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Shareholder Stewardship in the Netherlands: The Role of Institutional Investors in a Stakeholder Oriented Jurisdiction

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Abstract

We study institutional investors' voice in the Netherlands, focusing on shareholder voting in particular. The Dutch Stewardship Code, developed by institutional investor platform Eumedion, came into force in January 2019, emphasises engagement and responsibilities of institutional investors in Dutch listed companies and should further boost the engagement with the investees. With a new dataset, we observe that institutional investors critically consider (non) current voting items which could negatively affect shareholder rights, like some of the amendments of the articles of association as well as remuneration packages of directors that contain insufficient or inappropriate incentives. Compared to other investors, institutional investors show significantly higher opposition rates. Particularly, Eumedion members show even higher opposition rates than other institutional investors. However, there may still be room for a stronger focus on the activities and outcomes of stewardship, including changing the behaviour of companies, and not just policy statements.

Keywords: institutional investors, stewardship code, engagement, shareholder voting, the Netherlands

JEL Classifications: G23, G34, K12, M14, O16

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We study institutional investors' voice in the Netherlands, focusing on shareholder voting in particular. The Dutch Stewardship Code, developed by institutional investor platform Eumedion, came into force in January 2019, emphasises engagement and responsibilities of institutional investors in Dutch listed companies and should further boost the engagement with the investees. With a new dataset, we observe that institutional investors critically consider (non) current voting items which could negatively affect shareholder rights, like some of the amendments of the articles of association as well as remuneration packages of directors that contain insufficient or inappropriate incentives. Compared to other investors, institutional investors show significantly higher opposition rates. Particularly, Eumedion members show even higher opposition rates than other institutional investors. However, there may still be room for a stronger focus on the activities and outcomes of stewardship, including changing the behaviour of companies, and not just policy statements.

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I. INTRODUCTION

Following regulatory, market and societal demands, companies need to be aware of their impact beyond the relationships with contractual counterparties more than ever before. In recent years, corporate law has been used to address the internal governance of business corporations to tackle broader social and economic problems.[1] An example includes the European non-financial disclosure obligations related to 'environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters'.[2] Academics have questioned the shareholder value model and the related corporate objective function that was largely influenced by Friedman's 1970 article for a long time.[3] For instance, Hart and Zingales argue that the corporate goal should not be maximising market value but shareholder welfare, which can be different if shareholders also have ethical and social concerns.[4] Additionally, practice and academic research tell us that many shareholders indeed have other concerns than (short-term) market value. In particular, various investors use negative (positive) screening to exclude (include) companies with poor (good) sustainability performance, influencing sustainability performance with this behaviour.[5] Others use their control rights to actively engage with their investees on Environmental, Social and Governance (ESG) matters.[6] Shareholder engagement takes a central role in corporate governance and is the focal point of many (soft) regulatory initiatives to stimulate long-term value creation, which is now the first principle of the Dutch Corporate Governance Code (hereinafter: 'DCGC').[7] Institutional investors are targeted particularly, as these investors are reversing the trend of dispersed ownership and can have a huge impact on market-wide corporate governance best

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[1] Reinier Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, OUP 2017) 93.

[2] Directive 2014/95/EU of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1.

[3] See for instance Oliver Hart and Luigi Zingales, 'Companies Should Maximize Shareholder Welfare Not Market Value' (2017) 2(2) JLFA 247.

[4] Hart and Zingales (n 3). See also Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (OUP 2019).

[5] Alexander Dyck and others, 'Do institutional investors drive corporate social responsibility? International evidence' (2019) 131(3) JFE 693; Elroy Dimson, Oğuzhan Karakaş and Xi Li, 'Active Ownership' (2015) 28(12) RFS 3225. See also Patrick Bolton and others, 'Investor Ideology' (2019) Columbia Business School Research Paper No. 18-21; European Corporate Governance Institute (ECGI) - Finance Working Paper No. 557/2018 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119935> accessed 26 January 2020.

[6] Dimson, Karakaş and Li (n 5); Bolton (n 5).

[7] The English version of the current DCGC can be found here: <https://www.mccg.nl/?page=4738> accessed 26 January 2020. The current DCGC is the 2016 version.

practices with their large investment portfolios.[8]

In Europe, more than a decade ago, the first Shareholder Rights Directive (hereinafter: SRD I) already emphasised that 'effective shareholder control is a prerequisite to sound corporate governance and should, therefore, be facilitated and encouraged.'[9] The Revised Shareholder Rights Directive (hereinafter: SRD II) added to this kind of shareholder control, the role of institutional investors in fostering sustainable companies in particular, and *inter alia*, requires them to disclose an engagement policy.[10] In the Netherlands, the implementation of the SRD II was approved in November 2019.[11] Also the Dutch Stewardship Code,[12] developed by institutional investor platform Eumedion and several institutional investors, came into force in January 2019, emphasising engagement and responsibilities of institutional investors in Dutch listed companies. Exemplary for Eumedion's key role in Dutch corporate governance is its lobbying during the implementation of the SRD II under Dutch law. This led to the adoption of a qualified majority requirement of 75 per cent for remuneration policy resolutions in the new article 2:135a(2) Dutch Civil Code (hereinafter: DCC),[13] providing institutional investors with a stronger tool to address pay issues in Dutch listed companies.

However, whereas the role of institutional investors and their responsibilities are considered important now in corporate governance in the Netherlands, Dutch corporate law can be characterised by a so-called *institutional approach* that puts the interests of the company and not the shareholders at the center.[14] Particularly, Dutch landmark cases highlight that the interests of shareholders do not take priority over the interests of other stakeholders.[15] This institutional vision was also confirmed by the 2016 DCGC that takes

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[8] For instance, Edward B Rock and Marcel Kahan, 'Index Funds and Corporate Governance: Let Shareholders be Shareholders' NYU Law and Economics Research Paper No. 18-39 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295098> accessed 26 January 2020.

[9] Directive EU 2007/36 of the European Parliament and of the Council on the exercise of certain rights of shareholders in listed companies [2007] OJ L184/17, preamble (3).

[10] Directive EU 2017/828 of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132/60.

[11] 'Wetsvoorstel implementatie EU richtlijn bevordering aandeelhoudersbetrokkenheid' (*Bill on the implementation of the EU directive on the promotion of shareholder involvment*) < https://wetgevingskalender.overheid.nl/Regeling/WGK008744> accessed on 20 December 2019.

[12] The Dutch Stewardship Code can be found at Eumedion's website: <https://www.eumedion.nl/en/public/knowledgenetwork/best-practices/2018-07-dutch-stewardship-code-final-version.pdf> accessed 26 January 2020. Eumedion is the Dutch Corporate Governance Forum that "represents institutional investors' interests in the field of corporate governance and related sustainability performance" <https://www.eumedion.nl/en/abouteumedion> accessed 26 January 2020.

[13] SRD II (n 10) preamble 55.

[14] Also see section II.A. of this chapter.

[15] HR 29 May 2017, JOR 2017, 261 (*Akzo Nobel*). See Part II.B.

a clear stakeholder approach.[16] The corporate board plays a central role in Dutch corporate law: under the supervision of the supervisory board (or non-executive directors, *see* Part II), the management board independently determines the strategy and policies of the corporation (2:129 DCC).[17] This board autonomy (in Dutch: '*bestuursautonomie*') is widely established in Dutch case law.[18]

This chapter sheds fresh light on the engagement and stewardship of institutional investors in the Netherlands and their position in Dutch corporate law. The commonly used definition of shareholder engagement – or shareholder activism – describes the attempts to 'change the status quo through 'voice',' without a change in control of the firm'[19]. This chapter discusses the use of voice by institutional investors in the Netherlands in theory and practice, focusing on shareholder voting in particular. After a brief introduction to the Dutch corporate law framework in Part II, we outline and discuss the shareholder stewardship (regulatory) initiatives. Next, in Part III we outline our empirical framework for the practical assessment of shareholder stewardship engagements in the Netherlands. Here, we investigate the use of voting rights by institutional investors in the shareholder meetings (hereinafter also: AGM), for which Part IV provides some statistical analyses. Part V provides concluding remarks.

II. THE DUTCH FRAMEWORK OF SHAREHOLDER STEWARDSHIP

A. STATUTORY SHAREHOLDER RIGHTS AND DUTIES

Although the AGM does not have the 'highest powers' in the Dutch corporate law framework, it traditionally has an important position as it receives the residual powers of control.[20] Besides the appointment and removal of board members, shareholders are

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[16] For example, DCGC (n 7) Principle 1.1 on long-term value creation states: 'The management board is responsible for the continuity of the company and its affiliated enterprise. The management board focuses on long-term value creation for the company and its affiliated enterprise, and takes into account the stakeholder interests that are relevant in this context. The supervisory board monitors the management board in this.'

