Dutch Ministry of Finance
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By email:
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Draft legislation to implement the recommendations of the Dutch Corporate Governance Code Monitoring Committee ("Frijns Committee")

Dear Professor Schoenmaker,

I am writing to give Hermes' views on the legislation proposed by the Dutch Ministry of Finance to implement the recommendations of the Dutch Corporate Governance Code Monitoring Committee ("Frijns Committee").

Hermes is one of the largest pension fund managers in the City of London and is wholly owned by the BT Pension Scheme. We also respond to consultations such as this one on behalf of many other clients, including the British Coal Staff Superannuation Scheme, the BBC Pension Trust, Ireland's National Pension Reserve Fund, Denmark's PKA and Canada's Public Sector Pension Investment Board. We have some €47 billion assets under management and over €60 billion assets under advice (31 December 2007).

Hermes takes a close interest in matters of company law and regulation because they set the context for the exercise of our clients' rights as part-owners of the companies in which they invest. We seek to safeguard our clients' current rights and also to enhance the transparency and accountability of companies and their directors to their long-term owners.

By enhancing accountability, we hope to improve efficiency by addressing what economists call the agency problem. It is our fundamental belief that companies with concerned and involved shareholders are more likely to achieve superior long-term returns than those without. By helping make company directors accountable to company owners for the decisions they make and the actions that they take, we believe that over time we will encourage better decision-making and greater value-creation. We believe that this will benefit our clients, which need long-term real growth to meet their obligations to pension beneficiaries, and it will also make companies and economies as a whole more efficient. In pursuit of these aims Hermes supports a flexible regime which will encourage company accountability and responsible ownership by shareholders and fiduciaries.

Markets are only efficient if they enjoy the benefit of transparency and equality of information. As such, we strongly support the objective of the proposed legislation to increase transparency. We also share concerns regarding risks which could arise if investors pursue particular short-term interests, which may hinder the creation of long-term value for all stakeholders involved. Enhanced transparency is one way to address such risks. However, we have some reservations regarding certain aspects

of the proposals. In particular, we are very concerned about any changes that would make it more difficult for shareholders to exercise fundamental rights.

In the following paragraphs, I focus on selected aspects of the proposed legislation which we regard as particularly important for our work.

1. Disclosure thresholds

Whilst we would note that the proposed lowering of the first threshold for disclosure of holdings from 5% to 3% is a deviation from the Transparency Directive, it is in line with the approach in the UK and Germany. This may lead to additional administrative burden for shareholders. However, in the interest of increased transparency, we have no objections with regard to this proposal.

2. Disclosure of intentions of shareholders

The proposal states that shareholders holding more than 10% of a company's voting rights should disclose their intentions. Although there may be benefits of increasing the transparency regarding the intentions of shareholders, we fear that in practice such disclosure will be of little value. Any notification regarding the intentions of an investor will most likely be formulated so vaguely in a boilerplate manner that the real intentions of a shareholder will not become any clearer. We would also question whether it is possible to monitor effectively the accuracy of such disclosures. In addition, depending on a range of factors, changes in such intentions are bound to occur often frequently and we understand that these will not be subject to disclosure. This undermines the value of any notification. Finally, we would note that activist investors with a short-term agenda may be inclined to disclose their intentions at a very early stage of their engagement with a company in any case, if only to increase their influence. Overall, the proposed disclosure requirement may thus add unjustifiable additional administrative burden without a real benefit to the market. It may also lead to more unhelpful public discussion which may get in the way of the dialogue between companies and investors. We therefore do not support the proposed legislation regarding the disclosure of intentions.

3. Right to put items on the agenda of general meetings

We believe that engagement between companies and shareholders on environmental, social and governance issues is best conducted in private through a constructive dialogue over a period of time. However, shareholders need to have the possibility in exceptional cases to put items on the agenda of a general meeting and thus to move an engagement into the public domain. We are thus disappointed that the Ministry of Finance is considering raising the threshold for shareholders to put items on the agenda of general meetings from 1% to 3% of the issued capital. This would make it considerably more difficult for shareholders to exercise a fundamental right even in justified cases.

Whilst it is correct that this brings Dutch regulation into line with some other European countries, we are concerned about this erosion in shareholder rights. For the very largest companies it is likely that a significant number of shareholders would have to pool their holdings to reach the new threshold causing significant administrative burden and legal uncertainty due to the unclear acting in concert concept. As a result, justified and ultimately value-enhancing shareholder proposals may not be tabled. Also given that there does not seem to be any evidence that the important right of shareholders to put items on the agenda of general meetings has

been abused frequently in the past by investors with a particular, short term agenda, it would be our strong preference to keep the existing threshold of 1%.

4. Identification of shareholders

We believe that companies should be able to identify their underlying beneficial shareholders. We are therefore supportive in principle of mechanisms that enable companies to discover who is at the end of the ownership chain, which typically involves shareowners, fund managers and several custodians. Although we sympathise with the objective to increase transparency regarding the identity of the beneficial owners, we see significant practical problems with the implementation and enforcement of the various aspects of the proposed approach. As a result we are not convinced that the significant administrative burden and expenses placed on companies and parties in the ownership chain to implement the proposals are justified. We would encourage the Ministry of Finance to carry out an impact assessment to get a thorough understanding of the costs and benefits associated with the proposal. We would also urge you to ensure that the rules ensure a level playing field for the company and its shareholders, particularly in situations involving 'proxy contests', without creating a legal battlefield.

We trust that you will carefully consider our comments and suggestions and where appropriate take them as constructive input to the development of Dutch company law. If you would like to discuss our views in further detail, please do not hesitate to contact me.

Yours sincerely,

Dr. Hans-Christoph Hirt