBM (25.68% against) and Fugro (29.83% against). During the 2011 AGM season we saw shareholders taking a stand and companies receiving very high 'Against' votes on this topic (Akzo Nobel, Fugro, Philips, SBM Offshore and Wolters Kluwer). At Fugro this agenda item only passed because 42.5% of the votes represented at the AGM were voted in favour by the company friendly foundation. Dutch law permits pre-emptive rights to be restricted or excluded, after approval of the AGM, for a period of five years. It is generally accepted by most shareholders and Proxy Advisors that 18 months is a

reasonable period and most companies suggest a period of 18 months. Also, most institutional shareholders have the 18 month period in their voting policies.

As predicted last year, 2011 saw that the authority to issue shares and the authority to restrict or exclude pre-emptive rights received the most 'Against' votes. Even though these topics are related, they were usually put on the agenda as two separate items and therefore both received more than 5% 'Against' votes in 11 instances. However, combining them may cause problems for investors and therefore lead to high 'Against' votes on both. Many UK, US and French investors only allow 15% issuance (limited to 10% per year) of the issued share capital for issuances without pre-emptive rights, although most companies still put forward a request to issue 20% (as per Dutch law this authority shall be limited annually to 10% of the capital, plus 10% of the capital if the issuance or the granting of rights occurs on the occasion of the acquisition of an enterprise or a corporation). During the course of the year issuers should talk to their investors and explain the importance of this yearly agenda item.

In the AEX 25 an average of 9% of the voting capital voted against the issuance of shares and an average of 17% voted against the authority to restrict or exclude pre-emptive rights. In the AMX an average of 25% (Wessanen 64.71%) of the voting capital voted against the issuance of shares and an average of 19% (Wessanen 65.68%) voted against the authority to restrict or exclude pre-emptive rights.

In the AEX with 37.49% 'Against' votes, Wolters Kluwer received the highest percentage of 'Against' votes on the authority to restrict or exclude pre-emptive rights. In the AMX this was Wessanen with 65.68% 'Against' votes.

Dutch companies have expressed their concerns regarding this 'market practice' and have asked for fewer restrictions with regards to raising solvency. They have stated that they have less flexibility in raising capital compared to other European countries due to the extended announcement period for an AGM, and the United States where no shareholder approval is required.

2.4 Remuneration

Remuneration has long been a key area of interest. During the last few years this has only been strengthened by the economic climate and this season remuneration again was as a hot topic. In the AEX Aegon, Akzo Nobel, BAM Group, Heineken, ING, KPN, SBM Offshore, TomTom and Wolters Kluwer decided to include remuneration on their agenda. In the AMX, companies Arcadis, Pharming Group and USG People included remuneration on the agenda. Despite a long list of companies including remuneration on their agenda this year, they all received shareholder approval. In most cases these simply related to amendments in the remuneration policy and were therefore minor changes. The three companies that stand out with a high percentage of 'Against' votes on remuneration are Aegon (30%), ING (20%) and Heineken (19%). A reason for the high 'Against' votes is that all three of these companies

were the only ones that received an ISS against recommendation on this topic. In the AMX, USG People received a high percentage of 'Against' votes (18.97%) due to an ISS against recommendation. Interestingly, in the AMX the highest proportion of 'Against' votes (41.67%) on this topic was received by ASMI for their supervisory board remuneration. This highlights the importance of ISS as a significant stakeholder in the AGM process.

After having their remuneration resolution rejected in 2009, Shell decided to put remuneration on the agenda again in 2010 and this time they received shareholder approval. This was the result of extensive consultation with their shareholders. They reviewed the full policy, gained advice from external advisors and formulated certain proposals to instigate changes. In 2010 Shell decided to add a 10% sustainability bonus³ in the remuneration policy for board members.

This year, remuneration was again an item on the agenda. After being dropped from the Dow Jones Sustainably Index (DJSI) due to oil leaks in Nigeria the Remuneration Committee decided to adjust the remuneration policy and set the sustainability bonus at 0%. In a letter to shareholders Hans Wijers, Chairman of the Royal Dutch Shell Remuneration Committee, outlined proposals to review executive remuneration.