[17] Dutch Civil Code: 'the Board of Directors is charged with the governance (management) of the Corporation'. As regards board duties, article 2:9 DCC stipulates the duty of care, which is directed towards the company. Article 2:129(5) includes the duty of loyalty. The famous Dutch *Forumbank*-case (1955) determined that the AGM cannot provide the board binding instructions with regard to the powers that the board has under the law and the articles of association. HR 21 January 1955, ECLI:NL:PHR:1955:AG2033, NJ 1959/43 m.nt. Hijmans van den Bergh (*Forumbank*).

[18] See HR 12 July 2007, NJ 2007, 434 (*ABN AMRO*) and HR 9 July 2010, NJ 2010, 544 (*ASMI*).

[19] Stuart L. Gillan and Laura T. Starks 'A Survey of Shareholder Activism: Motivation and Empirical Evidence', Contemporary Finance Digest, 2, 10–34 (1998).

[20] Article 2:107(1) DCC states that 'the general meeting, within the limits set by law and the articles of association, has all powers that are not assigned to the board or to others'. Translation by the authors.

granted several other statutory rights. The right to request information is incorporated in article 2:107(2) DCC. This provision states that the management board and supervisory board must provide the AGM with all requested information, unless such information would run contrary to a substantial company interest. In contrast with article 9(1) SRD I that includes the European shareholder question right, article 2:107(2) DCC does not limit the scope of the questions to the items on the agenda of the AGM, and thus individual shareholders also have the right to request information about matters other than agenda items under Dutch law. In addition to the right to request information, all shareholders have the right to speak during shareholder meetings.[21] The AGM has a large number of formal decision-making rights, including *inter alia* the adoption of the annual accounts,[22] the appointment of board members[23] and the external auditor,[24] say-on-pay resolutions and the approval of mergers and takeovers.[25] Shareholders may add their proposals to the general meeting's agenda since 2004.[26] Thereto, a shareholder has to hold 3 per cent of the issued capital or the lower threshold as provided in the articles of association. In addition to adding shareholder proposals to the meeting's agenda, shareholders are also able to request the convening of a shareholder meeting in court with a 10 per cent capital stake.[27] . Lastly, shareholders are able to initiate private litigation.[28]

Next, it is well-established in Dutch case law and legal scholarship that shareholders may act in their own interest, but need to take into account the boundaries of article 2:8 DCC as regards the reasonableness and fairness.[29] A recent Dutch phenomenon consists of the 'testing' of the division of powers between the corporate board and the shareholders, taking place in the courtroom, in which particularly Anglo-Saxon hedge funds are involved.[30] A recent landmark case involves Dutch listed company AkzoNobel and hedge fund Elliott Management Corp. ('Elliott').[31] AkzoNobel

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[21] DCC (n 17) 2:117.
[22] DCC (n 17) 2:101(3).
[23] Depending on the board structure, shareholders appoint the executive and non-executive directors, or the supervisory board members. Most Dutch listed companies voluntarily apply the *structuurregime* (structure regime) (2:132, 2:142, 2:144 and 2:162 DCC).
[24] The AGM provides the external auditor the instruction to control the annual account (2:393(2) DCC).
[25] Many of these decision-making rules stem from the European regulatory framework (2:135 and 145 DCC).
[26] DCC (n 7) 2:114a.
[27] DCC (n 7) 2:110.
[28] Typically, shareholder litigation in the Netherlands takes place before the Enterprise Chamber. Often, shareholders use their right to order an inquiry into the policy of the company.
[29] DCC (n 17) 2:8.
[30] Prominent examples include the ABN AMRO, Stork and ASMI cases 17 January 2007, LJN AZ 6440 (Stork). See nt. 20 for ABN AMRO and ASMI. Other examples are for instance JANA Capital's pressure on the board of TNT NV. For instance, see Matt Steinglass, 'TNT Express Feud with shareholders widens', *Financial Times* (Amsterdam, 6 February 2012).
[31] *Akzo Nobel* (n 15).

received three unsolicited friendly offers from the American Fortune 500 company PPG Industries in 2017, which the AkzoNobel's board all rejected, *inter alia*, arguing that these bids do not reflect the value of the company and PPG does not make any serious commitments to AkzoNobel's stakeholders. However, after the rejection of the second bid, Elliott requested to call a general meeting to remove AkzoNobel's chairman. Although the 10 per cent threshold required under Dutch law was met, the request was rejected by AkzoNobel,[32] and after the rejection of the third bid, Elliott started a legal action using the Dutch inquiry procedure (in Dutch: '*enquêteprocedure*') before the Enterprise Chamber,[33] to investigate the decision-making concerning the rejection of PPG's offers and filed for immediate measures (in Dutch: '*onmiddellijke voorzieningen*'), including calling for a general meeting to vote on the oust of AkzoNobel's chairman. The Enterprise Chamber rejected the request for these immediate measures and held that there were no serious grounds to question the proper management of the company, confirming the earlier stakeholder model ruling in the ABN AMRO[34] case.

While the Dutch corporate governance landscape is characterised by some landmark feuds between hedge funds and the corporate board in the past, nowadays we more commonly observe increased engagement by institutional investors. Institutional investors became the shareholder class with the largest holdings in a vast majority of Dutch companies. Recent research found that around 87 per cent of the shares of Dutch large cap companies were owned by (mostly) foreign institutional investors in 2014.[35] While these investors usually engage behind the scenes, some regulatory initiatives make their role in corporate governance more visible, in particular through disclosure requirements. Article 5:86 of the Dutch Financial Supervision Act (hereinafter: Wft) requires institutional investors to publicly disclose how they are accountable for those DCGC provisions applicable to institutional investors.[36] The Dutch Financial Supervisory Authority (hereinafter: AFM) can fine any violation of this disclosure requirement.[37] As a result, the provisions in the DCGC addressing institutional investors'

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[32] Shareholders also need to have a 'reasonable interest' (in Dutch: '*redelijk belang*') in order to request the convening of a general meeting ex article 2:111(1) DCC. The supervisory board argued that this reasonable interest was lacking.

[33] This is a specialised chamber of the Amsterdam Court of Appeal.

[34] *ABN AMRO* (n 18).

[35] R. Abma, D. van Kleef, N. Lemmers, and M. Olaerts. *De algemene vergadering van Nederlandse beursvennootshappen.* Recht en Praktijk Ondernemingsrecht (*The general meeting of Dutch listed companies. Law and Practice Corporate Law*), Deventer: Kluwer 2017.

[36] These provisions include provision 4.3.5 on the 'Publication of institutional investors' voting policy' and provision 4.3.6 on the 'Report on the implementation of institutional investors' voting policy'. DCGC (n 7).

[37] Besluit bestuurlijke boetes financiële sector (*Decree on administrative fines in the financial sector*) Article 10.

and shareholders' duties (see section IV.A of this Chapter showing more critical voting by Dutch institutional investors) seem to be an important driver for engagement practices of institutional investors in the Netherlands. More recently, with the implementation of SRD II, institutional investors must, among other things, include in their engagement policy information on how they exercise their voting rights and other rights attached to their shares (new article 5:87c Wft). Regarding this policy, the Dutch parliamentary explanatory statement clarifies that:

> The engagement policy deals with the way in which [institutional investors] monitor (a) the relevant matters of the companies invested in, (b) conducting a dialogue with these companies, (c) exercising their voting rights, (d) with other shareholders collaborate and (e) communicate with relevant stakeholders of these companies, such as the works council. Relevant matters (a) include the strategy, the financial and non-financial performance and risks, the capital structure, the social and environmental effects and corporate governance of their investees.[38]

B. SOFT LAW STEWARDSHIP REQUIREMENTS

In addition to mandatory, statutory corporate law,[39] the Dutch corporate governance system for listed companies is governed by the DCGC. In accordance with the European Directive 2006/46/EC,[40] the DCGC was endorsed by the Dutch legislator as a mandatory comply or explain regime. The DCGC 2003,[41] introduced in the aftermath of corporate governance scandals like Enron and Ahold, was the first code following a binding 'comply-or-explain' principle.[42] It further developed the role of shareholders by stating

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[38] *Kamerstukken II* (*Chamber Documents II*), 2018-2019, 35058 nr. 3, p. 62, translated by the authors.

