The conflict between Boskalis and Fugro concerning the right to place items on the agenda

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1. Introduction

This contribution is about the meaning of the Shareholder Rights Directive[2] for shareholders of listed companies limited by shares ('NVs') to place items on the agenda.[3] In particular the injunction proceedings between (the Board of) the listed Fugro N.V. ('Fugro') on the one hand and Boskalis Holding B.V. ('Boskalis') on the other hand, which held over 20% of the shares in Fugro, will be further examined.[4] One month before these injunction proceedings Boskalis had asked Fugro to allow its shareholders' meeting to vote on a recommendation to (the Board of) Fugro. This recommendation read as follows:

> *"Recommendation to the Board of Directors and the Supervisory Board of Fugro [...] to do anything that is necessary to achieve immediate termination of the anti-takeover construction established at the level of two subsidiaries of Fugro established in Curacao."*

This was only a recommendation because Boskalis acknowledged that the power to decide whether or not to maintain this construction accrued exclusively to the Board. However, Fugro informed Boskalis that in the shareholders' meeting only a discussion would be held on this subject therefore without this being linked to a vote. Therefore Boskalis claimed in injunction proceedings that Fugro should place a vote on the agenda, but without any success.

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[2] The full title:
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.

[3] Several sections in this contribution are also discussed in our contribution to the compilation to be published shortly on the occasion of the farewell of *mr*. Ingelse as Chairman of the Enterprise Section. In that contribution the *Cryo-Save Ruling* (Enterprise Section 6 September 2013, *JOR* 2013/272 with annotation by Josephus Jitta) is the central issue.

[4] Already on 17 March 2015 a ruling was given in an abbreviated (unfounded) judgment. The reasoned judgment was published on 27 March 2015 (ECLI:NL:RBDHA:2015:3452).

The respective judgement did not examine substantively the Shareholder Rights Directive, probably because the parties did not do this either.[5] This is unfortunate because the Directive is of decisive meaning for the interpretation of the right of shareholders of listed NVs to place items on the agenda.

First the context is outlined below, covering the discussion of the right to place items on the agenda, namely the different (Dutch and European) legal opinions with regard to the role of shareholders in listed NVs (par. 2). After this the meaning of the Shareholder Rights Directive for the right to place items on the agenda is dealt with (par. 3). After this the judgement pronounced between Boskalis and Fugro (par. 4) will be discussed followed by a conclusion (par. 5).

We are not dealing with the questions of whether anti-takeover constructions form part of the strategy as the domain of the Board and whether, as thought by Boskalis, the respective anti-takeover construction is in contravention of the applicable standards.

2. Control of shareholders' rights

The right of listed companies to place items on the agenda appears to act in the Netherlands as the point at which shareholders' power and managing authority are balancing. The discussion between both bodies includes the question of where the tipping point lies.[6] By preventing votes being cast in the shareholders' meeting, shareholders are partly prevented from exercising their control, or - if it is something different - having their voice clearly heard.

The Dutch legal opinions are ambivalent with regard to the extent of this control. It is not in question that shareholders should have certain (controlling) rights. Even on the introduction of the company structure regime - a model of the institutional ideas in company law - the legislator noted that the power to amend the articles of association can scarcely be taken away from the autonomy of the shareholders' meeting.[7] In addition, the power of the shareholders' meeting to appoint Directors is traditionally considered as a major 'check and balance' within the corporate governance of the company. This power is even considered so

[5] In the *Cryo-Save* ruling where the right to place items on the agenda was also a central issue, this was also the case.

[6] For instance see Enterprise Section 17 January 2007, *JOR* 2007/42 with annotation by Blanco Fernández (*Stork*) and Enterprise Section 6 September 2013, *JOR* 2013/272 with annotation by Josephus Jitta (*Cryo-Save*).

[7] Parliamentary Documents 10751, no. 10, p. 14.

important that the possibilities of giving away this power in the articles of association has been restricted. The intention of this was to prevent too much power being concentrated in the Board.[8]

At the same time the shareholders are feared, at any rate by listed companies. In the past this fear was rationalised by the absenteeism problem in shareholders' meetings. This could give too much power to the few shareholders who do attend and who were put aside as "accidental majorities".[9]

It is therefore striking that the fear of shareholders nowadays is on the contrary associated with the phenomenon that activist shareholders try to mobilise their co-shareholders to enforce better governance. In some circles such shareholders seem to be considered as intrinsically bad persons.[10] This fear exists not only on the left of the political spectrum. For instance the shareholders-unfriendly judgement between Fugro and Boskalis was quoted as a boost for listed companies fearing activist shareholders.[11]

Whatever the case, the current Dutch legal opinions with regard to the shareholders' control of listed companies are less and less important. After all, their control is increasingly provided for at EU level. This also applies to the right to place items on the agenda since this right is determined by the Shareholder Rights Directive. In other words, on this point the Dutch State surrendered its own control for a European compromise.

