



Shareholder Activism and ESG: From Locust to Green Knight? A Perspective from the Netherlands

D. J. F. F. M. DUYNSTEE,
T. DRENTH
and
A. C. W. PIJLS*

In this article, we will answer the questions (i) what is the role and what are the rights of activist shareholders under Dutch law, (ii) how these rights relate to ESG developments, and (iii) whether the associated changes in shareholder activism will affect the existing negative image of activist shareholders and their limited rights. We will examine all of this against the backdrop of recent developments – both legislative and practical – around ESG and the broad public support for it. In other words: will the pendulum, that in recent years has placed the power in the company in the hands of the management board and the supervisory board, swing back a bit toward the shareholders? We will discuss these matters from the Dutch perspective and will focus on the rights of shareholders according to Dutch law. The structure is as follows. In Section 2, we first outline the current playing field. What and who are activist shareholders, what do they want, what strategies do they employ and what trends can be discerned in practice? In Section 3, we provide a brief overview of the legal and non-legal “tools” that activist shareholders use. In Section 4, we discuss some recent developments in the field of ESG legislation and examine whether those developments affect or should affect existing shareholder rights. In Section 5, we discuss some additional “routes of attack” that the ESG-oriented activist shareholder can take. In Section 6, we wrap up with a brief conclusion.

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* Dirk-Jan Duynstee and Tiemen Drenth are lawyers at Clifford Chance LLP. Arnoud Pijls is professor of European and Comparative Financial Law at Radboud University Nijmegen. The authors would like to express their sincere gratitude to Fabienne Evers, research assistant of the Financial Law Centre (FLC) of Radboud University Nijmegen, for her research assistance. Research for this article was completed on 1 October 2024. Subsequent developments have not been included.

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1. Introduction

In *The big fight*, Jeroen Smit's book about *Unilever* and *Paul Polman*, *Polman* sets the mood as follows:

"Hedge funds are not at all concerned with long-term value creation. Hedge funds would sell their grandmother if they could make money off it."¹

This is the fairly ingrained – and not very positive – image of activist shareholders. Critics are quick to see the focus on short-term returns as a major drawback of activist shareholders.² However, here and there this notion of a one-sided focus on the short term is subjected to some nuance. *The Economist* wrote in early 2023:

"Contrary to their reputation or short-term opportunism, activist investors can help boost long-term return. One study of 2,000 activist campaigns concluded that target firms on average outperformed their rivals after five years on both share-price and operating measures."³

Proponents of shareholder activism also point to the corrective effect on legacy structures and policies. Activist shareholders keep corporate management on their toes. In doing so, they discipline companies and the market.⁴ Proponents

1 Jeroen Smit, "Het grote gevecht & het eenzame gelijk van Paul Polman", Amsterdam: Prometheus 2021, p. 165.

2 That too is a more nuanced debate, see among others, Claudio R. Rojas, "Eclipse of the Public Corporation Revisited: Concentrated Equity Ownership Theory", *Oxford Business Law Blog* <https://blogs.law.ox.ac.uk/business-law-blog/blog/2017/06/eclipse-public-corporation-revisited-concentrated-equity-ownership> (last accessed: 25 February 2025), 22 June 2017.

3 "Elliott and fellow activist investors take on big tech", *The Economist*, <https://www.economist.com/business/2023/01/26/elliott-and-fellow-activist-investors-take-on-big-tech> (last accessed: 25 February 2025), 3 February 2023.

4 Leo E. Strine, "Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System", *The Yale Law Journal*, https://www.yalelawjournal.org/pdf/i.1870.Strine.1970_cfq35f6x.pdf 2017, vol. 126, 1870, 1953–1954.

also believe that these highly focused shareholders can generate good ideas for the company. Even the former “targets” of shareholder activism are not always uniformly negative. See, for example, the former CEO of *AkzoNobel* in an interview following interactions with *Elliott*:

“Actually, in retrospect, an activist shareholder like Elliot[t] proved to be a very useful sparring partner. That probably sounds surprising, given our history. Occasional sparring with large, knowledgeable shareholders works very well, as long as you follow all the rules.”⁵

In the Netherlands, shareholder control is limited.⁶ This is primarily due to the fact that determining policy and setting the strategy are reserved for the company’s board. As a result, the board can set the policy and strategy for the company and its affiliated business with a certain degree of independence (i.e., separate from the shareholders).⁷ Throughout this article, we will be using the terms policy and strategy as synonyms.

In this article, we will try to answer the questions (i) what is the role and what are the rights of activist shareholders under Dutch law, (ii) how these rights relate to ESG developments, and (iii) whether the associated changes in shareholder activism will affect the existing negative image of activist shareholders and their limited rights. We will examine all of this against the backdrop of recent developments – both legislative and practical – around ESG and the broad public support for it. In other words: will the pendulum, that in recent years has placed the power in the company in the hands of the management board and the supervisory board, swing back a bit toward the shareholders? We will discuss these matters from the Dutch perspective and will focus on the rights of shareholders according to Dutch law.

This article is structured as follows. In Section 2, we first outline the current playing field. What and who are activist shareholders, what do they want, what strategies do they employ and what trends can be discerned in practice? In Section 3, we provide a brief overview of the legal and non-legal “tools” that activist shareholders use. In Section 4, we discuss some recent developments in the field of ESG legislation and examine whether those developments affect or should affect existing shareholder rights, or at least the effective exercise of those rights in practice. In Section 5, in light of the developments discussed in Section 4, we discuss some additional “routes of attack” that the ESG-oriented activist shareholder can take. In Section 6, we wrap up with a brief conclusion.

5 “The quarterly cycle destroys value for a publicly traded company”, *EY*, https://www.ey.com/nl_nl/strategy-transactions/de-kwartaalcyclus-vernietigt-waarde-voor-een-beursgenoteerd-bedrijf (last accessed: 25 February 2025), 12 August 2020.

6 See for example *L. Timmerman*, “Een groene bom op het vennootschapsrecht?”, *WPNR* 2022/7396, pp. 933–934.

7 According to *Timmerman* (fn. 6), p. 934.

2. Activist shareholders: goals, strategies and trends

Shareholder activism is an undefined concept. In our view, it includes every shareholder in a listed company exercising their shareholder rights to force change in relation to that company and its affiliated business.⁸ So broadly speaking, these are “active” shareholders, as distinguished from their non-active fellow shareholders.⁹

The goals of activist shareholders are diverse and may include, for example, a better capital structure; improving corporate governance; selling non-core divisions; dividend payments; share buyback programmes; or, the most drastic option, putting the whole company into play.¹⁰ Yet other shareholders are trying to bring about a change of course for predominantly idealistic reasons. Achieving financial returns as a result of the intended change of direction is often not the primary motive in that case. This will mostly pertain to changes to the strategy regarding topics in the ESG sphere. An intermediate form is also common, of course, namely that there is primarily a financial motive, in which ESG elements (whether or not based on idealistic motives) then also play a role.

There is extensive debate on whether or not activist shareholders perform a useful function in the system of checks and balances within the company and whether or not they make a valuable contribution to long-term value creation by the company. Apart from the fact that we do not think a general and unequivocal answer to this question is possible, we will not repeat that debate here.¹¹

In recent years, we have seen a trend of civil society organisations and institutional investors using the same tactics previously reserved for classically activist hedge funds.¹² Those civil society organisations might include, for example, initiatives such as *Follow This*. *Follow This* is a Dutch association that takes an active stance as shareholder at general meetings of companies operating in the oil and gas sector. In particular, it does this by proposing a resolution that, in concise terms, calls for Paris-aligned targets for the Scope 3 emissions re-

8 See *Duynstee/Drenth*, “Aandeelhoudersactivisme in Nederland anno 2020: van hyena tot papieren tijger?”, *Ondernemingsrecht* 2020/159, para. 2.12.2.

9 See *Duynstee/Drenth*, (fn. 8), para. 2.1 and the literature cited there in footnote 6.

10 Well-known examples of companies in the Netherlands that have faced shareholder activism include *ABN AMRO*, *Ahold*, *ASMI*, *Stork*, *VNU*, *CSM*, *Euronext*, *TNT Express*, *AkzoNobel*, *Intertrust*, *Just Eat Takeaway* and *AholdDelhaize*.

11 See, among others, *Duynstee/Drenth*, (fn. 8), para. 2.3.

12 For a comprehensive empirical analysis from an international perspective, we refer to the well-researched study *Michael H. C. Bakker*, “Shareholder Proposals and Sustainability: An Empirically-Based Critical Reflection”, *ECFR* 2023, 276–313.

ported by those companies (which, in short, concerns the emissions from customers due to the use of the energy products sold).¹³ Other organisations such as *Fossil Free*, *Milieudefensie*, *ClientEarth* and *Extinction Rebellion* are also increasingly active at general meetings.