As the European Capital Requirements Directive (CRD) came into force in the Netherlands in January 2011, Aegon and ING amended their remuneration policies, aligning them with the Directive. The amendments included a single variable incentive plan with a one year performance period. Due to the changes, the overall focus is being shifted to short-term performance. A positive element in the implementation of the CRD is the ex-post risk assessment granting the supervisory board the authority to adjust variable remuneration in accordance with the performance of the company in the long term. ING and Aegon both received high 'Against' votes on this topic but ultimately managed to get this resolution passed.

There are two angles from which to view the voting results. The first one is to explain how these companies managed to receive approval for this resolution even with an ISS against recommendation. ING consulted their shareholders prior to the AGM on this topic. In order to comply with the new European Union recommended guidelines and the Dutch Corporate Governance Code ING's amendments to the remuneration policy have been put on the agenda to seek shareholders' approval. The bonuses awarded to the Board led to a revolt in the Netherlands and among ING shareholders. This was even discussed in the Second Chamber in the Netherlands because of the financial support ING received in the past. Eventually the Board decided not to take the bonus.

The other point of view is to try and find an explanation for the high 'Against' votes. Besides the fact that that shareholders have expressed their concerns regarding this topic due to the economic climate, the main reason can be found in an against recommendation from ISS. ISS believes that seeking annual shareholder approval for a company's compensation policy is a positive corporate governance provision. At the same time ISS gave an against

³ This is a bonus that is rewarded to board members depending on the sustainability rating of the company

recommendation on the ING remuneration policy because in their opinion there is a lack of long-term focus. We can conclude that some big shareholders had decided to follow the ISS recommendation resulting in a high percentage of 'Against' votes.

This year Aegon had executive remuneration on its agenda and even with an ISS against recommendation Aegon managed to get approval for their resolution. ISS gave an against recommendation because in their opinion the new remuneration is considered not to be sufficiently aligned with shareholders' long-term interest. In addition it lacks transparency because there are no clear performance criteria. Aegon managed to get its new remuneration policy approved because they consulted their shareholders prior to the meeting and received approval from their biggest shareholder and the 'Vereniging Aegon'. Without the Aegon 'foundation' the remuneration policy would have passed but would have received a significant 48% of 'Against' votes.

Heineken is another company who decided to put remuneration on the agenda again this year. Last year Heineken warned their investors about changes in executive remuneration policy and this year both the board members' base salary and the variable bonuses were raised but this resolution did receive high 'Against' votes. About 73% of the independent shareholders voted against the executive remuneration. Many shareholders did not agree with the 'free' shares the board members were given without any links to performance. Also they felt that the long-term incentives only took into account the performance over a period of one year and that the transparency on performance measurements was insufficient. Cees van Lede, Chairman of the Supervisory Board, reaffirmed that the new policy represented the performance of the Executive Board members and the international position of Heineken in the world wide brewery business. With some important takeovers, the Heineken concern grew even further and higher remuneration for their board members was a logical next step to get their remuneration in line with similar size companies. Interestingly Heineken, in addition to the Management Board, also raised Supervisory Board remuneration significantly this year. The chairman went from €60,000 to €90,000 and of the members of the Supervisory Board from €45,000 to €60,000. The rationale behind the raise is again the increased size and global footprint of Heineken N.V. and current market practice. The adjustment in the supervisory board remuneration received 19% 'Against' votes.

Total Shareholder Return is no longer the leading tool to measure performance. To compensate shareholders, companies are using remuneration guidelines to encourage board members to invest a part of their bonus in shares of their 'own' company. We have seen increased encouragement for executives to hold shares in the company to increase engagement. In addition sustainability measurements have become a part of the remuneration policy of many companies. One issue with this is that the transparency on the performance goals is very limited.