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[8] See Meinema, *Dwingend recht voor de besloten vennootschap* [Mandatory law for the private company with limited liability], Deventer: Kluwer 2003, IVO series no. 43, p. 18, 19, 53 en 54, Klaassen 'Opgelegde bescherming aan de AvA: de dominee en de koopman in Boek 2 BW' [Imposed protection of the AGM: the minister and the merchant in Book 2 of the Dutch Civil Code], in '*Opgelegde bescherming' in het bedrijfsrecht* ['Imposed protection' in business law], The Hague: BJU 2010, p. 66 to 68, Klaassen, *Bevoegdheden van de algemene vergadering van aandeelhouders* [Powers of the general meeting of shareholders], IVO series no. 60, Deventer: Kluwer 2007, p. 17 to 33. See Assink, *Compendium Ondernemingsrecht* [Compendium Corporate Law], Deventer: Kluwer 2013, p. 693.

[9] De Jongh, *Tussen societas en universitas* [Between societas and universitas], IVO series no. 94, Deventer: Kluwer 2014, no. 127, 131, 134 and 170.

[10] Cf Parliamentary Documents 31083, no. 37, p. 7-8 in which this is described as "highwayman capitalism". That it is also possible to take rational positions with regard to shareholder activism appears from two articles in *The Economist* of 7 February 2015 (*'An investor calls' and 'Shareholder activism'*: *Capitalism's unlikely heroes'*). It sets out briefly that activist hedge funds are indeed not without faults but that they do keep the board of listed companies sharply focussed. It appears from an analysis of the fifty biggest positions taken by activist hedge funds since 2009 in the US that in most cases not only the profits of the respective companies increased but also the investments in for instance research and development.

[11] See *Financieel Dagblad*, 'Fugro wint slag, maar beleg duurt voort' [Fugro wins the battle but the siege is ongoing], 18 March 2015.

The preamble of the Shareholder Rights Directive states that effective control of shareholders is a primary requirement for good corporate governance and as a result of this should be facilitated and encouraged.[12]

The shareholders' rights attached to shares holding voting rights should be able to "be actually and smoothly exercised".[13]

This is also due to the fact that these rights are incorporated into the price paid for the shares.[14]

So, shareholders should get value for their money. The Shareholder Rights Directive tries to elaborate on this by for instance ensuring that shareholders everywhere in the EU can effectively use their right to place items on the agenda.[15]

Any semblance of fear of shareholders' influence is absent. The resistance to shareholders exercising control makes one think of the Greek Minister-President Tsipras, who objects to arrangements made in a European context because he considers that they will end up being unacceptable in his country.

3. The right to place items on the agenda and the Shareholder Rights Directive

3.1 Art. 6 Shareholder Rights Directive

Art. 6 paragraph 1 of the Shareholder Rights Directive obliges the Member States to ensure that shareholders have the right to place a point on the agenda of the shareholders' meeting, and also to submit motions for a resolution. In addition, Art. 6 of the Shareholder Rights Directive includes several (partly) optional restrictions of that right. The most important of these are that a request to place an item on the agenda must be submitted within due time, by a shareholder with sufficient capital interest and must be provided with the motives or a motion for a resolution.[16]

Before the Shareholder Rights Directive was implemented, pursuant to Section 2:114a of the Dutch Civil Code the shareholders of an NV had a right with special stipulations to put items on the agenda within the sense that (the Board of) the company could refuse such a request

[12] Preamble under 3. See also Parliamentary Documents 31746, no. 3, p. 1.
[13] Preamble under 4.
[14] Preamble under 3.
[15] Preamble under 7 and 14.
[16] See Art. 6 paragraph 3 Shareholder Rights Directive.

due to a substantial interest of the company.[17] Because the right to place items on the agenda of Art. 6 Shareholder Rights Directive is not subject to special stipulations in such a way, this power to refuse to put items on the agenda was deleted from the wording of the Dutch Act.[18] Thereby the respective provision has been reduced to a simple syllogism: if a shareholder holds sufficient capital - herein defined in the Act at a minimum of 3% of the share capital - and submits a motion for a resolution, it will be placed on the agenda.