The trend that also institutional investors, such as large pension funds and asset managers, are taking – especially on ESG issues – a more active stance in general meetings than before,¹⁴ has been emerging for some time.¹⁵ However, over the past year, an opposing dynamic has arisen in this arena, particularly in the U.S., where certain Republican politicians actually believe that ESG should not play a role at all in investment choices by asset managers such as *BlackRock*, *Vanguard*, *Fidelity Investments*, and *State Street Global Advisors*.^{16, 17} Perhaps partly because of this, *Larry Fink's* Annual Chairman's Letter to In-

13 Contrary to what the proposal suggests, there is no one-size-fits-all answer as to what a so-called “Paris-aligned” Scope 3 target should look like (in absolute terms or otherwise). This will depend, among other things, largely on the energy products the company sells, the sectors in which it operates, and the countries in which it operates.

14 Institutional investor participation in matters of corporate governance is often referred to as ‘investor stewardship’, see also *Tim Bowley & Jennifer G. Hill*, ‘Stewardship codes, ESG activism and transnational ordering’, in: T. Kuntz (ed.), *Research Handbook on Environmental, Social and Corporate Governance*, Edward Elgar Publishing: Cheltenham UK, 2024, p. 117 et seq.

15 A recent study of NGO *ShareAction* says that legislative requirements in Europe appear to have improved the voting performance of European asset managers. European asset managers supported more “key environmental and social” shareholder proposals than ever, voting in favour of 88% of resolutions 2023, on average. It also concludes however that on a global level the support for these proposals has declined drastically. In 2023, only 3% of the assessed shareholder resolutions passed. This is down from 21% of assessed resolutions in 2021. See the report “Voting Matters 2023. Are asset managers using their proxy votes for action on environmental and social issues?”, *ShareAction*, January 2024, available at: <https://cdn2.assets-servd.host/shareaction-api/production/resources/reports/Voting-Matters-2023.pdf> (last accessed: 25 February 2025).

16 In this respect, it is notable that the study of *ShareAction* mentioned in the previous footnote concludes that the world's four largest asset managers (*BlackRock*, *Vanguard*, *Fidelity Investments*, and *State Street Global Advisors*, which are all from the U.S.) are among “the most culpable, backsliding on support for shareholder resolutions”. In 2023, these four asset managers only supported – on average – one eighth of those put forward, a marked drop since 2021. The study also says that U.S. asset managers in general “show particularly poor performance”. They supported just a quarter of resolutions, on average.

17 A recent study of *Morningstar* also concludes that there is a widening gap between U.S. and European asset managers with respect to support for so-called “Key ESG Resolutions” at general meetings, see “Voting on ESG: Ever-Widening Differences Voting records for the largest U.S. and European managers reveal greater divergence in 2023”, *Morningstar Manager Research, Proxy-Voting Insights*, January 2024, available at: <https://www.morningstar.com/lp/esg-proxy-voting> (last accessed: 25 February 2025).

vestors was in 2023 considerably more cautious. Not only was the letter this time addressed only to investors, but it also no longer mentioned ESG as a term and it emphasized that there are multiple perspectives (“There are many people with opinions about how we should manage our clients’ money. But the money doesn’t belong to these people. It’s not ours either. It belongs to our clients, and our responsibility and our duty is to them.”¹⁸). Nevertheless, there is still very large and sustained growth in ESG investments.

Besides civil society organisations and institutional investors, there are also hedge funds that focus specifically on ESG activism. A well-known example of such an ESG-focused hedge fund is *Engine No. 1*. Perhaps the most notable victory it has achieved was the appointment at *ExxonMobil* of three directors with experience in renewable energy and the energy transition. Incidentally, the success of this campaign was partly due to the support of major institutional investors such as *BlackRock*, *Vanguard* and *State Street Global Advisors* using their ownership leverage to encourage their investee companies to tackle ESG issues. In early 2024, *ExxonMobil* was again front-page news in the context of (anti-)ESG activism.¹⁹ *ExxonMobil* sued *FollowThis* and U.S. asset manager *Arjuna Capital* to get resolutions submitted by them to the general meeting off the table.²⁰ Through these resolutions, *FollowThis* and *Arjuna Capital* called on *ExxonMobil* to accelerate reductions in greenhouse gas emissions, which would also require *ExxonMobil* to include in its reduction plans targets for its reported Scope 3 emissions. *ExxonMobil* stated in its complaint that, in previous years, almost identical proposals had already been rejected by a very large majority of shareholders and therefore resubmission of this proposal was not allowed. In addition, *ExxonMobil* argued that the proposal concerned a topic ‘relating to the company’s business operations’.²¹ For these reasons, it asked the federal District Court for the Northern District of Texas for a declaratory judgment that it did not have to include this proposal in the agenda of the general meeting. Although following this subpoena *FollowThis* and *Arjuna Capital* withdrew their proposal, *ExxonMobil* decided to continue proceedings. Ultimately, the court dismissed *ExxonMobil*’s claim, although this

18 Available at: <https://corpgov.law.harvard.edu/2023/03/17/larry-finks-annual-chairmans-letter-to-investors/> (last accessed: 25 February 2025). In 2022, one of the chapters was titled “*Empowering clients with choice on ESG votes*”, see <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> (last accessed: 25 February 2025).

19 See e.g. *Financial Times*, ‘*ExxonMobil* sues to block shareholder climate petition’, January 22, 2024.

20 The relevant court filings can be accessed at: <https://climatecasechart.com/case/exxon-mobil-corp-v-arjuna-capital-llc/> (last accessed: 25 February 2025).

21 See Rule 14a–8 of the Securities Exchange Act 1934, and then specifically Rule 14a–8(i) (7) and (12).

only happened after Arjuna Capital had unconditionally committed not to submit this proposal or similar proposals in the future again.²²

As investment bank *Lazard* signaled a few years ago, ESG is no longer the exclusive domain of civil society organisations, institutional investors or ESG-focused hedge funds.²³ A recent development is that traditional activists are also increasingly including ESG aspects in their campaigns.²⁴ One example was *Third Point's* (unsuccessful) campaign to break *Shell* into an oil and gas arm and a renewables and LNG arm. It explicitly mentioned that such a split – besides increasing shareholder value – could lead to lower CO₂ emissions.²⁵ The same was at play in *Elliott's* campaign against Scottish energy firm *SSE*,²⁶ in which it was argued, among other things, that if the Renewables division were spun off, that new company could actually expect more investment from ESG funds.²⁷ Another well-known initiative is the *Say on Climate* movement

- 22 See Arjuna's letter to Exxon Mobil dated 27 May 2024: 'Arjuna hereby unconditionally and irrevocably covenants to refrain henceforth from submitting any proposal for consideration by Exxon shareholders relating to GHG or climate change', available at: https://climatecasechart.com/wp-content/uploads/case-documents/2024/20240527_docket-424-cv-00069_notice-1.pdf (last accessed: 25 February 2025) With respect to FollowThis, ExxonMobil had previously already been declared inadmissible.
- 23 Lazard's Annual Review of Shareholder Activism 2021, available at: <https://www.lazard.com/research-insights/annual-review-of-shareholder-activism-2021/> (last accessed: 25 February 2025).
- 24 See in this regard also the well-researched study *Bakker* (fn. 12), pp. 276–313.
- 25 See e.g. *Financial Times*, "Activist fund Third Point calls for break-up of Shell," October 27, 2021, quoting Third Point as follows: "Pursuing a bold strategy like this would likely lead to an acceleration of CO₂ reduction as well as significantly increased returns for shareholders, a win for all stakeholders".
- 26 Letter dated 7 December 2021, available at: <https://www.businesswire.com/news/home/20211206005885/en/Elliott-Publishes-Letter-on-SSE-Calling-for-Immediate-Action-to-Enhance-Governance-and-Value> (last accessed: 25 February 2025).
- 27 Another example of an attempt to spin off the coal business was Enkraft Capital's proposal at RWE's April 28, 2022 Annual General Meeting. This proposal was however rejected by a large majority (97,6%) of RWE's shareholders, see <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/rwe-investors-vote-down-activist-s-coal-spinoff-motion-70047268> (last accessed: 25 February 2025). At the end of September 2022, RWE announced its decision to expedite the phase-out of its coal business by 2030. See on the RWE case also *Christoph H. Seibt*, "Taking stakeholder interests seriously: A practitioner's view from Germany on management duties", in: T. Kuntz (ed.), *Research Handbook on Environmental, Social and Corporate Governance*, Edward Elgar Publishing: Cheltenham UK, 2024, p. 32. A further example of ESG shareholder activism in Germany is the case brought by six European pension funds against Volkswagen on the right to file a climate lobbying proposal. Begin 2023, the case was dismissed by the regional court of Braunschweig. On May 8, 2023, the higher regional court of Braunschweig denied the pension funds the right to appeal the court's