2.5 Discharge of Board of Directors

The formal discharge of the Executive and Supervisory Board is a common item on the agenda and represents a vote of confidence and the approval for the decisions made during the year. With 60% 'Against' votes at this year's meeting TNT shareholders made a statement

by voting against the discharge of the Supervisory Board. This was the way the investors expressed their dissatisfaction regarding the disproportionate range of takeover defences set in place after the demerger. TNT would be equipped with more than average protection mechanisms. Shareholders would have a hard time appointing and dismissing supervisory board members. The new call-option agreement with the company friendly foundation uses “unwanted influence by and pressure from shareholders to amend the strategy of the Company” as sufficient justification to exercise the option. The call-option agreement could even be interpreted as an anti-influence mechanism. In addition shareholder influence on the appointment and dismissal of management and supervisory board members has been reduced. This clearly isn't in the shareholders' best interest as it would reduce shareholder power concerning important issues. Eumedion stated that having a protection 'foundation' with a call-option doesn't need to be a problem if the purpose is to prevent a hostile takeover. Also the company continues to require that shareholders allow for a 180 days response time before submitting items to the agenda. These two components also lead to an against recommendation from ISS on this resolution.

The failure to gain approval was not entirely unexpected for TNT, as shareholder disapproval existed prior to the meeting on this matter. Looking at last year's warning from shareholders, the commotion and an ISS against recommendation it was important to talk to their shareholders. As a response to ISS there was some last minute consultation. In an attempt to possibly avoid disapproval of this resolution TNT CEO Peter Bakker sent a letter to the shareholders stating that “it would be inappropriate to vote against the discharge of the Supervisory Board”. In the letter he also stated that TNT Express would be willing to discuss alternatives and possibly change the statutes the following year. Therefore shareholders should not vote against this resolution.

Shareholders have become active and sceptical but at the same time they seem to be losing their power with the protection mechanisms. According to shareholders, the protection mechanisms of TNT Express do not represent good corporate governance requirements of a well-managed company. The board was granted more power at the expense of the shareholders. The shareholders were not happy with the oversight exercised by the Supervisory Board and held them responsible by not approving the discharge of the Supervisory Board. This means the Supervisory Board is still responsible and in some cases can be held liable.

On the role of the Supervisory Board it is interesting to note the outcome of the ASMI case. The Dutch Supreme Court ruled that the Supervisory Board's task is, strictly speaking, limited to supervising and therefore they are not required to mediate in the event of a conflict of interests with shareholders.

The increase in shareholder activity was also represented in the number of agenda items that were initiated by the shareholders.

3. Resolutions with 'Against' recommendations by Proxy Advisors

The following companies received an 'Against' recommendation by the Proxy Advisors (Glass Lewis & Co. and ISS) during the 2011 AGM season.

In the AEX, TNT did not receive enough support for the discharge of the Supervisory Board and SBM Offshore did not receive enough support to amend the articles of association on the dividend payable on preference shares. Both items received an against recommendation from ISS and this definitely contributed to the shareholders disapproval. At TNT, shareholders voted against the discharge of the Supervisory Board because the protection mechanism of TNT Express would be a limitation of shareholders' power. At SBM Offshore the increased dividend payable on preference shares would finance the company friendly foundation. The preference shares constitute an anti takeover instrument as the company friendly foundation would use the funds to exercise their call-option in case of a takeover. Raising the dividend payable on preference shares would mean financing an anti-takeover defence. This is not in the shareholders' best interest as it would limit their influence in case of a takeover.

Table 3. Overview of negative recommendations by Proxy Advisors on AEX AGM's

Aegon	Against remuneration
Arcelor Mittal	Against Re-election Lakshmi N. Mittal Against Share Unit Plan
Boskalis	Against Repurchase of Issued Share Capital
Fugro	Authority to Issue Shares Against authority to exclude Pre-emptive Rights
Heineken	Against remuneration Against Amendments to Long-Term Incentive Plan Executive Board Against Amendments Short-Term Incentive Plan Executive Board
ING Group	Against remuneration
Randstad	Against Change in Legislation on Shareholders Rights
SBM Offshore	Against Amendment Articles of Association: Increase Dividend Payable on Preference Shares
TNT	Against Approve Discharge of Supervisory Board Against Repurchase of Issued Share Capital