By implementation of this amendment the obligations of the Netherlands to guarantee a certain result pursuant to Art. 6 Shareholder Rights Directive have ended. Dutch law must be interpreted in conformity with the directive, that is to say as much as possible in the light of the wording and purpose of Art. 6 Shareholder Rights Directive, so that the intended result is thereby achieved. [19] This not only involves the provision in which the right to place items on the agenda has been laid down (Section 2:114a of the Dutch Civil Code), but also other provisions including reasonableness and fairness.[20]

It should be kept in mind that not much will come of the full operation and uniform application of EU law if every Member State can determine at its discretion which parts not to apply whilst invoking national doctrines such as reasonableness and fairness. The case law of the Court of Justice of the EU therefore restricts the possibilities of this very strictly to evident cases of deception and obvious abuse.[21] Pursuant to this case law Section 2:8 subsection 2 of the Dutch Civil Code can only detract from the right to place items on the agenda if and insofar as this right does not obtain a different purport than intended in the Shareholder Rights Directive and moreover its objective is not liable to be pushed aside. In practice this is not easy to imagine, as detailed in par. 0 and 4.[22]

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[17] Timmermans, 'Het agenderingsrecht, preferente beschermingsaandelen en oligarchische clausules' [The right to place items on the agenda, preference protection shares and oligarchic clauses], *Ondernemingsrecht* [Corporate law] 2012/ 121, par. 2.2.

[18] Parliamentary Documents 31746, no. 3, p. 8 and 9.

[19] Hartkamp, *Asser 3-I* Europees recht en Nederlands vermogensrecht* [European law and Dutch law of property], Deventer: Kluwer 2008, no. 181 and Wissink 'Interpretation of Private Law in conformity with EU directives', in *The influence of EU law on national private law*, Deventer; Kluwer 2014, SO&R no. 81-1, numbers 5.1 to 5.4.

[20] See previous annotation.

[21] ECJ 12 March 1996, *NJ* 1997, 173 (*Pafitis*), ECJ EU 12 May 1998, *NJ* 1999, 239 (*Kefalas*) and ECJ 23 March 2000, C-373/97 (*Diamantis*). Please refer comprehesively to Snijders 'Beperkende werking van redelijkheid en billijkheid' [Restrictive effect of reasonability and fairness]: the European dimension' in *Het Europese recht en het Nederlandse contractenrecht* [European law and Dutch contract law], SO&R no. 42-I, Deventer: Kluwer 2007 and 'Good faith as a Dutch and a European concept', in SO&R, no. 81-1, quoted.

[22] See the preamble of the Shareholder Rights Directive under 3, 7 and 14.

3.2 The right to design resolutions.

Art. 6 paragraph 1 Shareholder Rights Directive requires that shareholders themselves can explain the agenda items required by them and that they can submit motions for a resolution. If shareholders refrain from doing so, the Board can refuse to place items on the agenda.[23] This implies that the shareholders can and even must determine the contents of the agenda points themselves and also that this is voted on in the shareholders' meeting.

This raises the question of whether a request to put an item on the agenda can be refused due to the contents of a motion for a resolution. Such a restriction does not become apparent from Art. 6 paragraph 1 Shareholder Rights Directive. That is why the Dutch legislator was forced to delete the substantive review (substantial interest), which had previously been included in Section 2:114a of the Dutch Civil Code (see also par. 3.1 and further below in this paragraph).[24]

In principle such a possibility to refuse the request is anyway unnecessary: if the Board considers the motion for the resolution undesirable for substantive reasons, it is reasonable to expect that the Board would first try to convince the shareholders' meeting of this and will be open to the counter-arguments of shareholders. This can take place during the shareholders' meeting itself but also outside it. For instance by having the motion for the resolution accompanied by the position of the Board, or its position expressed in the media (there was certainly no lack of media attention for Boskalis' motion for a resolution and the response to this by Fugro). If the resolution is accepted against the wishes of the Board, the Board can consider whether it will put the resolution aside (if necessary by driving for a suspension or annulment of the resolution, or by invoking Section 2:8 subsection 2 of the Dutch Civil Code). This *'retrospective review'* which the Board can and should always make,[25] appears to be an adequate remedy against excesses.