(along the lines of *Say on Pay*) by hedge fund manager *Chris Hohn* of *The Children's Investment Fund* (TCI). The initiative actively campaigns for shareholders to have an annual advisory vote on corporate climate plans, such as a net-zero transition plan. The campaign is backed by institutional investors, activist shareholder groups and proxy advisory services *ISS* and *Glass Lewis*.²⁸ More than 20 companies have now embraced the *Say on Climate* initiative, including *Unilever*, *Shell*, *Glencore* and *Nestlé*.²⁹

So what exactly are the motives of activist shareholders to run ESG campaigns? This will vary for each activist shareholder. Some campaigns are so-called “trojan horse campaigns”, in which hedge funds combine a traditional activist approach, such as selling or splitting up a company, with an ESG initiative. Institutional investors, on the other hand, seek to maximise the long-term value of their entire portfolio. This means mitigating risks or negative externalities of the portfolio, such as climate change, and this can be done by requiring companies to adopt stricter ESG policies. For institutional investors, this therefore provides an incentive to adopt a (more) activist stance. This incentive is additionally linked to changing societal attitudes, the corresponding expectations of investors, and concomitantly the image (and the related commercial advantage to be gained) of the institutional investor in question. In short, just as activist shareholders differ in shapes and sizes, their motives will always differ too.

decision that their proposal was not permissible, see <https://www.responsible-investor.com/court-dismisses-investor-case-at-vw-on-right-to-file-climate-lobbying-proposal/> (last accessed: 25 February 2025) and *C. Nagtegaal & E. J. Breukink*, ‘Naar een effectiever gebruik van het recht op inlichtingen bij beursfondsen’, *Ondernemingsrecht* 2024/55, para 2.4.

28 See <https://www.sayonclimate.org/about/#supporters> (last accessed: 25 February 2025). Other examples of organizations like the *Say on Climate* initiative are *Institutional Investors Group on Climate Change* (IIGCC), *Investor Group on Climate Change* (IGCC), *Asia Investor Group on Climate Change* (AIGCC) and *Global Investor Coalition on Climate Change* (CIG).

29 Another compelling example to mention in this context is the settlement reached by Belgian chemical group *Solvay* with its activist shareholder *Bluebell Capital Partners* in 2022. This settlement came about after *Bluebell Capital* called for the resignation of the CEO because the company continued to discharge waste into the Tyrrhenian Sea. The parties agreed that discharges of limestone residue would be phased out at an accelerated rate and stop permanently by 2050.

3. *The tools of the activist shareholder*

The activist shareholder's toolbox contains various resources, some more legal in nature than others, which are almost always combined. We limit ourselves here to a few key points.³⁰

We start with the most important non-legal tools:

- (a) The *Dear Board* letter, of which there are also well-known examples in the Netherlands.³¹ The audience of such a letter consists mainly of the fellow shareholders, other stakeholders of the company, analysts, proxy advisory services and the press. Such letters therefore often mention the pain points the company is struggling with under – or as a result of – its current management, and are often accompanied by proposals for a better future.
- (b) Another non-legal tool is getting proxy advisory services, such as *ISS* and *Glass Lewis*, on side. The power of such agencies can be very great at listed companies.³² This is partly due to the fact that a large number of non-active shareholders adopt these recommendations, sometimes on the basis of internal regulations, without question, combined with the large number of non-active shareholders who do not even attend general meetings (either in person or virtually).
- (c) The influencing of proxy advisory services is often accompanied by PR campaigns, including specialised consultants who can explain the activist shareholder's position and plans to the (financial) press and other potential supporters.

We will dwell a little longer on the legal tools employed. The position of the shareholder in a Dutch listed company has become considerably weaker since 2007. Scholarly opinion has previously pointed to a “pendulum”³³ between a

30 See more extensively on this subject: *Duynstee/Drenth*, (fn. 8), pp. 931–936.

31 Perhaps the best-known is *TCI's* letter to *ABN AMRO* in mid-2007, which, as is well known, resulted in the biggest takeover fight in Dutch history. That letter is still available at: <https://ftalphaville.ft.com/2007/02/21/2666/tcis-letter-to-abn-amro/> (last accessed: 25 February 2025). A more recent example is *Tweedy Bowne's* readable letter to *Akzo*: https://www.tweedy.com/resources/library_docs/general/AkzoLtrToTheBoardMay2017.pdf (last accessed: 25 February 2025).

32 See on this *A.F. Verdam*, “Zorgen rond de kwaliteit en invloed van stemadviseurs; naar een andere dynamiek rond de aandeelhoudersvergadering”, in: R. Abma et al. (eds.), *De aandeelhoudersvergadering van de beursvennootschap (ZIFO-reeks no. 27)*, Deventer: Wolters Kluwer 2019.

33 See, among others, *P.M. Storm* in his case note to Dutch Supreme Court 9 July 2010 (*ASMI*) in *Ondernemingsrecht* 2010/105, at 5: “One could also see in the Supreme Court's ruling a legal-political statement: the pendulum, set in motion in the mid-1990s by the call

focus on the primacy of the management board and the supervisory board, on the one hand, and the rights of shareholders to discipline underperforming management, on the other.³⁴ This pendulum movement is broadly visible where shareholder rights are concerned, affecting, among other things, the calling of shareholder meetings, the right of dismissal, the right to put items on the agenda and the right to information.

The pendulum currently swings towards the management board and supervisory board. This has everything to do with the concept of “the strategy of the company”. Activist shareholders generally focus on strategy. Under Dutch law, it has been established case law since 2007 that strategy – in principle – is the board’s domain.³⁵ This notion has been enshrined in law for listed companies since 1 May 2021 (in Article 2:129(1) of the Dutch Civil Code (DCC)), which incidentally does not feature the qualifier “in principle”. The general meeting can express its views on strategy only by exercising the rights granted to it by law and the articles of association. Under Dutch law, the key rights of shareholders are:

- (a) *Removal of executive and supervisory directors.* The right of the general meeting to remove executive and supervisory directors is an essential power of the general meeting. The law even states that the general meeting can remove executive directors “at any time” (Article 2:134(1) DCC),³⁶ and the same is assumed for supervisory directors (Article 2:144(1) DCC).³⁷

for more shareholder power, seems to have swung back in 2010 to (now somewhat more controlled) officer power. Protective measures (of limited scope) are not so bad.”.

- 34 C.J.C. De Brauw, “Bescherming van beursvennootschappen: tijd voor herijking op basis van de pijlers van het huidige stakeholdermodel”, *Ondernemingsrecht* 2019/94, para. 3.2. See also L. Timmerman, ‘De carrousel van beschermingsmaatregelen’, *Ondernemingsrecht* 2018/78.
- 35 It follows from the decision of the Dutch Supreme Court in its well-known *ABN AMRO* case (Dutch Supreme Court 13 July 2007, *NJ* 2007/434; *JOR* 2007/178) that the determination of the strategy of a company and its affiliated business is in principle a matter for the management board, that the supervisory board supervises it and that the general meeting can express its views on the matter by exercising the rights granted to it by law and the articles of association. Along similar lines: Dutch Supreme Court 9 July 2010, *NJ* 2010/544; *JOR* 2010/228 (*ASMI*), para. 4.4.1; Dutch Supreme Court 20 April 2018, *NJ* 2018/331; *JOR* 2018/142 (*Boskalis v. Fugro*), para. 3.3.6. See also Hof Amsterdam (Amsterdam Court of Appeal) (Enterprise Chamber) 17 January 2007, *JOR* 2007/42 (*Stork*); Amsterdam Court of Appeal (Enterprise Chamber) 29 May 2017, *JOR* 2017/261 (*AkzoNobel*), para. 3.9. On the strategy, see also G. van Solinge/M.P. Nieuwe Weme, Asser 2-IIb 2019, para. 139.
- 36 This right can be exercised by whomever is authorised to appoint; here it is assumed that this is the general meeting.
- 37 This paragraph does not mention “at any time”; it is assumed that it nevertheless applies. See, inter alia, Van Solinge/Nieuwe Weme (fn. 35), para. 417; W.J. Slagter/B.F. Assink, *Compendium Ondernemingsrecht*, Deventer: Kluwer, 2013, p. 766.