[39] In addition, the Dutch Pension Act (in Dutch: *Pensioenwet*) is applicable to pension funds. Under article 135(4) of the Dutch Pension Act, pension funds must state in their management report how their investment policy takes account the environment, climate issues, human rights and social matters. Following the implementation of the IORP II Directive (Directive 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision, OJ L 354/37). in the Netherlands, ESG matters are further included in *inter alia* the Dutch Pension Act and in the Wft.

[40] Directive 2006/46/EC of the European Parliament and of the Council amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings [2006] OJ L224/1.

[41] DCGC 2003. An English version of the 2003 DCGC ('de Code Tabaksblad') is available at < https://www.mccg.nl/download/?id=647> accessed 26 January 2020.

[42] DCC (n 17) Article 2:391. The first DCGC was published in 1997 and did not follow the mandatory comply-or-explain principle. One of its guidelines requested shareholder involvement in the critical assessment of strategy, risks, activities and financial results. Yet, the code acknowledged that the company should be allowed to curb the influence of shareholders, in particular in take-over situations, indicating that 'the quality of the input by shareholders sometimes leaves much to be desired.' See

that 'good corporate governance requires the fully-fledged participation of shareholders in the decision-making in the general meeting of shareholders'.[43] Moreover, the general meeting should be able to exert such influence on the corporate policy that it plays a fully-fledged role in the system of checks and balances.[44] Institutional investors need to act responsibly for their beneficiaries, through careful decisions to exercise their shareholder rights and entering into dialogues with the company in situations that the company is non-compliant with the DCGC 2003 in an unacceptable manner.[45] The DCGC 2003 recommended institutional investors to develop a voting policy with annual reporting about this policy and at least every quarter of the year reporting about if and how shares are voted.[46]

Shortly after the introduction of the DCGC 2003, short-termism of hedge funds and other active investors became an influential Dutch corporate governance feature.[47] Correspondingly, in the new DCGC that was published in December 2008 (DCGC 2008), the responsibilities of shareholders vis-à-vis their investees were further developed. In addition to the provisions regarding the stewardship role allocated to institutional investors as already contained in the DCGC 2003,[48] a responsibility for all shareholders was added.[49] The DCGC 2008 also expects the shareholders, when using their legal right to put an item on the agenda of the general meeting, to consult the management board prior to the meeting. The shareholder must also explain its proposal during the general meeting, requiring the shareholder to attend the meeting in person or by proxy.[50]

In December 2016, the DCGC was again revised,[51] emphasising 'long-term value creation' in its very first provision. The DCGC 2016 strengthened the existing requirements for institutional investors, stating in particular the following:

> 4.3.5 Publication of institutional investors' voting policy: Institutional investors (pension funds, insurers, investment institutions and asset managers) should post

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Peters Commission, 'Corporate Governance in the Netherlands - Forty Recommendations' (25 June 1997) <https://www.mccg.nl/commissie-peters> accessed 30 August 2019.

43 DCGC 2003 Principle IV.1.

44 ibid.

45 DCGC 2003 (n 41) Principle IV.4.

46 DCGC 2003 (n 43) Best Practice Provisions IV.4.1.3.

47 See e.g. ABN AMRO and Stork (n 30).

48 DCGC 2008. An English version of the 2008 DCGC ('de Code Frijns') is available at < https://www.mccg.nl/dutch-corporate-governance-code> accessed 26 January 2020. DCGC 2008 Principle IV.4.

49 '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. This includes the willingness to engage in a dialogue with the company and their fellow shareholders.' (ibid).

50 DCGC 2008 (n 48) Best Practice Provision IV.4.4. and IV.4.6.

51 DCGC 2016 (n 7).

> annually, in any event on their website, their policy on the exercise of the voting rights for shares they hold in listed companies.
>
> 4.3.6 Report on the implementation of institutional investors' voting policy: Institutional investors should report annually, on their website and/or in their management report, on how they implemented their policy on the exercise of the voting rights in the relevant financial year. In addition, they should report on their website at least once per quarter on whether and, if so, how they have voted as shareholders at general meetings. This report will be posted on the website of the institutional investor.[52]

Before the introduction of the DCGC 2016, the Dutch Monitoring Committee already indicated that with a future review of the DCGC it would be recommended to evaluate the possibility of including the shareholder duties in a separate Dutch Stewardship Code.[53] However, given the pending SRD II at the time, the Committee indicated that it was too early to make substantial amendments to the DCGC as regards the relationship of the company with the (general meeting of) shareholders.[54]

Partly as a result of the introduction of SRD II, the Dutch Stewardship Code that entered into force on 1 January 2019, was introduced by Eumedion and its institutional members.[55] In 2011, Eumedion already issued 10 Best (stewardship) Practices,[56] including the requirement to develop a policy concerning situations when there are remaining different opinions between the corporate board and the institutional investor.[57]

The Dutch Stewardship Code contains eleven Principles and also provides – like the 2012 UK Stewardship Code – Guidance Principles.[58] The principles include the 2011 Best Practices and provide in further guidance as to the requirements set forth in the DCGC 2016.[59] All institutional investors that hold shares in Dutch listed companies are

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[52] ibid Best Practice Provisions 4.3.5 and 4.3.6. In addition, Provision 4.2.2. adds that companies should formulate an outline policy on bilateral contacts with the shareholders and should post this policy on their websites. From the 2018 report of the Monitoring Commission Corporate Governance Code it follows that about 85 per cent of the Dutch listed companies comply with this provision. The report is available at https://www.mccg.nl/rapport-monitoring-boekjaar-2018 accessed <date>.

[53] Voorstel voor herziening van de Code (*Proposal for revision of the Code*), <https://www.mccg.nl/?page=5405> accessed <date>. However, the Monitoring Committee indicated that, given the developments at the time (the SRD II was not yet adopted at the European level), significant changes to the DCGC in 2016 regarding the provisions on shareholder duties and stewardship were not suitable.

[54] ibid.

[55] The Dutch Stewardship Code (n 12).

[56] Eumedion, 'Best practices for engaged share-ownership intended for Eumedion participants' (30 June 2011) <https://www.eumedion.nl/en/public/knowledgenetwork/best-practices/best_practices-engaged-share-ownership.pdf> accessed 30 August 2019.

[57] ibid Best Practice 3.

[58] The Dutch Stewardship Code (n 12); The 2012 UK Stewardship Code (section Comply or Explain, 2.), .

[59] Preamble 3 of the Dutch Stewardship Code (n 12) outlines that it incorporates the stewardship obligations for asset owners and asset managers from the SRD II and the relevant provisions in the DCGC (n 7), and Preamble 8 mentions that the secretariat of Eumedion will annually monitor the

expected to report about their compliance with the principles in the Dutch Stewardship Code starting from the financial year 2019 (Preamble 5) on a comply-or-explain basis. However, unlike the DCGC, the Dutch Stewardship Code is not included in the Dutch statutory corporate law framework. Despite its legal basis is lagging and that this code is written by Eumedion members only, Eumedion expects that *all* institutional members follow the Dutch Stewardship Code.[60] The 'service document' of Eumedion and the *Pensioenfederatie* (*Pension Federation*) provide guidance on how the principles in the Dutch Stewardship Code should be addressed by institutional investors.[61] We outline the Dutch Stewardship Principles below.

The Dutch Stewardship Code states that 'engagement is conducting a meaningful dialogue with listed companies on these aspects as well as on issues that are the subject of votes at general meetings' .[62] Principle 2 explains the issues that should be monitored by institutional investors:

> Material issues,[63] including, but not limited to, the company's business model for creating long-term value, the company's strategy, performance and risks and opportunities, the capital structure, social and environmental impact, corporate governance and corporate actions such as mergers and acquisitions.

Principle 3, 4 and 5 consider dialogue, cooperation and communication with stakeholders as important facets of stewardship:[64]

> Principle 3 – Asset owners and asset managers are prepared to enter into dialogue with the executive and/or supervisory directors of their Dutch listed investee companies and are prepared to escalate their stewardship activities in case issues remain unresolved, where appropriate and at their discretion.
>
> Principle 4 – Asset owners and asset managers cooperate with other shareholders in exercising stewardship activities towards Dutch listed investee companies, where appropriate and at their discretion.

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compliance of its members and those other asset owners and asset managers that requested to be included, based on the disclosed information on the websites and annual reports.

[60] Cremers, M.A.J., & Rietveld, S. (2019) Aandeelhoudersbetrokkenheid van institutionele beleggers bij Nederlandse beursvennootschappen en de Nederlandse Stewardship Code (*Shareholder involvement of institutional investors in Dutch listed companies and the Dutch Stewardship Code*), *Tijdschrift voor Ondernemingsrechtpraktijk, 4* (June 2019).