That is why we are of the opinion that in very exceptional cases a motion for a resolution can be refused *in advance* due to its contents.[26]

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[23] Parliamentary Documents 31746, no. C, p. 6 and 7.

[24] Parliamentary Documents 31058, no. 22, p. 21. Cf ECJ 24 January 2012, C-282/10 (*Dominguez*), ground for decision 17 and 18.

[25] See Supreme Court 8 November 1991, *NJ* 1992, 174 (*Nimox*).

[26] In the same sense ground for decision 2.5 of the Judge for Interim Relief of the District Court of Noord Holland 14 November, 17 June 2014, *JOR* 2014/293 with annotation of Nowak (*Te&Je Holding/NedAliment en Kromme Leek*) with regard to Section 2:224a of the Dutch Civil Code that has even wider possibilities to refuse a request to put an item on the agenda.

This requires at least that (i) in the given circumstances placing the motion for a resolution on the agenda is unacceptable according to the principles of reasonableness and fairness and also that (ii) the right to put items on the agenda can be left inapplicable without detracting from the realisation of the purpose and purport of the Shareholder Rights Directive (see par. 3.1), in short: effective exercise of control by shareholders by means of the right to put items on the agenda (see par. 2).

Two examples of this can be quoted from the legislative history: (i) the agenda item has no relation whatsoever to the activities of the business and (ii) the agenda item involves a series of subjects such that it is plausible that the order of the meeting will be disturbed.[27] In both cases the effective exercise of controlling rights will not be impeded if the item is not placed on the agenda.

After all, in the first case the request to place the item on the agenda does not make sense and therefore the control of shareholders is not at all up for discussion and in the second case its effective exercise is particularly obstructed by the request to place the item on the agenda.

In the legislative history the situation is also discussed where a shareholder wants to place an item on the agenda concerning a subject with regard to which the shareholders' meeting has no power. In those cases, as the Minister of Justice states, the respective issue does not have to be put to the vote but it can be placed on the agenda merely as a discussion point.[28]

This means the majority is prevented from voting on a resolution which pretends to be binding, but is not binding because it is not at all a legally binding resolution and thereby creates confusion – considered very undesirable[29]. If in such a case putting the item on the agenda is prevented, the effective control of shareholders will not be threatened since the control is absent in that case.

Such a motion for a resolution must be distinguished from the motion for a resolution that Boskalis wanted to put to the vote. After all, Boskalis did not want the shareholders' meeting to pass a resolution which was within the scope of the powers of the Board. Instead Boskalis wanted to make a non-binding recommendation to the Board expressing the opinion and interests of the shareholders. The legislative history confirms that such recommending resolutions are possible. During the Parliamentary debate of the amendment to Section

[27] Parliamentary Documents 31746, no. 7, p. 5.
[28] Parliamentary Documents 31746, no. 7, p. 12.
[29] Cf Eikelboom, 'Vragen rond verjaring, verval, rechtsverwerking en het vernietigen van besluiten in het kader van de enquêteprocedure' [Questions involving prescription, extinction, forfeiture of rights and annulment of resolutions in connection with inquiry proceedings] , *WPNR* 2012/6946, par. 2.2.

2:114a of the Dutch Civil Code referred to above, an amendment was submitted that intended to create or retain the possibility to refuse to put items on the agenda with regard to such resolutions.[30]

However, that amendment was withdrawn because the Shareholder Rights Directive does not allow requests for putting items on the agenda to be assessed with regard to their content.[31] This appears to us correct. By means of a vote on the recommending resolutions it becomes clear to what extent the ideas propagated by Boskalis are supported by the shareholders represented. It is highly questionable whether this can also be deduced from a mere discussion in the shareholders' meeting. The question can be discussed of whether such a recommending resolution qualifies as a resolution within the sense of Section 2:14/15 of the Dutch Civil Code. However, a vote on such a resolution yields useful information for the Board, which after all also has to take the interest of the shareholders into account in carrying out its duties and powers.[32]

The way in which it will subsequently incorporate this information into its policy is up to the Board itself. That is why one cannot say that a vote on a recommending resolution would make no sense, or would infringe the autonomy of the Board too much, let alone that this would be unacceptable in terms of Section 2:8 subsection 2 of the Dutch Civil Code. In addition, with regard to the recommending resolutions there should be no fear of (unacceptable) confusion regarding the legal consequences of putting them to the vote. A clear explanation suffices in order to avoid such a confusion. It is beyond dispute that listed companies are deemed to communicate clearly and are also doing so. For instance, nobody will say that the many times more complex information arising from annual accounts should better not be communicated because annual accounts would lead to speculation. Therefore we do not see on what ground one can deviate with regard to recommending resolutions from the right of shareholders to design resolutions themselves and to place them on the agenda (or have them placed on the agenda).