- (b) *Convening meetings.* Any shareholder individually or jointly holding at least 10% of the capital in a public company (NV) may request the board to convene a general meeting. If the board refuses to do so, this shareholder can apply to the court for an interim measure authorising it to convene the meeting itself (Article 2:110/2:111 DCC).
- (c) *Right to put items on the agenda.* Shareholders who individually or jointly hold at least 3% (or so much less as stipulated in the articles of association) of the issued capital of a public company (*'naamloze vennootschap'*) (or a listed private company (*'besloten vennootschap'*))³⁸ can request the board to put items on the agenda of that meeting up to 60 days before a general meeting (Article 2:114a DCC³⁹).⁴⁰
- (d) *Right to information.* Article 2:107(2) DCC⁴¹ lays down that the management board and supervisory board will provide the general meeting with all the information requested, unless a compelling interest of the company is opposed to this. In principle, this article relates to information requested at the meeting that concerns the company's financial and operational situation, so that the general meeting can reach a sufficiently well-founded decision. Whether a substantial interest of the company arises is at the discretion of the management board and supervisory board. The general meeting does not have the power to decide on this.⁴² The refusal to provide the requested information is not specifically sanctioned. In addition, answering questions posed by shareholders quite often breaks down into a discussion of whether the questions posed are "relevant" rather than the substantial interest that would oppose answering them. In short, the right is there in theory, but in practice it is an ineffective tool for the activist shareholder.
- (e) *Withholding of discharge.* With the annual discharge, the general meeting signs off on behalf of the company on the policies pursued by the manage-

38 Article 2:187 DCC.

39 The implementation of the First Shareholders' Rights Directive (Directive 2007/36/EC, L 184/17), and specifically the provision in Article 6(1)(a) regarding shareholders' right to put items on the agenda, required an amendment to the then-existing Article 2:114a DCC.

40 See on Article 2:114a DCC also *M. van Olffen/E.J. Breukink*, "Say on what's next", *ECFR* 2023, 753–756.

41 Article 2:107(2) DCC should be interpreted in line with Article 9 of the Shareholders' Rights Directive (Directive 2007/36/EC, L 184/17). Article 9(1) of this Directive provides: 'Every shareholder shall have the right to ask questions related to items on the agenda of the general meeting. The company shall answer the questions put to it by shareholders.'

42 *Van Solinge/Nieuwe Weme* (fn. 35), para. 6.

ment board and the supervision exercised by the supervisory board for the company's past financial year. In recent years, it can be seen that the discharge vote is increasingly used to cast a protest vote.⁴³ By not granting discharge to executive and/or supervisory directors, shareholders are increasingly expressing their dissatisfaction with the (alleged unsatisfactory) actions or supervision of the management board or supervisory board. Although the legal relevance of withholding discharge is relatively limited (it formally causes the director(s) and/or the supervisory directors to remain exposed to internal liability vis-à-vis the company), its symbolic value should not be underestimated.

On the statutory right to information (item d), we already noted that it will be ineffective in practice. The same applies to the right of the general meeting to dismiss executive and supervisory directors (item a), the right to convene a general meeting (item b) and the right to put items on the agenda (item c).⁴⁴ The biggest hurdle shareholders will encounter in this regard is that the board will take the position that the removal, the convening of a general meeting or the agenda item proposed is related to the company's *strategy*. And decisions concerning the strategy are up to the board, not the shareholders.

So what exactly is this strategy?⁴⁵ This is not entirely clear, but one can assume that according to the board almost *all* issues that active shareholders want to raise (such as the sale of certain business units, changes in the composition of the management board or supervisory board, changes in governance, etc.) will fall under the heading of "strategy". So, this effectively puts the shareholder at

43 In this regard also see *R. Abma*, "Kroniek van het seizoen van jaarlijkse algemene vergaderingen 2014", *Ondernemingsrecht* 2014/120, in Section 3 titled "Stempunt over discharge wordt vaker aangegrepen om 'proteststem' uit te brengen".

44 In her analysis of the Dutch system, Cools reaches the conclusion that shareholder proposals are a rare phenomenon in the Netherlands: "There is (...) a noticeable variation in the occurrence of shareholder proposals between EU member states, with almost no activism of this form in the Netherlands. This is undoubtedly due to its restrictive regulation of shareholder interference. First, the articles of association of Dutch listed companies commonly contain an "oligarchic clause" pursuant to which shareholders can only table resolutions (or certain resolutions) with the approval of the managing or supervisory board. Second, (...) limitations on shareholder competence are most severe in the Netherlands (...)", see *Sofie Cools*, 'Climate proposals: ESG shareholder activism sidestepping board authority', in: T. Kuntz (ed.), *Research Handbook on Environmental, Social and Corporate Governance*, Edward Elgar Publishing: Cheltenham UK, 2024, p. 141.

45 See on this *B.F. Assink*, "Aandeelhouders en strategie na Boskalis/Fugro", in: R. Abma et al. (eds.), *De aandeelhoudersvergadering van de beursvennootschap (ZIFO-reeks no. 27)*, Deventer: Wolters Kluwer 2019, p. 37 et seq. See on strategy also *Van Solinge/Nieuwe Weme* (fn. 35), para. 139.

a disadvantage from the start. Whether the ESG policy as a whole or a particular subtopic is covered by the strategy depends on the topic in question, but generally this will be the case.

An illustrative example of the fact that the “strategy” and the autonomous position of the management board and the supervisory board – vis-à-vis the shareholder – in shaping that strategy are, in practice, a real obstacle in the shareholder’s exercise of his rights, can be found in the well-known *Akzo* case.⁴⁶ There, the Enterprise Chamber at the Amsterdam Court of Appeal (“Enterprise Court”) found that the proposed dismissal of the chairman of the supervisory board qualified as (covert) interference with the strategy. In our view, this goes quite far. Indeed, this raises the question in which cases a shareholder can, in fact, remove the management board or supervisory board (or specific members thereof). This will be self-evident in obvious cases, such as fraud, but where removal is proposed for alleged non-performance, the domain of strategy is likely to be difficult to delineate. This leaves only limited cases where – in the light of the *Akzo* decision – removal would be possible without question. In other words, whenever a shareholder requests the removal of an executive or supervisory director (or of the management board or supervisory board as a whole), the company will be able to put forward the defence that it is not a failure in performance that is the reason for the removal, but that the real reason lies in the fact that the shareholder does not agree with the strategy. It may be added here that a request to put the dismissal of an executive or supervisory director (or of the management board or supervisory board as a whole) on the agenda will trigger the statutory reflection period⁴⁷ (250 days) or the response time from the Dutch Corporate Governance Code⁴⁸ (revised in 2022) (180 days). This imposes a delay of at least six months before the shareholder is able to exercise any right. In short: exercising the general meeting’s legally enshrined power to remove executives and supervisory directors is actually quite difficult.

In practice, the aforementioned right to put items on the agenda is only effective when it comes to matters that fall within the competence of the general meeting. If the shareholder so requests, those items must be put on the agenda as voting items, after which the general meeting can pass a resolution. But the right to put items on the agenda can, of course, also include subjects that are not within the competence of the general meeting. Those items need not be included as *voting items*, but only as *discussion items*.⁴⁹ However, the board is

46 Amsterdam Court of Appeal (Enterprise Chamber) 29 May 2017, *JOR* 2017/261 (*AkzoNobel*).

47 See Article 2:114b DCC.

48 See Best Practice Provision 4.1.6 and 4.1.7 of the Dutch Corporate Governance Code.

49 See on discussion items on the agenda of the general meeting also *Van Olffen/Breukink* (fn. 40), 755–756.

in principle obliged to put the requested item on the agenda if the requirements of Article 2:114a DCC are satisfied. Various arguments for refusing agenda requests have been cited in the literature.⁵⁰ In its well-known decision in *Boskalis v. Fugro*, however, the Dutch Supreme Court ruled that “an [agenda-setting] request under Article 2:114a DCC (...) can only be refused *in exceptional cases*. A basis for such a refusal may lie in Article 2:8(2) DCC or Article 3:13(1) DCC” (additions and italics by authors).⁵¹ In this case, *Boskalis* had asked the board to put on the agenda the topic of aborting protection of *Fugro*’s subsidiary, as an “item on which the views of shareholders will be sought, in the sense that shareholders will be given the opportunity to express, by casting a vote, whether they are in favour of or against the recommendation contained in the agenda item.” The Supreme Court ruled on this matter that the company could *not* be obliged to include a topic reserved for the board on the agenda *for a vote* by the general meeting.⁵² It is in this context irrelevant that this vote has no legal effect and is referred to as an informal vote, a recommendation, a motion or a poll, according to the Supreme Court.⁵³ An issue that touches on strategy is not within the competence of the general meeting and is therefore not placed on the agenda as a voting item. Shareholders can only put items on the agenda for voting insofar as the general meeting is authorised to pass resolutions on these.⁵⁴ However, any shareholder can ask the chairman for permission to speak at the meeting and (after having been given the floor) can take a position on a matter related to an agenda item.

The above leads to the intermediate conclusion that the main shareholder rights do not always turn out to be equally effective in practice.

Before we discuss some recent developments in the field of ESG legislation, we would like to conclude this Section on the tools of the activist shareholder by pointing out a potential issue that activist shareholders may encounter if they collaborate in order to influence the ESG policy of the company they invest in.