[61] See Pensioenfederatie en Eumedion, 'Verantwoord en betrokken aandeelhouderschap' (Responsible and committed shareholding) <https://www.eumedion.nl/nl/public/kennisbank/best-practices/2018-12-servicedocument-nederlandse-stewardship-code.pdf> accessed 20 December 2019.

[62] Dutch Stewardship Code (n 12) Preamble 2.

[63] Principle 2 adds that 'material issues are those matters that are likely to significantly affect the company's ability to create long-term value'.

[64] The Dutch Stewardship Code (n 12) mentions stakeholders seven times.

> Principle 5 – Asset owners and asset managers communicate with relevant stakeholders of Dutch listed investee companies, where appropriate and at their discretion.

Like in other jurisdictions including the UK, also in the Netherlands, shareholder engagement involves more than just voting. Yet, voting is considered an important aspect of shareholder stewardship, and hence Principle 7 stipulates that institutional investors should exercise their voting rights in an informed manner, and publicly disclose (i) at least every three months how they voted their shares 'at an individual company level and per voting item', and, (ii) at least annually a general description of their voting behaviour and an explanation 'of the most significant votes'. Votes can be 'significant' due to the subject matter of the vote or the size of the holding in the company (Guidance principle 7). As regards the subject matter, Guidance principle 11 explains that this includes a resolution that is (i) of economic or strategic importance, (ii) which voting outcome is anticipated to be close or controversial, or (iii) where the asset owner or asset manager disagrees with the recommendation of the company's board.[65] It is important to note that it is Eumedion's policy to issue an alert to its members when there is a controversial voting item on the agenda of Dutch AGMs.[66]

Late December 2019, Eumedion published the Implementation Progress Report 2019 of the Dutch Stewardship Code.[67] Eumedion finds that about half of their investigated members[68] mentions the Dutch Stewardship Code in their disclosures, and that a vast majority of Eumedion members provides 'high levels of transparency on their voting behaviour'[69]. As regards to the 'significant votes', Eumedion uses its own alerts service for establishing a sample of significant voting items to investigate the compliance by institutional investors.[70] The results show that about half of the members in the sample report on the alerted voting items. With respect to continuous dialogues between

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[65] ibid, Principle 7 adds that when institutional investors vote against a particular management resolution, or withhold their votes, the reasons for such a request should be explained at least at the request of the company. In addition, Principle 8 states that those asset owners and asset managers that use proxy advisors and other voting services need to ensure that their votes are cast in line with their own voting policy.

[66] However, Eumedion abstains from providing any voting recommendation. See Eumedion, 'Beleidsplan 2020: Invloedrijk op goed bestuur en duurzaamheid'(*Policy plan 2020: Influential on good governance and sustainability*) (2019), p 17 < https://www.eumedion.nl/clientdata/215/media/clientimages/Beleidsplan-2020.pdf?v=191223123841> accessed 23 December 2019.

[67] See Eumedion, 'Dutch Stewardship Code Implementation Progress Report 2019', (2019) <https://www.eumedion.nl/clientdata/215/media/clientimages/Dutch-Stewardship-Code-Implementation-Progress-Report-2019.pdf?v=191220152455> accessed 23 December 2019.

[68] The report investigates a sample of 27 asset owners and asset managers, about half of its members, which is considered a representative sample according to ibid 3-4.

[69] ibid 7-8.

[70] ibid 8.

institutional investors and companies, Eumedion finds that about 96 per cent engages with their companies, whereas only 44 per cent discloses engagement goals and 19 per cent reports on the consequences of engagements.[71]

Since voting can be considered an important aspect of shareholder stewardship, we first empirically investigate the voting behaviour of institutional investors and Eumedion members in particular, in the next Parts. Second, since stewardship in the Netherlands is understood as a continuous dialogue of which voting constitutes only one element, we also consider the open shareholder dialogues that take place during Dutch AGMs.

III. EMPIRICAL FINDINGS

A. METHODOLOGY

We constructed a sample of 29 Dutch AEX (large-cap) and AMX (midcap) companies.[72] Thomson Reuters Eikon data shows that the average aggregate ownership share of institutional investors in these companies is 42.3 per cent.[73] However, it is highly likely that these ownership shares are underestimating institutional ownership in the Netherlands. For instance, Wolters Kluwer announces in its 2018 Annual Report that the institutional ownership is approximately 85 per cent,[74] whereas the institutional ownership data from Thomson Reuters Eikon only shows a 63.3 per cent stake.[75] Also, previous research found that 87 per cent of the shares in Dutch companies is owned by (foreign) institutional investors.[76]

Next, using the Proxy Insight database, information on institutional investors' voting behaviour and rationale is retrieved for all AGMs and EGMs[77] of those 29 Dutch listed companies for a five-year period (2015-2019). We removed all agenda items that

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[71] ibid 12.

[72] Since part of the empirical research contains an analysis of the AGM transcripts for these companies, the sample was established based on the requirement that the AGM transcripts were available for five years (2015-2019). The list of companies is available from the authors upon request.

[73] Data retrieved on 20 October 2019 from Thomson Reuters Eikon. Note that Gemalto NV was acquired at the time the authors conducted this analysis, and therefore excluded from this sample.

[74] Wolters Kluwer, 'Annual Report 2018' 28.

[75] Also see A Tupitcyna, 'Committed Shareholders: Institutional Ownership Report' (2018) <https://www.rsm.nl/fileadmin/Images_NEW/Erasmus_Platform_for_Sustainable_Value_Creation/Committed_shareholders_01.pdf> accessed in December 2019.

[76] Abma, Kleef, Lemmers, and Olaerts (n 35) p. 8.

[77] The sample retrieved from the Proxy Insight database also contains EGMs. Especially amendments to articles of association (one of the four voting item categories we focus on in sections III.C and III.D) are often voted on by shareholders during these extraordinary general meetings. The AGM turnout analysis (Part III.B) only contains AGMs.

only contained discussion items from the sample and only considered those resolutions that are recorded as voting items in the Proxy Insight database. The total sample of institutional investors' voting decisions totals 633,976, including yes and no-votes, abstentions, voting splits and occasionally the decision not to vote ('DNV'). In addition to data from the Proxy Insight database, we used hand-collected turnout (or participation) rate[78] data and AGM transcripts of the same sample of 29 Dutch listed companies. It is common practice for Dutch companies to disclose the transcripts of their general meetings on the corporate websites for compliance with Principle 4.1.10 of the DCGC. These transcripts are relevant for research on institutional investor engagement practices, as shareholders in the Netherlands are able to ask questions and make remarks in Dutch general meetings [79] Since it is common practice for different shareholder types to ask questions in Dutch AGMs,[80] the AGM transcripts offer valuable insights on institutional investor engagement practices. Finally, we also hand-collected the voting results of those voting items that were missing in the Proxy Insight database.[81]

B. AGM PARTICIPATION

Figure 1 shows that overall turnout rates of Dutch AGMs stabilised around 70 per cent over the last years.[82]

Figure 1: Participation Rates at Dutch AGMs (%)

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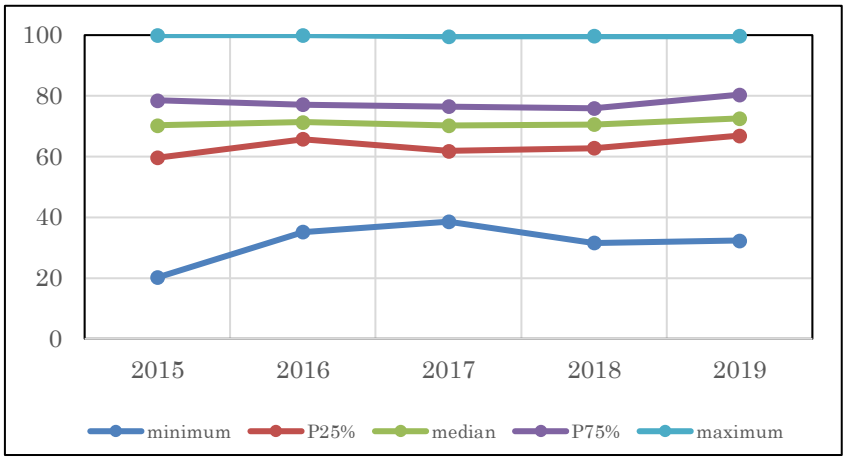
[78] Turnout (or participation) rates are based on the disclosed voting results by the Dutch listed companies and calculated as the Total Number of Votes Casted divided by the Total Amount of Votes Outstanding times 100 per cent.