Therefore, with a view to this there is still something to be bargained for with regard to the (other) position of the Minister of Justice namely that, if a shareholder wants to place an item on the agenda on a subject with regard to which the shareholders' meeting itself has no

[30] Parliamentary Documents 31746, no. 14.
[31] Parliamentary Documents 31058, no. 22, p. 21.
[32] Supreme Court 9 July 2010, *NJ* 2010, 544 with annotation of Van Schilfgaarde, *JOR* 2010, 228 with annotation of Van Ginneken (*ASMI*).

power, the respective subject then should only appear on the agenda as a discussion point instead of a recommending resolution.[33]

3.3 Right to place items on the agenda and interim injunction proceedings

The above means that a claim by a shareholder to place a vote on the agenda concerning a motion for a resolution should have a very high chance of success in an action on the merits.

A defence should only have a chance of success in relation to frivolous requests to place an item on the agenda which in practice it is not properly imaginable that a 3% shareholder would do. After all, this capital requirement ensures that millions of euros have to be invested in shares to be able to submit a request to place an item on the agenda and parties who decide to do this generally behave in a professional manner.

The same should also apply in outline to interim injunction proceedings. After all, the Judge for Interim Relief has to focus on the probable outcome of the substance of the case.[34] In addition, the weighing of interests which the Judge for Interim Relief is allowed to involve in his decision prompts in principle the awarding of a claim to place an item on the agenda. The fact is when Section 2:114a of the Dutch Civil Code is interpreted according to the Directive, it should be assumed that using the right to place an item on the agenda is in principle in the interest of good corporate governance (see par. 3.1) and thereby of the company. That is why it can only be assumed in exceptional cases that the interest of the company is incompatible with the exercise of the right to put an item on the agenda.

In those cases too there appears to be hardly any scope for rejecting a claim to put an item on the agenda. After all, there is an interaction between the weighing of interests and the probable outcome of the action on the merits: the greater the chance that what is claimed in interim injunction proceedings will be allowed in the action on the merits, the heavier the interest must weigh in nevertheless rejecting this claim.[35]

Nevertheless, the weight of this interest is such that in exceptional cases there can be reason to reject the claim, despite the fact that it is probable that this claim would be allowed in an action on the merits. An example of this is the situation in which steps with irreversible

[33] De Jongh (quoted, no. 198) and Timmermans (quoted) do agree with the Minister.

[34] Supreme Court 21 April 1995, *NJ* 1996, 462, ground for decision 3.4, with annotation of Verkade (*Boehringer Mannheim/Kirin Amgen*), Snijders, Klaassen and Meijer, *Nederlands Burgerlijk Procesrecht* [Dutch Law of Civil Procedure], Deventer: Kluwer 2011, no. 339, Tjong Tjin Tai, *Groene Serie Burgerlijke Rechtsvordering* [Green Series of Civil Procedure], Section 257 of the Dutch Civil Code, note 5.

[35] See previous note.

consequences are threatened to be taken whereas a party might have a substantial interest in this not happening.[36] However, it should be kept in mind that this is a doubly exceptional case: it is exceptional in the sense that exercising the right to place an item on the agenda is not in the interest of the company and exceptional in the sense that the company has a substantial interest such that in the interim injunction proceedings the probable outcome of the action on the merits can be put aside.

Such a situation does not occur if it involves allowing a claim to place a recommendation to be put to the vote on the agenda. After all, if the majority of the shareholders' meeting votes in favour of such a recommendation, while following-up this recommendation is in contravention of the interests of the company, the Board does not have to pursue it. It can be assumed that the Board fulfils its duties properly and therefore always also takes into account the interests of the company and the other stakeholders (should these be contrary to the interests of the shareholders). Therefore, insofar as the interests of the company are incompatible with placing a motion for a recommendation on the agenda, this should hardly have any weight.