50 For example *L. Timmerman*, “De rol van vennootschappelijk belang en strategie bij het beschermen van beursvennootschappen”, *TvOB* 2018/248.

51 Dutch Supreme Court 20 April 2018, *NJ* 2018/331; *JOR* 2018/142 (*Boskalis v. Fugro*), para. 3.3.4.

52 Dutch Supreme Court 20 April 2018, *NJ* 2018/331; *JOR* 2018/142 (*Boskalis v. Fugro*), para. 3.3.6-3.3.8.

53 See more fully *E.J. Breukink*, “Reikwijdte agenderingsrecht van kapitaalverschaffers”, *Ondernemingsrecht* 2019/18 and *Nowak*’s case note to Court of Appeal of The Hague 31 May 2016, *JOR* 2016/181 (*Boskalis v. Fugro*).

54 Dutch Supreme Court 20 April 2018, *NJ* 2018/331; *JOR* 2018/142 (*Boskalis v. Fugro*), para. 3.3.6-3.3.8. On the issue mentioned in the body text also see *Van Solinge/Nieuwe Weme* (fn. 35), para. 56; *J.H.M. Willems*, “Mogen aandeelhouders strategische onderwerpen agenderen?”, *Ondernemingsrecht* 2017/116.

This issue concerns the mandatory takeover bid rule and the corresponding ‘acting in concert’ rules, both arising from the Takeover Directive.⁵⁵ The mandatory takeover bid is included in Article 5(1) of this Directive, which reads as follows:

‘Where a natural or legal person, as a result of his/her own acquisition or the acquisition by *persons acting in concert with him/her*, holds securities of a company (...) which, added to any existing holdings of those securities of his/hers and the holdings of those securities of *persons acting in concert with him/her*, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company.’ (italics added by authors)⁵⁶

In the Netherlands, the mandatory takeover bid rule is implemented in Article 5:70 of the Dutch Financial Supervision Act (DFSA), where a threshold of 30% of voting rights is chosen. Hence, shareholders who cooperate to influence the ESG policy of the company they invest in, may potentially, under Article 5:70 DFSA, be confronted with the obligation to make a bid, if they hold together – taking into account the acting in concert rules – more than 30% of the voting rights. Although we are not currently under the impression that this considered to be a serious issue in the Netherlands among institutional investors, as ESG shareholder activism increases, the mandatory takeover bid rule may deter shareholders from collaborating as part of their ESG efforts. For certain other jurisdictions, for example Germany, in legal scholarship it is noted that the rule causes institutional investors to hesitate in collectively using their voting power to replace boards resistant to climate change proposals, thereby potentially obstructing efforts by shareholders to address ESG issues.⁵⁷

55 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (*OJEU* 2004, L 142/12).

56 The term ‘persons acting in concert’ is defined in Article 2(1)(d) of the Takeover Directive.

57 Last year, the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – ‘BaFin’) addressed the debate on whether, under German law, collaboration between shareholders concerning ESG matters can be classified as acting in concert. This was analyzed in a survey that included several case studies and their legal assessment. The survey can be accessed at: https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2023/fa_bj_2303_Collaborative_Engagement_en.html (last accessed: 25 February 2025). That the mandatory takeover bid rule may deter shareholders from collaborating as part of their ESG efforts, is probably also the reason why ESMA has set out to provide shareholders with more clarity on stewardship and engagement collaborations, more specifically collaborations relating to sustainability objectives, so that the ‘acting in concert’ rules do not hinder these collaborations. See ESMA, *Sustainable Finance Roadmap 2022–2024*, 10 February 2022,

4. Key recent developments on ESG legislation

In this Section we discuss some recent developments in the field of ESG legislation and examine whether, under Dutch law, those developments affect or should affect existing shareholder rights, or at least the effective exercise of those rights in practice. Successively, we address (i) the Dutch Corporate Governance Code (revised in 2022), (ii) the Shareholders' Rights Directive,⁵⁸ and (iii) the Corporate Sustainability Reporting Directive (CSRD).⁵⁹ Finally, we turn to the shareholder's right to put items on the agenda in relation to ESG issues.

4.1. The new Dutch Corporate Governance Code

The new Dutch Corporate Governance Code is permeated by the theme of sustainability. One of the central pillars of the Code is "Sustainable long-term value creation", see principle 1.1:

"The management board is responsible for the continuity of the company and its affiliated enterprise and for *sustainable long-term value creation* by the company and its affiliated enterprise. The management board takes into account *the impact the actions of the company and its affiliated enterprise have on people and the environment and to that end weighs the stakeholder interests that are relevant in this context*. The supervisory board monitors the management board in this regard." (italics added by authors)

ESMA30-379-1051, para 'Issuers disclosure and governance', A.5: 'Contribute to developing further guidance in the area of stewardship and engagement to ensure acting in concert does not impede collaborative engagement by investors around common sustainability goals'. Apparently, ESMA believes that the existing guidance on acting in concert under the Takeover Bids Directive does not provide sufficient clarity. This existing guidance contains a so-called 'white list' of topics in respect of which shareholder can in principle cooperate without giving rise to a presumption of 'acting in concert'. See ESMA, *Information on shareholder cooperation and acting in concert under the Takeover Bids Directive*, 20 June 2014 (last update 8 January 2019), ESMA/2014/677-REV, para 4 (The 'White List' of activities).

58 Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (*OJEU* 2007, L 184/17).

59 Directive (EU) 2022/2464 of December 14, 2022, amending Regulation (EU) 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, with respect to sustainability reporting by companies. See previously on the CSRD, among others, *Sina Allgeier/Robert Feldmann*, "CSRD Sustainability Reporting For Non-listed SMEs: European Regulators Remain Challenged", *ECFR* 2023, 438–346; *Van Olffen/Breukink* (fn. 40), 750–753; *J.B.S. Hijink/L.K. van Dijk*, "Finalisering van de Europese CSRD: een mijlpaal voor duurzaamheidsverslaggeving met grote impact op het ondernemingsrecht vanaf 2025", *Ondernemingsrecht* 2022/87.

The explanatory notes to the Code clarify that “sustainable” in this context refers to “the balance between the social, environmental and economic aspects of business, also known as the three Ps: *people*, *planet* and *profit*.” In that context, reference is also made to the CSRD and the Corporate Sustainability Due Diligence Directive (CSDDD),⁶⁰ which are discussed below.

For the shareholder, this central pillar is reflected in Principle 4.4 of the Code, which, in brief, prescribes that shareholders, including institutional investors “recognise the importance of a strategy focused on *sustainable* long-term value creation” (italics added by authors). Following on from this Principle, the Code contains an important provision on the so-called “engagement policy” of institutional investors:

“Institutional investors should implement principle 4.4 when drawing up their engagement policy. Institutional investors should publish their engagement policy on their website.”⁶¹

This raises the following question for us: how can shareholders adequately recognise the importance of *sustainable* long-term value creation and how can institutional investors make the theme of *sustainability* effectively resonate within their engagement policies if – when it really matters (read: the board makes policy choices that in their view detract from this long-term *sustainable* value creation) – they are not allowed to vote, not even in an advisory capacity, on these policy choices of the board?⁶² In our view, therefore, there is a certain tension between, on the one hand, board autonomy with regard to strategy as it is rather firmly entrenched under current law and, on the other, the respon-

60 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859a (OJEU 2024, L 5.7.2024). When the new Code was drafted in 2022, the CSDDD had not yet been adopted. The explanatory notes to the Code therefore still referred to the European Commission’s CSDDD proposal of 23 February 2022. After an eventful and much-discussed legislative process, the CSDDD was published in the Official Journal of the European Union at 5 July 2024. See on the CSDDD also the critical, but well-researched, studies *Harm-Jan de Kluiver*, ‘Towards a Framework for Effective Regulatory Supervision of Sustainability Governance in Accordance with the EU CSDD Directive. A Comparative Study’, *ECFR* 2023, 203–239 and *H.J. de Kluiver*, ‘De EU Corporate Sustainability Due Diligence Directive. Over ondernemingen, mensenrechten en duurzaamheid. En over juridische principes en idealen en de verantwoordelijkheid van juristen’, *RM Themis* 2024, afl. 4, p. 153 et seq.