[79] DCC (n 7) 2.107(2), 2:117. Also in accordance with SRD I (n 9). See Part II.A.

[80] See A Lafarre and C Van der Elst, 'Corporate Sustainability and Shareholder Activism in the Netherlands' in B Sjåfjell and C M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP 2019).

[81] For the four voting item categories as discussed in Part III.C-III.D of this chapter about 10 per cent of the voting results was missing. In addition, a close analysis of the voting decisions contained in the Proxy Insight database showed us that several voting items were withdrawn before the general meeting. These voting items are excluded from all analyses in Part III.C-III.D.

[82] In an earlier study of Eumedion, it is shown that since 2014 the increase in participation almost stopped, while in the 10-year period before the attendance at Dutch AGMs doubled. See Eumedion, 'Groot aantal bestuursvoorstellen door aandeelhouders verworpen of ingetrokken: Eumedion publiceert evaluatierapport aandeelhoudersvergaderingen 2019' (*Large number of management proposals rejected or withdrawn by shareholders: Eumedion publishes evaluation report for shareholder meetings 2019*) (5 July 2019) <https://www.eumedion.nl/nl/public/kennisbank/persberichten/2019-07-persbericht-evaluatie-ava-seizoen-2019.pdf> 5 accessed 30 August 2019.



Note: The figure shows the turnout rates for the 29 companies in the research sample (own data).

Figure 1 shows that shareholders of Dutch listed companies have a relatively high willingness to vote compared to many other jurisdictions in continental Europe, which is likely due to the relatively high level of institutional investors' share-ownership.[83] Figure 1 shows that more than 75 per cent of the AGMs were visited by more than 65 per cent of the shareholders and 25 per cent of the AGMs experienced a turnout rate of over 80 per cent.. The high maximum is due to a specific Dutch system that some companies make use of – *depository receipts.*[84] Shares are deposited in a trust office and the trust issues non-voting share certificates, thus separating capital rights from voting rights. The owners of these share certificates, however, may submit a request to receive proxies for voting.[85] The trust office votes the remaining shares that the depository receipts holders did not vote for.

C. Overall Approval Rates

Next, we consider the approval rates for important voting items by all shareholders and institutional investors in particular, in line with the emphasis on 'significant votes' in the Dutch Stewardship Code (*cf.* Part II.B). These agenda item categories that we investigate are:

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[83] Abma, Kleef, Lemmers, and Olaerts (n 35) p. 8. Also see C Van der Elst, 'Shareholder Engagement Duties: The European Move beyond Stewardship' in H Birkmose and K Sergakis (eds), *Enforcing Shareholders' Duties* (Edward Elgar, 2019) 66.

[84] For more information, see Anne Lafarre, 'The AGM in Europe: Theory and Practice of Shareholder Behaviour', Emerald Publishing 2017, at 122

[85] DCC (n 17) 2:118a

1. Approval of amendments to articles of association;
2. Approval of board elections;
3. Approval of discharging board members; and
4. Approval of remuneration proposals.

First of all, the articles of association (or the corporate charter) can be considered as the constitution of the company, and any amendment to these articles can therefore be denoted as a fundamental change.[86] The second voting item category contains all proposals to (re-)elect board members, since this shareholder right can be considered a key strategy for controlling the enterprise in corporate governance.[87] In Dutch listed companies with a two-tier board structure, shareholders are generally able to only elect the supervisory board members.[88] The third category contains all discharge resolutions. Shareholders in the Netherlands are asked to vote on the discharge of board members .[89] In general, discharge is an act of the general meeting that bindingly declares not to hold the directors liable for conduct in the financial year they are discharged for. The decision to discharge, however, only limits internal liability for the conduct that was known upon approval of the annual accounts. Hence, discharge protects the board members against liability claims, and perhaps more important for practice, signals the shareholders' satisfaction with the course of action of the board.

Lastly, shareholders have a binding say on the remuneration policy since 2004, long before the SRD II introduced this shareholder right at the European level.[90] Article 2:135(1) DCC stipulates that the general meeting is the only corporate body that can adopt the remuneration policy as well as any (major) amendments to the remuneration policy.[91] The approval of (an amendment of) the remuneration policy is a key feature of Dutch corporate governance. It is known that boards intensively discuss the remuneration policy with the shareholders[92] and sometimes the company even withdraws the proposal to change the policy when the shareholder signalled before the meeting that the new policy

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[86] Also see Kraakman (n 1) 175 and further.
[87] ibid p.37.
[88] Under the structuurregime (*structure regime*), the supervisory board has the authority to (re-)elect and dismiss members of the management board ex article 2:162 DCC. Dutch listed companies generally follow the structuurregime (*structure regime*) requirements.
[89] Supervisory and management board members or non-executive and executive directors, DCC (n 17) 2:121.
[90] Wet van 9 juli 2004 tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met aanpassing van de structuurregeling, *Staatsblad* (*Stb.*) 2004, 370 < https://zoek.officielebekendmakingen.nl/stb-2004-370.html> accessed 26 January 2020.
[91] Derived from *Kamerstukken II* (*Chamber Documents II*) (2009-2010), 31877, nr. 5 (Nota naar aanleiding van het verslag) (*Note following the report*), p. 25.
[92] Eumedion (2019) (n 82).

is unacceptable.[93] Contrary to the remuneration policy, the approval of compensation packages for individual board members can be delegated to another corporate body in the articles of association ,[94] which is usually the supervisory board.[95] However, even in this case, article 2:135(5) DCC requires shareholder approval on pay schemes in the form of shares and options. The remuneration of the supervisory board also requires shareholder approval .[96]

Figure 2 summarises the overall mean approval rates by all shareholders for these four agenda item categories.

Figure 2: Mean approval rates for different agenda items (%)[97]

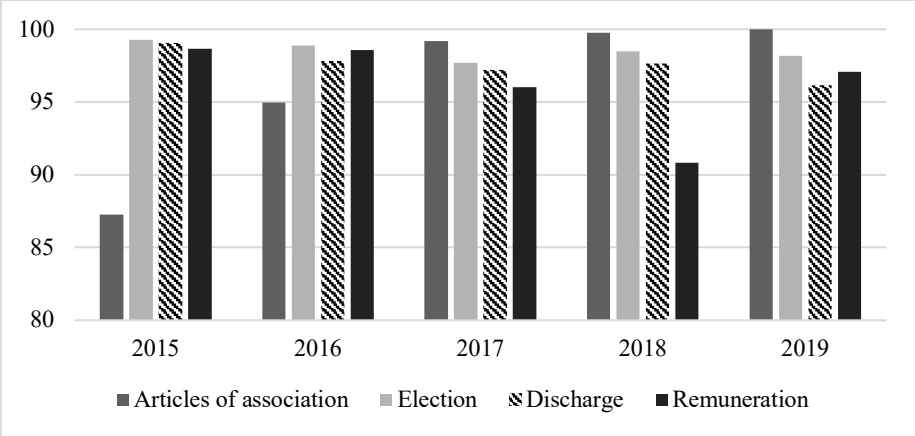


Figure 2 shows that generally, shareholders overwhelmingly support all these voting items. The high means, however, hide some resolutions that shareholders significantly opposed for all categories. This is illustrated by the 2018 sample mean of 90.8 per cent of the votes in favour for remuneration proposals. If only remuneration policy proposals are considered, the mean approval rate drops to 83.3 per cent in 2018. Since the remuneration policy only requires a vote if it is amended, the total number of observations is limited to

[93] Christoph Van der Elst and Anne Lafarre, 'Shareholder Voice on Executive Pay: A Decade of Dutch Say on Pay' (2017) 18 European Business Organization Law Review, 1.
[94] DCC (n 17) 2:135(4).
[95] A Lafarre and C Van der Elst 'Executive Pay and Say on Pay in the Netherlands' in C Van der Elst (ed), *Executive directors' remuneration in comparative corporate perspective* (Alphen aan den Rijn: Kluwer Law International 2015) 205-246.
[96] DCC (n 17) 2:145.
[97] Note to Figure 2: the figure contains all the voting items included in the Proxy Insight database for the 29 Dutch listed companies in the 2015-2019 research period for which voting results were available. We identified 28 agenda items concerning the articles of association, 445 agenda items related to director elections, 291 related to discharge and 96 concerning remuneration.

five in 2018, of which two remuneration policy proposals received approximately 30 per cent opposition, due to specific company related performance issues. As regards the articles of associations, only four companies changed their articles in 2015, and at one company a significant number of the shareholders opposed the changes (with 55.7 per cent in favour[98]), resulting in a mean approval rate of 87.2 per cent for this voting item category in 2015. Nonetheless, generally, changes of the articles of association are usually well-prepared and shareholders approve the changes with an overwhelming majority of the votes, as illustrated by the years after 2016.

