

## Trend Report

# Developments in the regulation of the position of shareholders of Dutch listed companies

**In December 2022, the Dutch Corporate Governance Code (the “DCGC”) was updated for the first time since 2016. Amendments on ESG topics, such as sustainability, diversity & inclusion and company culture, took the spotlight. However, this update also introduced various obligations for shareholders of listed companies which may impact their ability to exercise their shareholder rights. How will this affect the position of shareholders in Dutch listed companies, and what will the future hold?**

## The Dutch Corporate Governance Code

The DCGC was first introduced in 2003 and has since been updated and amended several times by the Monitoring Committee Corporate Governance Code at the request of, among others, interested parties representing listed companies, institutional investors, employees and employers. The latest amendment was published on 20 December 2022 and will apply to Dutch listed companies as from their financial year starting on or after 1 January 2023. Reference is made to our news flash summarising the main changes to the DCGC, which can be found [here](#).

The DCGC applies to Dutch listed companies and regulates the relations between the management board, the supervisory board and the (general meeting of) shareholders. The DCGC applies to such companies on a ‘comply or explain’ basis: the company either complies with the best practice provisions or explains in its annual board report why it deviates from them.

## Newly introduced obligations regulating the position of shareholders

Building on a development of regulating the position of shareholders in the various amendments of the DCGC, several new obligations for shareholders have been included in the 2022 update of the DCGC. We have identified three principal points that may impact the position of shareholders of Dutch listed companies:

- (i) **Recognition of strategy.** Shareholders, including institutional investors, should recognise the importance of the company’s strategy for sustainable long-term value creation as defined by the management board. The aim of this provision is to align shareholders with the company by obliging shareholders to take this strategy into account when exercising shareholder rights. Institutional investors

are required to reflect in their engagement policy how they recognise the importance of strategies of Dutch listed companies and are subject to certain periodic disclosure requirements under the DCGC.

- (ii) **Constructive dialogue.** The updated DCGC puts more emphasis on dialogue between the listed company and its shareholders and other stakeholders. Shareholders should be prepared to engage in a constructive dialogue with the company, where appropriate and at their own discretion. However, shareholders do not have an enforceable right to engage in a dialogue with the company. Shareholders who engage in a dialogue with a company outside the context of a general meeting are required to disclose their full equity position (long and short and through other derivatives) at the request of the company.
- (iii) **Short positions and securities lending.** The updated DCGC regulates shareholders that hold short positions and those that are engaged in securities lending. First, shareholders should abstain from voting if their short position exceeds their long position (i.e., holding a net short position).<sup>1</sup> Secondly, shareholders should recall their lent-out shares before the record date of a general meeting if the agenda for that meeting includes one or more significant matters. Significant matters concern in any event agenda items that are of strategic importance and where the shareholder disagrees with the proposal of the management board.

These newly introduced shareholder obligations to an extent reflect obligations that were already imposed on institutional investors under the Shareholder Rights Directive II, as codified in Dutch law in 2019. The obligations for shareholders regarding short positions and securities lending are inspired by the Dutch Stewardship Code 2018, a self-regulation code prepared by Eumedion, a Dutch interest organisation representing institutional investors. Whereas the Dutch Stewardship Code applies to institutional investors only, the DCGC in principle applies to all shareholders of Dutch listed companies.

## Compliance and enforcement

The 'comply or explain' principle referred to above does not apply to the newly introduced shareholder obligations and the DCGC is silent on enforcement. Certain requirements, such as those relating to short positions and securities lending, may also be difficult to monitor for listed companies. Limited guidance is available as to how enforcement would play out.

We expect that enforcement of shareholder's adherence to the DCGC will primarily take place through the Dutch courts. It has been consistently confirmed in case law that the provisions of the DCGC reflect the prevailing views on good governance. Provisions of the DCGC may thus impact what is considered proper conduct in Dutch company law by giving substance to what conduct of shareholders of a Dutch listed company would be required pursuant to the Dutch law principle of reasonableness and fairness. Breaches of the DCGC may expose shareholder conduct to be challenged in court.

## Expectations for the future

The shareholder obligations as introduced in the updated DCGC fit a broader trend of regulating the position of shareholders of listed companies. They reflect changing perspectives on the role of shareholders in listed companies, among other things. We expect that this trend will continue in the longer term. In the short-to-medium term, we expect that the newly introduced shareholder obligations may provide an additional hurdle for shareholders seeking to challenge choices related to the company's strategy and enable companies to force shareholders into a dialogue and disclose equity positions as part of that dialogue.

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<sup>1</sup> As regards short positions, we note that holders may be required to make a notification to the AFM pursuant to the EU Short Selling Regulation (Regulation (EU) 236/2012) in respect of net short positions (first notification threshold being 0.01%) and/or pursuant to the Dutch financial supervision act in respect of gross short positions (first notification threshold being 3%).

## Your Loyens & Loeff contacts

If you have any questions, please reach out to Bastiaan Kemp, Michel van Agt, Menno Baks, Philippe Hezer and Eline Viersen

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