61 Best Practice Provision 4.3.5 of the Dutch Corporate Governance Code.

62 See critical on the role of shareholders in this area: *H.J. de Kluiver*, ‘Onderneming en duurzaamheid’, *WPNR* 2023/7407, in Section 9 titled “*Van aandeelhouders kan niet veel worden verwacht*”.

sibility for sustainability that the Code also explicitly places on shareholders – institutional and otherwise.⁶³

4.2. Shareholders' Rights Directive

Secondly, we note the Shareholders' Rights Directive (revised in 2017).⁶⁴ Article 3g(1) of this Directive contains an important provision on institutional investors' responsibility for ESG policies.⁶⁵ Article 3g(1) of the Shareholders' Rights Directive has been implemented in Article 5:87c DFSA. Article 5:87c (1) DFSA requires an institutional investor to have an "engagement policy" and publish this on its website. Pursuant to Article 5:87c(2) DFSA, this engagement policy must contain, *inter alia*, a description of:

"the manner in which the institutional investor (...) monitors the investee companies with respect to relevant matters, including strategy, financial and *non-financial* performance and risks, (...) *social* and *ecological impacts* and *corporate governance* (...)." (italics added by authors)

The institutional investor is thus given the obligation to "monitor" for all investee companies at least (i) the strategy, (ii) the financial and *non-financial* performance and risks, (iii) the *social* and *ecological* effects of the policy, and (iv) the corporate governance. This again raises the following question: how

63 In addition to the Dutch Corporate Governance Code, which focuses on promoting sound governance practices for listed companies in the Netherlands – primarily targeting management boards, supervisory boards, and shareholders, and aiming to foster long-term value creation and to protect stakeholder interests – the Dutch Stewardship Code is also a progressive corporate governance phenomenon, acting as a powerful 'norm creator'. The Dutch Stewardship Code is more focused on encouraging responsible ownership and engagement by institutional investors. Its goal is to motivate asset managers and institutional investors to oversee actively and responsibly the companies they invest in. See on stewardship codes in general *Sofie Cools*, 'Climate proposals: ESG shareholder activism sidestepping board authority', in: T. Kuntz (ed.), *Research Handbook on Environmental, Social and Corporate Governance*, Edward Elgar Publishing: Cheltenham UK, 2024, p. 135 et seq.

64 For the review, see Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the promotion of long-term shareholder engagement (OJEU 2017, L 132/1). The 2017 revision was specifically adopted to encourage long-term shareholder engagement, to curb short-term risk-taking, and to foster sustainable corporate governance practices. See on this, among others, *Erik Lidman*, 'The EU Framework on ESG', in: T. Kuntz (ed.), *Research Handbook on Environmental, Social and Corporate Governance*, Edward Elgar Publishing: Cheltenham UK, 2024, p. 380.

65 *J.M. de Jongh*, "Say on climate. Over negatieve externe effecten en verdeling van bevoegdheden", *Ondernemingsrecht* 2021/110, para. 4, has already called attention to this previously.

can shareholders effectively “monitor” the strategy, including the ESG policies, if – when it really matters – they are not allowed to vote, even in an advisory capacity, on policy choices of the board? Here, too, we see tension emerging with the “bastion” of the board’s autonomy.

4.3. Corporate Sustainability Reporting Directive

Third, we draw attention to the CSRD, which came into force in early 2023. This Directive amends (inter alia) the EU Accounting Directive⁶⁶ and applies to “large” undertakings as referred to in the EU Accounting Directive and to (virtually all) listed companies.⁶⁷

An important, if not the most important, part of the CSRD is that the aforementioned undertakings and listed companies must prepare and publish annual sustainability reports. It would go beyond the scope of this article to set out the details of this sustainability reporting, but the essence is that companies are given far-reaching obligations to account for the objectives and realisation of ESG policies. Broadly speaking, a distinction can be made between (i) accounting for the ESG policy *pursued* and the results of that policy in the *past* financial year (the backward-looking part of sustainability reporting); and (ii) formulating the objectives for the *future* ESG policy and the associated strategy (the forward-looking part of the sustainability reporting).

Although the implementation deadline for the CSRD has already passed, the Dutch legislator is still working on the implementation. Thereby it has to decide how exactly it wants to shape this new reporting obligation in national law. This will require consideration of the questions of how this reporting obligation (i) fits into the system of checks and balances of Dutch company law, and (ii) relates to the annual accountability currently provided by the board – particularly on financial policy – by means of the annual financial reporting. In our perception, the implementation of the CSRD offers a not-to-be-missed opportunity to rethink the board’s annual accountability, with regard to financial and non-financial policies alike.⁶⁸

66 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (*OJEU* 2013, L 182/19).

67 On the scope of application of the CSRD, see, among others, *Hijink/Van Dijk* (fn. 59), para. 2.2.

68 For a discussion of the possible impacts of (i) the CSRD, (ii) the CSDDD, and (iii) the Directive on gender balance on company boards (Directive (EU) 2022/2381 of the Eur-

This immediately raises the follow-up question of what the role of the shareholder should be with regard to this reporting, especially in view of the role assigned to the shareholder in the field of sustainability in the Dutch Corporate Governance Code and the Shareholders' Rights Directive. We would argue here that the shareholder should be able to vote on at least the backward-looking part of the sustainability reporting at the annual general meeting.⁶⁹ The least we can give the general meeting here is an *advisory, non-binding*, vote, but we would venture the proposition that we could also give the general meeting a *binding* vote here.⁷⁰ We have already unfolded part of the argument above. Under the Dutch Corporate Governance Code, shareholders must recognise the importance of *sustainable* long-term value creation and effectively reflect sustainability in their engagement policies. In addition, under the Shareholders' Rights Directive, shareholders are expected to "monitor" the *non-financial* performance and risks of investee companies and the *social and ecological* impact of investee companies' policies. These shareholder obligations, and the rights that stakeholders can, in turn, derive from these obligations, will have little practical effect if shareholders are not allowed to vote, at least in an *advisory* capacity, on the board's key accountability document in terms of ESG policy.⁷¹ We have three additional arguments to include in the consideration.

opean Parliament and of the Council of 23 November 2022 (OJEU 2022, L 315/44)), on the Annual General Meeting agendas of European companies in the upcoming years, we refer to the study *Oona Huttunen*, "EU Legislative Changes: Sustainability Reporting, Sustainability Due Diligence, and Gender Balance on Company Boards: Anticipated Impacts of Selected EU Legislative Initiatives on General Meeting Agendas", *ISS European Research*, March 3, 2023, available at: <https://insights.issgovernance.com/posts/eu-legislative-changes-sustainability-reporting-sustainability-due-diligence-and-gender-balance-on-company-boards-anticipated-impacts-of-selected-eu-legislative-initiatives-on-general-meeting-agendas/> (last accessed: 25 February 2025).

69 For a different view we refer to *Van Olffen/Breukink* (fn. 40), 750–757.

70 If we understand it correctly, Eumedion is also advocating a binding vote by the general meeting on sustainability reporting, but then on the *entire* reporting and not specifically on the backward-looking part of it, because Eumedion wants the sustainability reporting to be formally adopted by the general meeting just like the financial statements. See Eumedion, "Policy Plan 2024: Impactful on good governance and sustainability," p. 9, available at <https://en.eumedion.nl/clientdata/217/media/clientimages/Beleidsplan-2024-DEF.pdf?v=231222123409> (last accessed: 25 February 2025) and Eumedion, "Evaluation of the 2022 AGM Season," p. 12, available at <https://www.eumedion.nl/clientdata/215/media/clientimages/Evaluation-AGM-season-2022-def.pdf?v=220713081225> (last accessed: 25 February 2025).

71 Interesting to mention in this respect is that the Dutch incorporated company Ferroviaal S.E. gave at its 2024 general meeting its shareholders the opportunity to cast an *advisory* vote on its Climate Strategy Report for the financial year 2023, while it was under no legal duty to do so. The relevant corporate documents can be accessed at: <https://www.ferroviaal.nl/>

Firstly, in the Dutch corporate law system, the general meeting has the power to adopt the financial statements. Adoption by the general meeting makes the financial statements a corporate document. Financial statements deal mainly with financial information, while sustainability reporting deals mainly with *non-financial* information, or rather: “sustainability information”.⁷² This raises the rhetorical question for us as to why sustainability information would be so much less important than financial information, that financial information (i.e.: financial statements) must be adopted by the general meeting but this meeting should not even be allowed to vote in an advisory capacity on sustainability information?

Incidentally, there is another point at play here. One of the arguments put forward by *Van Olffen* and *Breukink* against giving shareholders an advisory vote on ESG policy is that, in their view, the distinction between “regular” policy and ESG policy is difficult or impossible to make in practice.⁷³ But in our view, it is either one or the other. If the distinction between regular policy and ESG policy is indeed so difficult to make, it is not very logical to allow the shareholder (via the financial statements) to have a binding vote on (the outcome of) the financial policy, while not being allowed to vote on (the outcome of) the non-financial policy at all.

Secondly, we point out that if the general meeting is denied the right to express an opinion on (the backward-looking part of) the sustainability reporting, there is a danger that the general meeting will decide – on improper grounds – *not* to adopt the financial statements. Dissatisfaction at the general meeting with the sustainability report then translates into dissatisfaction at the general meeting with the financial statements.