D. INSTITUTIONAL VOTING BEHAVIOUR

In this section, we consider institutional investors' voting behaviour and compare their votes to the overall voting outcome as discussed in the Part III.C. Since Eumedion plays an active role in the establishment of the Dutch shareholder stewardship framework and the Dutch Stewardship Code in particular, we also research the engagement of Eumedion's institutional members.[99]

The Proxy Insight database reports in total 587,083 clear voting decisions by institutional investors (either 'for', 'against' or 'abstain').[100] In almost 97 per cent of the cases, institutional investors voted in favour of a resolution. In 16,159 cases (2.75 per cent), institutional investors voted against and in 1627 cases (0.3 per cent) they abstained. The database has 83,299 records of votes from Eumedion members. Whereas these institutional investors also vote in favour in almost 97 per cent of the cases, they slightly more often vote against with 3 per cent of the total votes casted. The approval rates of institutional investors provided in the sections below are calculated as: for / (for + against) * 100%. Hence, similar to the calculation of voting results, abstentions are not taken into account in the voting outcomes showed in this Part.[101]

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[98] In the Netherlands the articles of association can be modified with a simple majority of the votes if more than half of the capital is represented at the meeting.

[99] An overview of Eumedion members can be found via: <https://www.eumedion.nl/Over-Eumedion/deelnemers.html>.

[100] We excluded voting splits and did not vote ('DNV') decisions from the analysis.

[101] However, one should note that the data presented in the following Parts (including in Figures 3-4 and Tables 1-3) regarding the aggregate voting results for institutional investors and Eumedion members are calculated equally weighting each institutional investor's voting decision. In other words, the voting stakes of the institutional investors are not taken into account, as this information is not available for all institutional investors. Hypothetical situation: suppose 10 institutional investors have a voting decision recorded for voting item *X* in the Proxy Insight database, and 8 institutional shareholders voted in favour, whereas 2 shareholders voted against. In this case, the institutional voting outcome for voting item *X* is 80 per cent.

Figures 3 and 4 provide the findings regarding the voting behaviour of respectively all institutional investors and the Eumedion members for the aforementioned four voting item categories. Generally, these results are quite comparable to the overall approval rates presented in Figure 2.

Figure 3: Average number of approving institutional investors for different agenda items (%)[102]

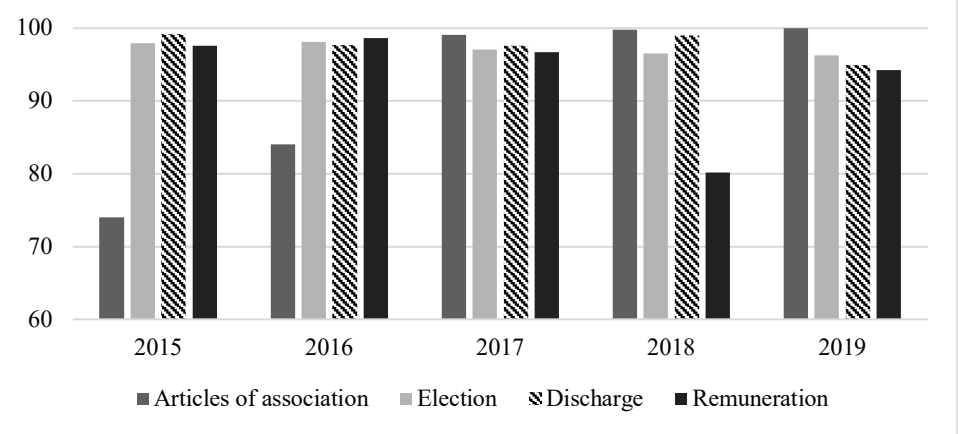
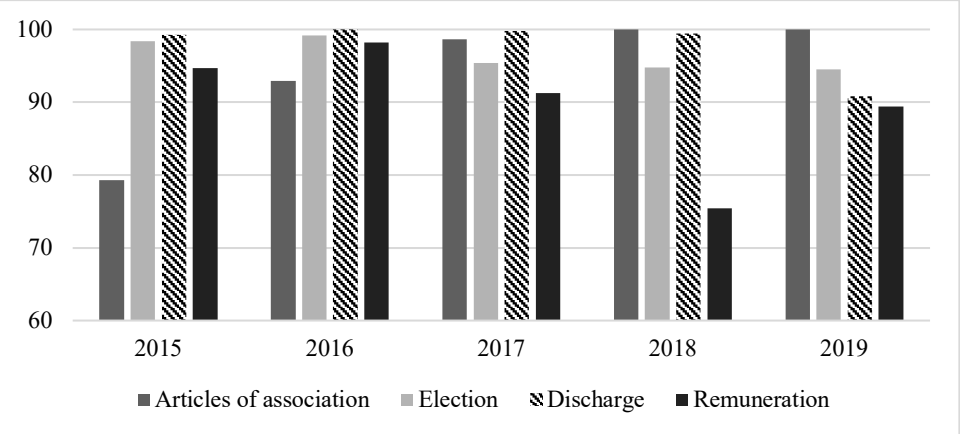


Figure 4: Average number of approving Eumedion members for different agenda items (%)[103]



[102] Note to Figure 3: the figure contains the mean approval rates of institutional investors (equally weighted) for the voting items included in the Proxy Insight database for the 29 Dutch listed companies in the 2015-2019 research period for which voting results were available. We identified 28 agenda items concerning the articles of association, 445 agenda items related to director elections, 291 related to discharge and 96 concerning remuneration.

[103] Note to Figure 4: the figure contains the mean approval rates of Eumedion members (equally weighted) for the voting items included in the Proxy Insight database for the 29 Dutch listed companies in the 2015-2019 research period for which voting results were available. We identified 28 agenda items concerning the articles of association, 445 agenda items related to director elections, 291 related to discharge and 96 concerning remuneration.

With respect to the voting category 'Articles of Association', most voting items received (large) support from the institutional investors (and the Eumedion members) with an average approval rate of 93.1 per cent from all institutional investors and 95.4 per cent from the Eumedion members. However, occasionally, voting items receive very high opposition rates, which is also shown by the average approval rates falling below 80 per cent in 2015. As mentioned in Part III.C, during one of the AGMs, only 55.7 per cent of the votes were in favour of the proposed amendment of the articles of association. When considering institutional investors only for this particular resolution, only *8.8 per cent of the 34 institutional investors* recorded in the Proxy Insights database voted in favour of this resolution (and 20 per cent of the Eumedion members). In this particular situation, the articles of association were modified in several ways and involved, *inter alia*, an increase of the dividend of the preferential shares and an increase of the required threshold to call a general meeting. A large majority of the (institutional investors') proxy votes voted against these changes. This is more than likely due to the increase in the threshold to call a general meeting[104], which is considered a strong limitation of shareholder rights. The board of directors withdrew this modification of the articles and the attending shareholders approved the other modifications. As most institutional investors usually vote by proxy prior to the general meeting, the dissatisfaction with the withdrawn amendment was still reflected in the voting result.[105]

The average approval rates presented in Figures 3 and 4 for 'Elections' show that director elections receive significant support with average approval rates of 97.2 and 96.4 per cent for all investors and Eumedion members respectively, and we observed only minor deviations in the average approval rates over the years. Only in particular situations, institutional investors vote against *en masse.* An example of this institutional investor revolt was the re-election of a supervisory board member during the 2017 AGM of Heineken. Heineken has a concentrated ownership structure with a controlling shareholder: the Heineken family is the ultimate owner of Heineken holding that controls via a pyramid structure an indirect stake of 50.005 per cent in Heineken. Next, its second larger shareholder FEMSA is an allied shareholder of the Heineken family that holds an

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[104] Which was also part of the changes of the articles of association.