Tom Tom	Against Authority to Issue Preference Shares Against Exclude Pre-emptive Rights Issuance Against Stock Option Plan and Exclude Pre-emptive Rights Against Re-election D.J. Dunn
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In the AMX, Wessanen was the only company that had agenda items voted down by the shareholders. Both voted down were:

- › the authority to issue shares up to 10% of the issued share capital, and
- › an additional 10% of the issued share capital in connection with or on the occasion of mergers and acquisition and the authority to restrict or exclude pre-emptive rights were voted down.

Wessanen didn't receive an ISS against recommendation for either resolution. Nevertheless, shareholders still decided to oppose it despite the total of 20% and the 18 month period being in line with the law and the ISS guidelines. The combination of one large US shareholder in combination with the low quorum most likely led to this resolution being voted down.

Table 4. Overview of negative recommendations by Proxy Advisors on AMX AGM's

Arcadis	Against authority to issue preference shares up to 100 percent of the ISC
ASMI	Against authority to issue shares in connection with remuneration policy
Heijmans	Against authority to issue shares
	Against authority to exclude pre-emptive rights from issuance
Pharming Group	Against stock option grants
Unit4	Against authority to issue preference shares Up To 100 percent of ISC and to issue ordinary shares Up To 20 percent of the ISC and restricting/excluding pre-emptive rights
USG People	Remuneration report containing remuneration policy SB
	Against restricted stock plan

4. Share blocking and voting

4.1 Impact of the new record date law

Up until 2007, the Netherlands was considered a blocking market and this implied that foreign institutional shareholders, who hold a significant proportion of the share capital of Dutch listed companies, would have to freeze their account if they wished to vote, thereby reducing liquidity in the stock. This only occurred if the shareholder decided to vote. In volatile markets shareholders were unwilling to take this risk and vote at general meetings.

During the 2011 AGM season the quorum numbers increased again. One of the reasons for these higher numbers this year is that we can see the effects of the change in law. The implementation on the European Union Directive on the exercise of certain rights of shareholders in listed companies was supposed to be implemented by August 2009. The Netherlands did not make that deadline and the implementation came into force in July 2010.

In the Netherlands a few changes in laws regarding voting took place:

- › Under the new law, companies that are incorporated under Dutch law and whose shares are traded on a regulated market must announce their General Meeting, including agenda items, no later than 42 days prior to the meeting. This rule also applies for Extraordinary General Meetings. Prior to the change this deadline used to be 15 days. Publication must be done on the company's website and a publication in a newspaper is no longer required;
- › The record date is now set on 28 days before the AGM, instead of the 21 days prior to this implementation;
- › The voting deadline is set at seven days prior to the meeting;
- › Within 15 days, following the meeting, the specified voting results must be published on the company's website. The publication must disclose information on the number of shares represented at the meeting, percentage of votes in favour, against as well as abstentions etc.

The goal of the combined changes in law is to encourage greater shareholder participation at the general meetings, especially from foreign shareholders. This year we have seen an impressive 13% increase in the average quorum in the AEX and this is mainly the result of the change in law.

In 2010 43%⁴ of the votes were submitted prior to the meeting by proxy. The problem with the voting chain is that shareholders will never know if their votes were submitted, and if they were, whether this was in accordance with their instructions.

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http://commissiecorporategovernance.nl/page/downloads/2010_Rapport_Monitoring_Commissie_Corporate_Governance_Code.pdf

Setting the announcement date at 42 days prior to the meeting will benefit the shareholders and the company. It gives shareholders a sufficient amount of time to prepare themselves for the meeting and if necessary to discuss agenda items with the company. This will contribute to a constructive dialogue and relationship between the company and the shareholders.