Thirdly, we think that if the general meeting is denied the right to express an opinion on (the backward-looking part of) the sustainability report, there is a risk that the general meeting will decide on improper grounds not to grant discharge to the executive and/or supervisory directors. In that situation, the general meeting that wants to disapprove the ESG policy via a vote, but that is

ferrovial.com/en/ir-shareholders/corporate-governance/meeting/ (last accessed: 25 February 2025).

72 In this regard, we refer to Recital 8 of the CSRD: “Many stakeholders consider the term ‘non-financial’ to be inaccurate, in particular because it implies that the information in question has no financial relevance. Increasingly, however, such information does have financial relevance. Many organisations, initiatives and practitioners in the field of sustainability reporting refer to ‘sustainability information’. It is therefore preferable to use the term ‘sustainability information’ in place of ‘non-financial information’. Directive 2013/34/EU should therefore be amended to take account of that change in terminology.”.

73 *Van Olffen/Breukink* (fn. 40), 750–757.

not allowed to give an opinion on the sustainability reporting, expresses its dissatisfaction by not granting discharge. This risks unnecessarily antagonising the relationship between the management board or the supervisory board on the one hand and the shareholders of the company on the other.

To conclude this foray into the CSRD, we have one more comment on the forward-looking part of the sustainability reporting. Based on the same arguments we have given above for the backward-looking part, it would make sense to allow the general meeting to also cast an *advisory* vote on the forward-looking part.⁷⁴ We immediately add that as far as this forward-looking part is concerned, it should remain an *advisory* vote. We consider a *binding* vote on this part a bridge too far and feel this would also not fit well with board autonomy on the strategy.

4.4. *The right to put items on the agenda in relation to ESG issues*

This finally raises the question of shareholders' agenda-setting rights in relation to ESG issues. Is the board obliged to honour a shareholder's request to put an item on the agenda if that request entails the general meeting voting in an *advisory* capacity on its proposal to amend (parts of) the company's ESG policy? *Abma* has previously commented on this question.⁷⁵ Like *Abma*, we are of the opinion that this agenda-setting request need not run afoul of *Boskalis v. Fugro*. Firstly – *Abma* also points this out – the agenda-setting request in *Boskalis v. Fugro* was about a completely different issue than ESG policy, namely the breaking up of an anti-takeover structure at subsidiary level. In principle, therefore, it was not a request aimed at contributing to *sustainable* long-term value creation. Secondly, the spirit of the times has changed enormously since *Boskalis v. Fugro*. When *Boskalis v. Fugro* was handed down some seven years ago, ESG was much less of a hot topic than it is now. Seven years ago, there was no implementation of the revised Shareholders' Directive; no CSRD; no Sustainable Finance Disclosure Regulation (SFDR);⁷⁶ no CSDDD; and – last but not least – no Corporate Governance Code steeped in ESG with “*sustainable* long-term value creation” as its main pillar. In other words, *Boskalis v. Fugro* was handed down at a time when the concept of

74 For a different view we refer to *Van Olffen/Breukink* (fn. 40), 750–757.

75 See *R. Abma*, “De duurzaamheid van de algemene vergadering”, in: C.D.J. Bulten et al. (eds.), *Duurzaam ondernemingsrecht (Serie Van der Heijden Instituut no. 184)*, Deventer: Wolters Kluwer 2023, para. 3.2.

76 Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability disclosure in the financial services sector (*OJEU* 2019, L 317).

long-term value creation had a different connotation and when the role and responsibility of the shareholder could be thought of differently in this respect.

Today, when a shareholder tables a request to be allowed to vote on an ESG proposal in an advisory capacity, that request does not therefore automatically have to run afoul of *Boskalis v. Fugro*.⁷⁷ One of the criticisms of the position defended here is that it is reportedly not clear what should then be voted on. That criticism is at least partly superseded by the level of detail of the sustainability reporting of the CSRD and by the increasingly comprehensive sustainability reports that most listed companies already published under the Dutch implementation of the EU Directive on Disclosure of Non-Financial and Diversity Information.⁷⁸ Partly because of that level of detail, we believe it is quite possible to make delineated proposals, just as it has always been possible for non-ESG-related issues.

On top of that, putting shareholder resolutions on the agenda, debating them and then voting on them is also a matter of course in neighbouring countries.⁷⁹ This regularly leads to useful questions being discussed in the plenary meeting and lively discussions, sometimes resulting in strategy adjustments. This usually improves the strategy and also creates more support for it, both among shareholders and other stakeholders. Why a dialogue on such an important issue should be prevented in advance and at any cost remains the big question for us.

5. Other ESG tools for the activist shareholder

5.1. The Netherlands Enterprise Court

One of the tools traditionally used by the activist shareholder is the right of inquiry. It goes without saying that in relation to “G” disputes, the Enterprise Chamber at the Amsterdam Court of Appeal is the right venue. But what about “S” and “E” issues? Can a shareholder also go to the Enterprise Court with these?

As early as 1979, the Enterprise Court classified *Batco*’s actions on social policy – including the cessation of consultation with the unions – as mismanage-

⁷⁷ For a different view we refer to *Van Olffen/Breukink* (fn. 40), 753–757.

⁷⁸ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large companies and groups (*OJEU* 2014, L 330).

⁷⁹ In this context, reference can be made, for example, to the annual general meetings of (the until recently Dutch companies) *Shell* and *Unilever*.

ment (the “S”). In the context of the determination that elementary principles of corporate responsibility were violated, it was specifically considered that it was not without significance that *Batco*’s parent company “had accepted the OECD Guidelines as a guideline for its policy”.⁸⁰

We see no reason why this should be different with the “E” of *Environmental*. The prominence of the themes of sustainability and sustainable long-term value creation in the Dutch Corporate Governance Code has already been mentioned. Many large companies explicitly and proactively recognise that “E” is a matter that is an essential part of strategy. With the developments discussed above, “E” policy will only become more important. Acting contrary to national or international standards to which the company voluntarily or involuntarily subscribes will be increasingly likely to affect the interest of the company. In this respect, we are waiting for the first ESG inquiry to address a sustainability issue.⁸¹

In addition to filing an application for an inquiry, shareholders can ask the Enterprise Court to order immediate relief. What immediate relief could an ESG activist shareholder conceive of? For example, the appointment of a temporary director (or supervisory director). As far as the “E” is concerned, this could, for example, involve vetting certain aspects of the sustainability policy and/or the provision of information around those policies to shareholders. The temporary director can also be appointed to break a deadlock in the ESG decision-making. The Enterprise Court may give the temporary director (“EC-appointed director”) a general instruction, but it may not give him or her specific instructions.⁸² More uncertain is the answer to the question of whether the Enterprise Court can stipulate, for example, that the EC-appointed director must align the company’s climate strategy with the goals of the Paris Agreement (leaving aside for a moment whether it can be determined exactly what that would mean for a specific company). The EC-appointed director operates independently and is not an “extension” of the Enterprise Court.⁸³ It is up to the EC-appointed director himself or herself to assess, within the limits of his

80 Amsterdam Court of Appeal (Enterprise Chamber) June 21, 1979, *NJ* 1980/71 (*Batco Nederland*).

81 See also *J. van Bekkum*, “De advocaat-generaal en duurzaamheidsmisstanden in het enquêterecht”, *WPNR* 2023/7407, p. 337 et seq.

82 See, inter alia, *D.J.F.F.M. Duynstee/T. Drenth*, “De door de Ondernemingskamer benoemde tijdelijke bestuurder en commissaris”, *MvO* 2021, Issue 7-8, par. 2.2-2.3. See also *F. Eikelboom*, “De (onmiddellijke) voorzieningen van de enquêteprocedure” (Instituut voor Ondernemingsrecht no. 105) (diss. Groningen), Deventer: Wolters Kluwer 2017, p. 263.

83 See, inter alia, Amsterdam Court of Appeal (Enterprise Chamber) 11 December 2013, *JOR* 2014/36 (*Slotervaart*), para. 3.1. See further *Eikelboom* (fn. 82), para. 16.3.5.

or her duties and powers, whether certain measures should be taken by the company.⁸⁴ Of course, we do realise that it is uncertain whether the Enterprise Court will ever go so far as to appoint an EC -appointed ESG director. It is at least worth mentioning in this context that other jurisdictions have already succeeded in appointing directors with ESG credentials without having to go through legal procedures to do so (see the example of *Engine No. 1*, discussed in Section 2).