[105] The voting rationales available in the Proxy Insight database reflect this. For instance, Acadian Asset Management LLC declared that 'A vote AGAINST is warranted because: The company proposes to amend the article that refers to the minimum requirement to place an item on the agenda. Instead of requiring a minimum threshold of 1 percent, management proposes to refer to the statutory minimum, which is increased to 3 percent. Such development is not favourable for minority shareholders. It is proposed to increase the preferred dividend on preference shares in order to finance an antitakeover instrument, which is considered not in the best interests of shareholders.'

indirect stake of 8.6 per cent in Heineken.[106] Although the opposition was 'only' 4.85 per cent against the re-election of the supervisory board member, given the concentrated ownership structure, this rate includes a significantly lower 77.7 per cent approval rate of all institutional investors and only 26.2 per cent, and hence disapproval, by Eumedion members. The representative of institutional investors (including some Eumedion members) present during the 2017 AGM of Heineken[107] declared to vote against the re-election of the supervisory board member, based on the (lack of) independency of this supervisory board member as the chair of the remuneration committee and the exceeding of the terms of his appointment.[108] Some institutional investors based their vote against on other rationales. PGGM and Allianz Global Investors's voting rationale sounded:[109]

> PGGM: The proposed candidate is considered to be a non-independent director and is becoming the chairman of the remuneration committee. This is not in line with PGGM guidelines and PGGM will therefore oppose this resolution.
>
> Allianz Global Investors: It believes that the board's Nomination committee should be at least majority independent and comprise directors who have qualifications, experience, skills and capacity to effectively contribute to the committee's work.[110]

During the 2019 AGM of Heineken, another supervisory board member was re-elected to the supervisory board with an overall approval rate of 92.6 per cent, hiding the fierce opposition rates of institutional investors of 32.5 per cent, and even 92.5 per cent from Eumedion members only. The voting rationales of these investors show similar arguments like the 2017 resolution.

Overall, the approval rates by institutional investors for the voting item category 'discharge' are high (97.7 per cent for all institutional investors and 97.7 per cent for Eumedion). However, some discharge proposals received fierce investor criticism. During the 2019 AGM of ING NV, the proposals to discharge both the management and supervisory board members were rejected by all shareholders with an approval rate of only about 37 per cent. Noteworthy, the institutional investors massively rejected these ING 2019 AGM proposals with approval rates of only 19.6 per cent and 18.7 per cent for

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[106] Data is retrieved from Heineken, Annual Report 2017 (2018) https://www.theheinekencompany.com/Information-Centre?Skip=0&Take=10> accessed 26 January 2020.

[107] Representing a large group of institutional investors, including Triodos Investment Management, Achmea Investment Management, Menzis and Aegon Investment Management BV.

[108] This supervisory board member is since 1994 a member of the supervisory board of Heineken.

[109] These voting statements are retrieved from the Proxy Insight Database.

[110] Note that the supervisory board member that is re-appointed is also a member of the Selection & Appointment board committee of Heineken.

the management board members and the supervisory board members respectively.[111] Particularly, from the disclosed institutional investors' voting rationales it follows that ING (supervisory) board members were criticised by their shareholders for the money laundering affair that led to a fine of € 775 million in 2018.[112] The representative of PGGM Investments critically states the following during the 2019 AGM of ING according to the AGM transcripts:[113]

> Ms [X] referred to PGGM's obligation to its members to take responsibility for how it voted on the policy implemented by and supervision at companies in which it invests. She believed that the principal duty of the Executive Board of a systemically important bank, under the supervision of the Supervisory Board, was to safeguard the reputation of the bank and public confidence in it. In respect of ING she listed the two main issues from 2018, the CEO's remuneration and the settlement agreement with the Dutch Public Prosecution Service, which she believed had been detrimental to ING's reputation and had led to adverse public sentiment towards the bank. These two issues were reasons why PGGM would not support the proposal to grant discharge to the members and former members of the Executive Board and the Supervisory Board in respect of their duties performed during 2018.[114]

The average approval rates for remuneration-related proposals are lower than for the other three voting item categories in our sample, with average approval levels of 94.9 per cent for all institutional investors, and 91.0 for Eumedion members. Some companies, including Unilever, experienced heavy opposition from their shareholders for this voting item. In particular for the year 2018, we can find lower average approval rates of 80.2 per cent from all institutional investors and only 75.4 per cent from Eumedion members. For instance, during the 2018 AGMs of Unilever, the remuneration policy proposal received significant shareholder opposition. Unilever is a Dutch listed company that is also incorporated in the UK, and hence, it yearly organises two AGMs, one in the UK and one in the Netherlands. The total dissent rates on the new remuneration policy proposal in these two AGMs were over 35 per cent and over 26 per cent for the UK and Dutch AGMs for this dually listed company respectively. When excluding the Unilever Trust Office

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[111] Remarkably, we find that we find that Eumedion members dismissed the discharge of the board members with a 30 per cent approval rate, but the supervisory board members' discharge with a 6.67 per cent approval rate as recorded by Proxy Insight. This may indicate that Eumedion members consider particularly the supervisory board responsible for the course of affairs.

[112] See for instance Toby Sterling and Bart H. Meijer, Dutch bank ING fined $900 million for failing to spot money laundering, Reuters 4 September 2018, < https://www.reuters.com/article/us-ing-groep-settlement-money-laundering/dutch-bank-ing-fined-900-million-for-failing-to-spot-money-laundering-idUSKCN1LK0PE> accessed 26 January 2020.

[113] Ms. [X] speaks on behalf of PGGM Investments and on behalf of its clients and shareholders.

[114] ING Groep, 'Minutes of the Annual General Meeting of ING Groep N.V.' (23 April 2019) 15. The authors removed the speaker's name.

from the voting results, 43 per cent of the shareholders voted against.[115] For the institutional investors, we find *approval rates* of only 48.1 per cent (all institutional investors) and 36.4 per cent (Eumedion members). Although Eumedion does not disclose its issued voting alerts (cf. Part II.D), from its 2018 annual report we can deduct that it issued an alert for this 2018 Unilever remuneration item to its members and thus considered this voting item controversial, as shown by the significant dissent rate of its members.[116] The representative of seven institutional investors[117] voiced his opinion about the new Unilever remuneration policy, making the following statement:

> … We would like to thank you for discussing this policy with us prior to the AGM. There are good aspects, for example the simplification. … In addition, you have also listened to the shareholders by including that 75% discretionary cap. But we also have a few points of criticism, because … the fact remains that the short-term bonus in the new program is rising faster than the long-term bonus component. We think that's a shame. In addition, there is an observation that the salary can rise sharply in maximum terms: by 21%. In addition, there is still a transition-forward option with a buy-out award without a formal upper limit. There you can find yourself in a situation where the board or the future director from outside may be in a strong negotiating position. Every investor, I speak on behalf of several investors, but everyone ultimately makes their own assessment of whether they will vote for or against the remuneration policy. I would at least like to inform you that MN [Services] will vote against, in particular because of the possible welcome bonus for a new external director.[118]

Hence, although there were some good elements in the amended remuneration policy, the institutional investors clearly voiced their discontentment during the 2018 Dutch AGM of Unilever. In addition, the first sentence of this statement also directly refers to another engagement tool that is commonly used by institutional investors: private conversations with the corporate management prior to the AGM.

On the other hand, both the average approval rates in Figures 2-4 and the Unilever 2018 AGM example show that institutional investors may more heavily criticise remuneration proposals compared to the entire shareholder base, although this is not always the case. A textbook example can be found during the SBM Offshore 2018 AGM:

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[115] Also see Eumedion, 'Wetsvoorstel ter implementatie van de richtlijn langetermijnbetrokkenheid aandeelhouders (*Bill to implement the long-term involvement of shareholders directive*) (Kamerstukken II 2018/19, 35 058, nr. 1 e.v.)' (21 November 2018) <https://www.eumedion.nl/nl/public/kennisbank/wet-en-regelgeving/2018/2018-11-commentaar-wetsvoorstel-implementatie-richtlijn-aandeelhoudersbetrokkenheid.pdf> accessed 20 September 2019.

[116] See Eumedion Annual Report 2018, 2019, p. 22. <https://www.eumedion.nl/clientdata/215/media/clientimages/jaarverslag-2018.pdf?v=191223123841> accessed 20 November 2019.

[117] The represented institutional investors are also members of Eumedion: MN Services, Achmea, Menzis, NN Investment Partners, Robeco, Double Dividend and PGGM.

[118] Translated by the authors.

where a total of over 30 per cent of the shareholders voted against,[119] the representative of the institutional investors[120] in the AGM stated to support the proposed remuneration policy 'since it is easier to understand and more transparent for shareholders'[121].