Most important was the change regarding the record date. The record date avoids previous concerns over share blocking and freezing client accounts. This way there are no trading restrictions, liquidity in the stock remains and this encourages shareholders participation. The period between the record date and the AGM ensures that shareholders - especially those located abroad - have enough time to register their shares for participation at the AGM. This is very important because in the Netherlands about 75%⁵ of the shares are held by shareholders located abroad. In order to be able to vote at the AGM shareholders will have a longer period to call back their shares instead of lending them.

Most foreign shareholders will vote by proxy instead of attending the meeting in person. Publishing specified voting results 15 days after the meeting will benefit those that didn't attend the meeting as they will get insight on the voting ratios and representation.

The legislative changes mean that Dutch market shareholders can make more effective use of their rights as shareholders. The electronic communication possibilities have been extended and regulated. This is a key benefit for the Dutch market because of the shareholder base and tendency of the shareholders to vote by proxy prior to the meeting. The facilities and regulation offered to the shareholders make it easier for them to get information. The effective use of shareholders' rights was represented in higher quorum numbers during the 2011 AGM season. The higher participation of shareholders has led to a less dominant position of votes from the company friendly foundation. At Fugro for the first time more votes came from the shareholders than from the company friendly foundation. This can ultimately improve the Dutch investment market and attract an even wider range of investors. The other effect of the new legislation was that most of the AGMs were held later in the season. The practical problems caused by several meetings being planned for the same day still exists.

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http://commissiecorporategovernance.nl/page/downloads/2010_Rapport_Monitoring_Commissie_Corporate_Governance_Code.pdf

5. Developments in Regulation

5.1 Recommendations of the Commission Frijns

The Commission Frijns has been monitoring the Corporate Governance Code in recent years. During their monitoring period in 2008, they concluded that some aspects of Dutch company law needed to be reviewed. The Commission amended the existing Code and the new Code came into force in January 2009. The proposed amendments to the law were:

- › To decrease the notification level from 5% to 3%;
- › To increase the level of shareholders right to speak at the AGM to 3%; and
- › To make it possible for the listed companies to request from Euroclear participant banks to disclose who their underlying shareholders are and for shareholders, holding more than 10%, can request the same list to distribute materials.

5.1.1 Status update

One of the proposed amendments on Dutch company law by the Commission Frijns was to decrease the notification level from 5% to 3%. Shareholders should have to give feedback to the company about the current strategy (i.e. if they agree or disagree) when they reach the 3% threshold. This proposal became a part of the legislative discussion but is criticised by the Dutch parliament. The changes would be unnecessary and would increase the administrative burdens for investors. The Commission Streppel acknowledges that the intention to improve the engagement between issuers and shareholders will not be realised. They say it's likely that, for legal reasons, shareholders, will state they do not agree with the strategy just to keep their options open for future discussions. This is to prevent having to explain why you don't agree and taking a substantial risk after stating you did agree.

The Second Chamber is still holding on to the suggestion to increase levels of shareholders right to speak at the AGM from 1% or 0.5% to 3 % of the outstanding shares. In a letter to the Second Chamber, the Minister of Finance stated that the 1% threshold is relatively low one. The government believes that, looking at the experience with shareholder activism, holding a relatively low threshold doesn't justify the shareholders' right to speak at the AGM. This proposal will likely be sent to the First Chamber for approval.

The Commission suggested that amendments to the law should be made to enable listed companies to identify their shareholders and for shareholders holding more than 10% to get the same list to distribute materials. This amendment has been sent to the Second Chamber in a separate law proposal to amend the Regulation on Electronic Securities⁶. Many parties involved were sceptical about the content of this proposal because the consequences of non-disclosure on the shareholders. The penalty for non-disclosure would lead to loss of voting rights for a period of 3 years. This means that a third party (the shareholder) would be punished while their intermediary is responsible for compliance with this law. This law proposal is still part of the legislative discussion. It is interesting that some amendments were made to the Regulation on Electronic Securities in October 2010 that came into force in January 2011, but these suggestions were not part of that.

⁶ Kamerstuk 31 830

This means that none of the proposed law amendments yet came into force but are still a part of the legal discussion. The Second Chamber has been very sceptical about parts of the law proposal to implement the Frijns advice.