Another question in this context is whether, in line with changing societal attitudes and the other developments described above, the advocate general at the Public Prosecutor's Office will be inclined to request an inquiry on an ESG-related issue. After all, the advocate general has the power to submit a request for an inquiry for reasons of "public interest" (see Article 2:345(2) DCC).⁸⁵ We believe that many ESG issues – such as the harmful effects of corporate policies on the environment, climate and/or human rights – will fall under the rubric of "public interest".⁸⁶ It is important to note in this context that this concept may be interpreted broadly.⁸⁷

Finally: the annual accounts proceedings of Article 2:447 DCC offer another route to the Enterprise Court. We already discussed the CSRD above, which has the effect that the sustainability report will become part of the report of the management board. This sustainability report thus falls within the scope of Article 2:447(1) DCC. This new route could be used to seek an order from the Enterprise Court that the company must correct its sustainability report in accordance with the directions given by the Enterprise Court.⁸⁸ Such an order to correct the sustainability report could then be a stepping stone to liability proceedings against the directors and/or supervisory directors (see Article 2:139 DCC and Article 2:150 DCC, respectively) or against the auditor,⁸⁹

84 Dutch Supreme Court 11 July 2014, *NJ* 2014/389; *JOR* 2014/263 (*Novero*), para. 3.3.3.

85 Interestingly in this regard, the advocate general has recently filed requests for inquiry in two different cases, although these were not ESG inquiries, see Amsterdam Court of Appeal (Enterprise Chamber) 3 November 2022, *JOR* 2022/285 (*Centric*) and Dutch Supreme Court 18 November 2022, *NJ* 2022/368 (*SMHHC*).

86 See in similar vein *K.A.M. van Vught*, "De maatschappelijke enquête herrezen. Over een enquêtebevoegdheid voor maatschappelijke organisaties", *Ondernemingsrecht* 2021/91, par. 2.1; *Van Bekkum* (fn. 81), p. 337 et seq.

87 See, among others, *K. Spruitenburg*, "De enquêtegerechtigden bij de NV en de BV" (Serie Van der Heijden Instituut no. 153) (diss. Nijmegen), Deventer: Wolters Kluwer 2018, para. 10.5.2.3 and the references to the parliamentary history in para. 10.5.

88 Incidentally, this "new legal entry" is also explicitly mentioned by the chairman of the Enterprise Court in an interview in *De Financiële Telegraaf*, T35, 19 August, 2023.

89 See on this *J.B.S. Hijink*, "Misleidende duurzaamheidsverslaggeving", in: J. van Bekkum et al. (eds.), *Geschriften vanwege de Vereniging Corporate Litigation 2022-2023* (Serie Van der Heijden Instituut no. 181), Deventer: Wolters Kluwer 2023, p. 510 et seq.

or could serve as an additional component in a PR campaign against the company in question. Given the scope of application of Article 2:447 DCC (in conjunction with Article 2:360(1) DCC), this will be particularly risky for Dutch companies (and less so for foreign companies operating in the Netherlands).

5.2. *Greenwashing claims*

Another tool the ESG activist shareholder could deploy is to accuse the company (or its directors) of engaging in “greenwashing”.

The rapidly growing demand for “green” financial products and services offers many opportunities for financial institutions. The exploding demand for, inter alia, sustainability-linked loans and bonds, sustainability bonds, green loans and bonds, etc., is a good example. Financial institutions are also responding to societal changes by drawing much attention to their “green” investments and loans in public statements. Whether claims such as “green”, “climate-friendly”, “sustainable”, etc., are actually lived up to is a question increasingly being asked, by NGOs, consumers and regulators too.⁹⁰ Such claims therefore carry a significant risk of complaints (e.g. at national advertisement standards boards⁹¹), legal proceedings or intervention by regulators. Shareholders can also go down this route, which will not infrequently be the first step in a longer and more extensive campaign.

Greenwashing claims initiated by shareholders, either in the form of a court order being sought or a claim for damages, bring a significant reputational risk for the party or parties addressed. Partly for this reason, it should be borne in mind that an activist shareholder may use a greenwashing claim as a “stepping stone” for exercising their shareholder rights and/or initiating inquiry proceedings.

5.3. *Directors’ and officers’ liability*

A final possible option is the threat of directors’ liability if directors do not pursue the desired policy on (certain aspects of) ESG. We note in that respect

90 This is expected to increase with the upcoming EU Green Claims Directive, see the Proposal for a Directive on substantiation and communication of explicit environmental claims, 22 March 2023, COM(2023) 166 final, 2023/0085(COD).

91 For example, the *Reclame Code Commissie* in the Netherlands and the Advertising Standards Authority in the United Kingdom have seen a range of complaints around sustainability-linked claims in recent years.

that bringing a claim for directors' and officers' liability is of course not specifically reserved for shareholders. Other parties can also use this tool. A detailed discussion of this is thus beyond the scope of this article and we will therefore limit ourselves to the following two observations.

A recent example from outside the Netherlands of an attempt to hold directors liable was the case before the English High Court in which *ClientEarth* sued *Shell's* directors in relation to its climate strategy. That case involved what is known as a derivative claim, where *ClientEarth* as a (very small) shareholder "puts on the company's coat" to bring a claim against the directors on behalf of the company (a similar cause of action does not exist in the Netherlands).⁹² That claim by *ClientEarth* was dismissed – in quite strong terms – by the English High Court.⁹³ NGOs are also threatening directors with personal liability in the Netherlands.

An earlier proposal for the CSDDD⁹⁴ included specific obligations for directors.⁹⁵ Some believed that these obligations could provide a basis for personal liability on the part of directors, although the obligations were not formulated as a standard for liability.⁹⁶ In the remainder of the legislative process, the Directive articles concerned were however deleted.⁹⁷ At the time, the Netherlands

92 See Part 11 of the UK Companies Act 2006, see Sections 260 et seq.

93 Judgment of 24 July 2023, [2023] EWHC 1897 (Ch), available at: <https://www.judiciary.uk/judgments/clientearth-v-shell/> (last accessed: 25 February 2025). See, inter alia, para. 93: "(...) ClientEarth has adopted a single-minded focus on the imposition of its views and those of its supporters as to the right strategy for dealing with climate change risk. This points strongly towards a conclusion that its motivation in bringing the claim is ulterior to the purpose for which a claim could properly be continued (...)".

94 Directive (EU) 2024/1760 (OJEU 2024, L 5.7.2024). See on the CSDDD also the critical, but well-researched, studies *De Kluiver* 2023 (fn. 60), pp. 203–239 and *De Kluiver* 2024 (fn. 60), p. 153 et seq.

95 See Articles 25 and 26 of the Proposal for a Directive of the European Parliament and of the Council on appropriate corporate sustainability due diligence and amending Directive (EU) 2019/1937, 23 February 2022, COM(2022) 71 final, 2022/0051 (COD).

96 On this, see *H.J. de Kluiver*, "Ondernemingsrecht, mensenrechten en klimaat. Doen we de goede dingen en doen we ze goed? Over mooie regulering en gebrek aan focus", *NJB* 2022, p. 1181 et seq and *De Kluiver* 2024 (fn. 60), p. 154.

97 Article 22 CSDDD establishes the obligation for companies to adopt and put into effect a transition plan for climate change mitigation. Amongst other requirements, the design of the transition plan must contain a description of the role of the administrative, management and supervisory bodies with regard to the transition plan for climate change mitigation, see Article 22(1), second subparagraph, sub d, CSDDD. In the final text of Article 22 however, references to directors' duties were removed. While the CSDDD remains silent on director's duties, it is up to the Member State to decide how the transition plan requirement of the company (along with other human rights and environmen-

supported this deletion precisely because of the higher liability risk for directors.⁹⁸ As the final text of the CSDDD does not contain specific provisions on directors' liability, directors are only liable for the violation (by the company) of standards that can be traced back to the CSDDD if the customary standard under Dutch law of personal gross culpability ("*persoonlijke ernstige verwijtbaarheid*") is satisfied. This will only happen in exceptional cases.

6. Conclusion

The ESG developments mentioned in this article present opportunities both for activist shareholders, and other shareholders who care about the company's strategy. In the ESG domain, an avalanche of new laws and regulations is coming. These laws and regulations, we believe, will help shareholders exercise their rights more often and more effectively. ESG shareholder activism will thus gain new momentum. As we noted, the image of the classic activist shareholder tends to be rather negative ("the locust"). But what will the picture be when that classic locust starts taking on ESG-related causes (the good cause)? Will the image of the activist shareholder then remain as negative as before, or will the "locust" suddenly become a "green knight"? In reality, of course, it is all a lot more nuanced than these two caricatured extremes. Activist shareholders come in many shapes and sizes and most are somewhere on the spectrum between the two extremes just mentioned. For us, at least, there is no doubt that ESG shareholder activism is not a temporary trend that will blow over in the short term. In our perception, this is a structural phenomenon that will permanently change our corporate law landscape. As to how and to what extent it will change, we can only speculate at this point.

tal due diligence requirements of the company included in the CSDDD) interacts with the wider duties the director has towards the company under national law.

98 Letter from Minister for Foreign Trade and Development Cooperation dated 22 November 2022, "Speeding up Council Negotiations on European Legislation on international responsible business conduct regarding human rights", p. 2: "Furthermore, the Netherlands has opposed personal civil liability for directors, supported by a majority of member states".