IV. STATISTICAL ANALYSES

A. OVERALL ANALYSIS

In this Part, we further analyse the descriptive results in Parts III.B-III.D. In particular, we measure whether institutional investors and Eumedion members in particular make statistically significant different voting decisions. Table 1 shows the results. Table 1 shows that institutional investors are more critical than the aggregate shareholder base for most of the voting items. In particular, for approval of amendments to the articles of association (AoA), institutional investors show higher dissent rates than all shareholders (with a statistically significant difference of -3.9 per cent, see column 4 of Table 1). Also, for remuneration proposals, institutional investors, and in particular Eumedion members, more often do not agree with the corporate management: column 5 of Table 1 shows that the difference in approval rates between all shareholders and Eumedion members is almost six per cent (statistically significant at the one per cent level). For these proposals, we see that Eumedion members are also more critical than all institutional investors: the difference is almost four per cent (statistically significant at the one per cent level).

Table 1: All shareholders, all institutional investors and Eumedion members approval rates (%)[122]

Voting items	All shareholders	All institutional investors	Eumedion members	Difference (all shareholders – all institutional)	Difference (all shareholders – Eumedion members)	Difference (all institutional – Eumedion members)
AoA (n=28)	96.99	93.12	95.43	-3.90* (-1.60)	-1.56 (-1.15)	2.31* (1.54)
Elections	98.48	97.17	96.39	-1.31***	-2.09***	-0.78**

[119] Calculated as: votes against / (votes against + votes in favour) * 100 per cent.
[120] MN Services and Menzis.
[121] SBM Offshore, 'Minutes of the General Meeting of SBM Offshore N.V.' (11 April 2018) 9.
[122] Note to Table 1: *, **, and *** indicate statistical significance at the 10%, 5%, and 1% levels, respectively. t-values are reported in parentheses.

(n=445)				(-6.24)	(-4.10)	(-1.81)
Discharge (n=291)	97.58	97.73	97.91	0.15 (0.51)	-0.33 (-0.49)	0.18 (0.28)
Remuneration (n=96)	96.75	94.91	91.04	-1.84** (-1.80)	-5.71*** (-3.72)	-3.87*** (-4.19)

B. OWNERSHIP CONCENTRATION

The data in Part III shows that several companies in the Netherlands have a rather concentrated ownership structure. Using the data from Thomson Reuters Eikon, we analyse the statistically significant differences between approval rates of all shareholders, all institutional investors and Eumedion members for these concentrated ownership companies. We divide the companies in our sample in two panels: panel 1 contains all companies with 80 per cent or less of the outstanding share capital in free float (hence, all companies with an ownership concentration of at least 20 per cent, 9 companies) and panel 2 contains the five companies in our sample with the highest ownership concentration (all companies have about 50 per cent or less of their shares in free float).[123] Since Table 1 has shown that particularly resolutions in the 'Remuneration' category receive higher dissent rates from institutional investors than all shareholders, we also provide the analyses for these concentrated ownership companies for remuneration proposals separately. Table 2 shows the results.

Table 2: Voting items companies with concentrated ownership (%)[124]

Ownership structure	All shareholders	All institutional investors	Eumedion members	Difference (all shareholders – Institutional investors)	Difference (all shareholders – Eumedion members)	Difference (all institutional – Eumedion members)
<u>All categories</u>						
Ownership top 5 (*n*=146)	99.26	96.31	93.86	-2.95*** (-4.98)	-5.40*** (-4.11)	-2.45*** (-2.70)
Ownership 20%	98.92	96.15	94.85	-2.77***	-4.06***	-1.30**

[123] These thresholds of 20 and 10 per cent are in line with the earlier work of La Porta et al. See for instance Rafael La Porta, Florencio Lopez-De-Silanes and Andrei Shleifer, 'Corporate Ownership Around the World' (1999) Journal of Finance 52(2) 471-517.

[124] Note to Table 2: *, **, and *** indicate statistical significance at the 10%, 5%, and 1% levels, respectively. t-values are reported in parentheses.

(*n*=255)				(-5.73)	(-4.76)	(-2.08)
Remuneration						
Ownership top 5 (*n*=18)	98.33	92.39	85.95	-5.94** (-1.79)	-12.38** (-2.39)	-6.44*** (-2.77)
Ownership 20% (*n*=32)	97.78	93.35	88.80	-4.44** (-1.93)	-8.98*** (-2.59)	-4.54*** (-3.14)

Table 2 shows that the difference in approval rates between institutional investors, and Eumedion members in particular, and the entire shareholder base are even more prominent when ownership concentration is taken into account. When we only consider the five companies with the highest ownership concentration, we see that the difference in approval rates is almost three per cent for all institutional investors, and even about 5.5 per cent for Eumedion members. Table 1 shows that remuneration proposals are generally most critically evaluated by Eumedion members and when we consider these proposals for concentrated ownership companies, we see that the difference in approval rates between all shareholders and Eumedion members even exceeds 12 per cent for the top five companies with the highest ownership concentration.

C. WITHDRAWN RESOLUTIONS

In the Proxy Insight database, we found eight voting items related to one of the four resolution categories that were withdrawn prior to the general meeting, for which the institutional investors, however, disclosed their voting behaviour.[125] The average approval rate for these resolutions is 56.73 per cent for all institutional investors, and 63.0 per cent for Eumedion members (with a standard deviation of respectively 37.0 and 38.0 per cent). These average approval rates show high dissent rates. The highest dissent rate could be found for resolution 5 of the 2016 EGM of Ahold NV, concerning a proposed amendment of the articles of association regarding an option right to *Stichting Ahold Continuïteit* (the Ahold trust office), with an approval rate of 13.5 per cent from all institutional investors in the Proxy Insight database and of only 8.1 per cent from Eumedion members. Another voting item was also withdrawn from the agenda prior to this Ahold meeting, concerning a proposed amendment to the remuneration policy (resolution 8): this voting item received approval rates of institutional investors and Eumedion members of respectively 42.6 and 62.2 per cent.

[125] These voting items are not included in the previous analyses (*see* Part III.A).

V. A SERIOUS STEWARDSHIP ROLE IN A STAKEHOLDER ENVIRONMENT

In the Netherlands, the corporate legal system embraces the stakeholder approach, which is widely recognised by Dutch scholarship, case law and the DCGC with its focus on long-term value creation. Nonetheless, investor stewardship is gaining importance in the Dutch context. The recent implementation of SRD II and the introduction of the Dutch Stewardship Code further emphasised this corporate governance feature.

Currently, (foreign) institutional investors hold a large part of the shares in Dutch listed companies. These foreign institutional investors are encouraged to take into account the Dutch stakeholder model when deciding to act as a steward in their Dutch investee companies, as the Dutch model differs substantially from the more shareholder-oriented models in the US and the UK. With its significant influence on the Dutch corporate governance landscape and the introduction of the Dutch Stewardship Code that recognises the involvement of stakeholders, Eumedion can play a pivotal role spreading good stewardship practices.

The Dutch turnout rates that are among the highest in Europe[126] and the observed opposition against controversial voting items show that many institutional investors take their engagement role seriously. Institutional investors critically consider (non) current voting items which could negatively affect shareholder rights, like some of the amendments of the articles of association as well as remuneration packages of directors that contain insufficient or inappropriate incentives. Compared to other investors, institutional investors show significantly higher opposition rates regarding these voting items. Particularly, Eumedion members show even higher opposition rates than institutional investors in general for the different voting items addressed in this research. However, there may be room for a stronger focus on the activities and outcomes of stewardship, including changing the behaviour of companies, and not just policy statements.[127]

We have also shown that the high ownership concentration in some Dutch companies has a major impact on voting outcomes. In these situations, voting can be insufficient to initiate a change of the behaviour of the investee companies. While institutional investors and Eumedion members sometimes heavily oppose agenda items,

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[126] This can be explained by the combination of high levels of institutional ownership in many Dutch listed companies and high ownership concentration in many other companies, since both types of shareholders (institutional investors and blockholders) actively make use of their voting rights.

[127] See Chapter XX in this Handbook on the UK, as this change was incorporated in the UK 2020 Stewardship Code.

with up to 90 per cent those investors voting against, large and in particular controlling shareholders align with management and the board, generally approving all the proposals. It raises questions as to whether the current system of voting based solely on the number of voting rights is appropriately balancing the powers between shareholders on the one side and between the board and cooperative shareholders and other shareholders on the other side. Alternatively, other voting systems, like the majority of minority (MoM) rule could enhance the effects of stewardship of, in particular, institutional investors. Meanwhile, institutional investors may seek further cooperation with other shareholders in exercising stewardship activities and engage with other stakeholders of their Dutch listed investee companies as Principle 4 and 5 of the Dutch Stewardship Code suggests. We will have to wait a few more years to find out if the Dutch Stewardship Code efforts complementary to the Dutch Corporate Governance Code indeed further encourage the interaction between Dutch companies and their (institutional) shareholders.

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