5.2 Recommendations of the Commission Streppel

In December 2010 the Commission Streppel published the first report on the progress of the implementation of the new Dutch Corporate Governance Code and their monitoring period in 2009. Their conclusion is that due to its support the Code has a self-regulating character. This is demonstrated by the high level of conformity with the Code. The use of the Code to regulate corporate governance prevails above law because the Code can be adjusted much faster and easier than laws. The intention of the self-regulating aspect of the Code is to bring about change in existing behaviour. This is done by creating support for the Code's principles as being good corporate governance. And it's this support the Commission is worried about when the legislators convert practices from the Code into law. Laws usually leave less space for the parties involved and this could lead to a decrease in support. The Commission wants to influence practices rather than develop corporate governance into a list of check marks against which companies must comply.

In line with their previous reports, the Commission stresses that there should be 100% conformity with the Code. All parties involved carry the responsibility to make the code an effective instrument as an alternative to law. The Commission noticed that only the big institutional investors are familiar with the Code and the Commission are now encouraging the medium-sized and small companies to comply with the Code's provisions on shareholders.

The Commission noticed that although many supervisory board members left, only a few were replaced by female members. The majority of the mid and small cap companies still have a supervisory board that only consists of males. The Commission hopes the proportion of female members will increase in the short-term and will support this development. This is also supported by a new law⁷ that was adopted in the Netherlands on May 31, 2011. This new law requires a minimum 30% female representation on the board on a 'comply or explain' basis. The same law also limits the number of outside board memberships. Non-executives are limited to a maximum of four outside board memberships and executives to a maximum of two outside board memberships. Besides that the publication of the evaluation of the supervisory board functioning in the majority of the cases isn't sufficient. The Commission will continue the dialogue with supervisory board members and the companies to encourage conformity with this best practice. The Commission did express some worries regarding voting and shareholder participation. Institutional shareholders that use proxy advisors rarely deviate from the advice they get. The Commission stresses that shareholders have the obligation to vote in line with their own principles. This is because the Dutch market is dominated by only two proxy advisors. The Commission noted that Shareholders voting by

⁷ http://www.eerstekamer.nl/behandeling/20110614/publicatie_wet_3/f=/viqscqohzwh.pdf

proxy deal with an important quantity and quality issue. Due to the many layers in the voting chain, they don't know if their votes were submitted to the meeting (quantity) - and if they were submitted, whether this was in line with their instructions (quality). The Commission points out that this issue requires further investigation. In the eyes of the Commission this is a lack of transparency and Institutional shareholders should put more effort into trying to ensure their instructions have been executed correctly.

During 2011, the Commission will focus on the supervisory board and shareholders. In addition they will continue to organise conformity meetings with companies, board members, shareholders and accountants. This year the focus will be on diversity, shareholding in an international perspective, report of the supervisory board and explanation of non-conformity in general.

5.3 EU Green Paper on Corporate Governance

In 2009, the G20 Finance Ministers agreed that action should be taken to ensure sustainable growth. Corporate governance is considered the tool to cut back short-term thinking and risk-taking. On 5 April 2011 the EU Commission, as part of a new action plan, published a Green Paper on the EU corporate governance framework ('Green Paper⁸'). With this Green Paper the EU Commission launched a consultation to assess the need for improvement in the corporate governance framework in Europe.

The Green Paper addresses the following three subjects which are at the heart of good corporate governance:

- › The composition and effectiveness of the board of directors;
- › Shareholders and how to encourage greater engagement and a focus on sustainable, longer-term performance rather than short-term profit;
- › How to improve the effectiveness of the 'comply or explain' approach.

Attempting to take proportionality into consideration the Green Paper also raises two general questions:

- › Should corporate governance measures take into account the size of the company and acknowledge that it might be difficult for smaller size companies to comply with some of the rules?
- › Should the corporate governance rules on EU level also apply to some bigger unlisted companies?

The Green Paper focuses on the role of the supervisory board including the chairman. The board of directors plays a vital part in development of responsible companies and the chairman is considered to make a significant impact on the boards' functioning and success. In order to enable the board of directors to challenge management decisions effectively, the Green Paper identifies some areas that need improvement. Some topics of the consultation are regarding the role and the composition of the board (professional, international and gender diversity).

⁸ COM(2011) 164 final

Whereas the last couple of years has focussed on shareholders' rights, this year the focus is on shareholders' obligation. Shareholders participation improves the corporate governance of the company they invest in. An important issue raised by the Green Paper and the consultation is on the role of proxy advisors and asset managers. The Green Paper states that the preparation of the advice lacks transparency and asset management performance is a short-term evaluation. The question is raised whether proxy advisors and asset managers should become subject to regulation at EU level.

The European corporate governance framework is built on the 'comply or explain' foundation. This is still considered as the right approach because its flexibility allows companies to adapt the corporate governance principles to their specific situation. Some adjustments will be necessary to safeguard the efficiency of the framework. The Green Paper suggests improving the quality and the monitoring of the corporate governance statements, in particular the explanations on non-compliance. In their consultation they have asked the parties involved to state their opinion on the best approach to ensure efficiency.

Georgeson, in conjunction with Computershare, submitted a response to the EU Green Paper. Overall, Georgeson believes that the basis for EU framework should be on the 'comply or explain' basis but that certain areas do require further regulation.

With regards to shareholders, Georgeson believes in the importance of facilitating and encouraging greater shareholder engagement with investee companies. Asset managers should be required to disclose their guidelines on the exercise of all aspects of their rights as a shareholder. There are four key aspects to consider when looking at shareholder cooperation as a means to facilitate engagement:

1. Addressing the impact of rules about 'acting in concert'
2. Agreeing effective mechanisms to facilitate cooperation
3. Shareholder communications from issuers to shareholders
4. The effective exercise of shareholder rights.

Given the significant percentage of institutional ownership in most publicly traded companies in Europe, the recommendations of proxy advisory firms have become a much greater factor in determining the vote outcome at those meetings. Although proxy advisors serve a necessary and beneficial purpose for institutional investors who are faced with the challenge of analyzing proxy statements for many meetings, we feel they should be required to provide certain information to the market place and to issuers specifically, whose meetings are directly impacted. We consider that proxy advisors who sell consulting services directly to issuers create a potential conflict of interests and in our opinion further measures are necessary. Georgeson is a strong advocate of the benefits that can be derived from a transparent share ownership structure, both for the efficiency of market structures and the ability of issuers to better and more directly engage with their shareholders, a key strand in any good governance model.

We believe the 'comply or explain' approach serves in the best interest of the market's participants. On one hand it recognizes the value of regional and national benchmarks that bring together the best practices on how to control and manage companies, while in the other aims to support the traditional corporate governance principle, that 'one size doesn't fit all'.

5.4 EU development CSD and SLD

At the end of last year the European Commission posted two documents for consultation. The first was a consultation for the Harmonisation of Securities Law⁹ (SLD) which focuses on holding and disposing securities and the exercise of rights attached to securities in the context of the Internal Market. This also includes questions on shareholder transparency and identification.

The second document was the consultation on Central Securities Depositories¹⁰ (CSD) and on settlement of securities in the European market. In the Dutch market, the Central Securities Depository is Euroclear. Questions in the consultation document are put forward regarding the possibility for CSD to offer instance ancillary issuer services.

Based on these documents and the result of the possible implementation in the Dutch market, this market could significantly change. Issuers should make themselves aware of these potential changes and the resulting economic impact, the costs of which will be charged back to the issuer in future.

5.5 Consultation Eumedion

In April 2011, Eumedion started a consultation to set up best practice guidelines for engaged share-ownership. Ten concept guidelines were set up and all parties, not just institutional shareholders, were invited to respond. Eumedion and its participants believe that the efficient use of shareholder rights leads to stronger checks and balances and will benefit all stakeholders. Shareholders are not only supposed to be involved in voting but should also monitor a company's behaviour and maintain an ongoing dialogue.

After a period of three months, the final best practice guidelines were published in July 2011 and Eumedion participants are due to start using them from January 2012 on a 'comply or explain' basis. Institutional shareholders will need to disclose up to what level they are acting in accordance with best practice and if they are not, explicitly state why they decided to deviate from this. The best practice principles set out actions and behaviour that are expected from member institutional shareholders. The most important guidelines for Eumedion members which affect issuers are:

- › Best practice 1 - they will closely monitor all Dutch companies in which they hold shares;
- › Best practice 2 - they will have clear guidelines on the exercise of their right as a shareholders and they will publish these yearly;
- › Best practice 6 - they will have clear voting guidelines that are made public;
- › Best practice 7 - they will vote in all Dutch meetings in line with their own guidelines;
- › Best practice 10 - they will not lend out shares for the sole purpose to shift the voting rights and in the event that an agenda has a controversial item they will make sure to get the shares back prior to the meeting.

⁹ http://ec.europa.eu/internal_market/consultations/2010/securities_en.htm

¹⁰ http://ec.europa.eu/internal_market/consultations/2011/csd_en.htm

By applying the best practice, investors will demonstrate that they are conscious of the responsibilities they have. Best practice will exist next to the rules on engaged shareholdership in the Dutch Corporate Governance Code. Best practice is not as binding as the Code but the guidelines are not free of obligation either. Best practice only applies to Eumedion members, however, non-members and international investors are encouraged to consider applying the new rules as well. Eumedion will be charged with monitoring the compliance of the best practices.

6. Contact Us

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Cas has been with Georgeson for over 15 years, bringing with him almost five years' experience in international investor relations and shareholder identification. At Georgeson, he is responsible for Georgeson's Northern European Proxy and Corporate Advisory business.

Cas has a longstanding knowledge of US proxy voting mechanics and key governance matters affecting issuers and shareholders across Europe and the US. Having worked for several activists (and against many more) he has in-depth experience to support investors or issuers during various activist campaigns.

He has vast industry knowledge on the voting mechanics in many jurisdictions and is called in to act as expert witness and advise the Department for Business Innovation and Skills in the UK, European Commission, The Takeover Panel in the UK and the Dutch Ministry of Finance. He ran the Vote Audit for the Shareholder Voting Working Group on behalf of Lord Myners analysing whether votes are still going missing in the UK.

As the mechanics of proxy voting has improved over the years, there are many challenges still faced by investors globally in voting locally and across borders. As part of Computershare, Cas has been involved in several global projects looking at the proxy plumbing for Computershare clients and enabling shareholders to vote and ultimately confirm that their votes were lodged as instructed.

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Domenic has been part of the Georgeson Corporate Advisory team since January 2000. He has worked on some of the largest M&A transactions in EMEA and has over 10 years' experience in the proxy space. His knowledge of the institutional community has allowed him to advise clients on their shareholder base and to ensure that client objectives are met when coordinating a campaign targeted at this community. Domenic spent 2008 working with the Australian team and is now based in London running the operations of the Georgeson European team. Domenic was instrumental in the early stages of the Georgeson European business in developing the Benelux, French and UK markets.

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Kirsten van Rooijen has three years' experience in proxy solicitation and worked on high-profile AGMs and transactions for companies including ASM International, ING Group, Shell and Unilever. She has had key involvement in Johnson & Johnson's acquisition of Crucell, Staples' acquisition of Corporate Express, the Lloyds / HBOS takeover and the ING Rights Issue. She joined Georgeson in 2007 in London and since 2009 has headed up the Georgeson office in the Netherlands. Her focus is on Corporate Governance in the Benelux market. She holds a Masters in Business Law from Erasmus University, Rotterdam.

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Ivana Cvjetkovic recently joined the Georgeson office in London. Over the last few months she has been analysing the Dutch 2011 AGM season. Her focus is on Corporate Governance in the Benelux market. She holds a Masters in European Private Law from the University of Amsterdam.

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