Considered from this theoretical framework, a claim in interim injunction proceedings to place an item on the agenda should be successful in all cases, particularly if this involves a vote on a non-binding recommendation. However, it will appear further below that the practice proves more resistant.

4. The judgement in interim injunction proceedings between Boskalis and Fugro

4.1 Introduction

As already discussed in par. 1, Boskalis claimed in interim injunction proceedings that Fugro be ordered to organise the agenda for the shareholders' meeting of 30 April 2015 in such a way that the motion for a recommendation to the Board requested by Boskalis would be put to the vote.

This claim was rejected for three reasons: (i) Boskalis had no authorisation to submit the respective request to place the item on the agenda, (ii) Fugro complied with the (rationale of) Section 2:114a of the Dutch Civil Code and (iii) the request to put the item on the agenda

[36] Supreme Court 6 April 1990, *NJ* 1991, 559.

failed due to Section 2:8 subsection 2 of the Dutch Civil Code. These grounds will be discussed below, one by one.

4.2 Power of Boskalis

It was discussed above in par. 3.2 that Section 2:114a of the Dutch Civil Code enables recommending resolutions to be placed on the agenda. Every shareholder who provides at least 3% of the capital has the right to do so. Because it is not in dispute that Boskalis (amply) fulfils this criterion, it is striking that the Judge for Interim Relief held that Boskalis has no power to submit its request to put the item on the agenda.

The substantiation of this opinion depends on two connected ideas. First, it was considered evident that Boskalis' request to put the item on the agenda was an attempt to exert pressure on the Board to terminate the respective anti-takeover construction. According to the Judge for Interim Relief, Boskalis does not have this power. Prior to this, it was held that, if the shareholders' meeting would vote in favour of the motion for the recommendation, this should be put on a par with a resolution instructing the Board to terminate the respective anti-takeover construction. The fact that such a recommendation does not have this legal consequence - it was not in dispute between the parties that the Board could put such a recommendation aside - was not considered decisive in this connection by the Judge for Interim Relief. But it was decisive for the Judge for Interim Relief that putting the respective motion for a recommendation to the vote would put the relationship between the Board and the shareholders' meeting "on edge" with regard to a subject that is covered by the exclusive power of the Board, namely strategy.

We consider this opinion to be wrong. Section 2:114a of the Dutch Civil Code does not include the restriction that the right to place items on the agenda can only be used insofar as the Board "cannot be put under pressure" by it. Reading such a restriction into it, as apparently the Judge for Interim Relief did, is not in accordance with the Shareholder Rights Directive (see par. 3.2).

In addition, we do not see why the legal consequences of admission of the motion for a recommendation are not decisive. It may be the case that some Directors feel put under pressure by it - although the Board of Fugro has apparently no problems by objecting to (majority) shareholders - but this does not mean that it is probable that the Board will give in to this if a proper performance of their duties entails that it does not give in. If the Board has

good reasons to do so, it can explain why it deviates from the will of the majority of the shareholders' meeting.

The opinion of the Judge for Interim Relief might be influenced by the fact that Boskalis sought the confrontation.[37] The tone of the recommendation is imperative and Fugro complained that Boskalis took legal action instead of consulting (albeit that they themselves refused any further consultations, as appears from the judgement). This attitude of Boskalis chafes in a Dutch context in which consultation and compromises are so much appreciated. However, in the European context of the Shareholder Rights Directive there are no instruments (or none were created) to do anything about this.

4.3 Compliance with Section 2:114a of the Dutch Civil Code

In addition, the Judge for Interim Relief held that the claim of Boskalis was inadmissible because Fugro observed Section 2:114a of the Dutch Civil Code by placing the respective anti-takeover construction as a discussion point on the agenda. In this connection the Judge for Interim Relief based himself on the rationale of Section 2:114a of the Dutch Civil Code. This rationale is in the opinion of the Judge for Interim Relief the possibility of increasing the dialogue between capital providers and business management.

This was indeed the rationale of the right to place an item on the agenda prior to the implementation of the Shareholder Rights Directive.[38]

However the purpose and purport of the right to place an item on the agenda that the Netherlands had to implement pursuant to Art. 6 Shareholder Rights Directive is different (see par. 2). As the name of this Directive already suggests, it is all about shareholders rights, and also to encourage them to (be able to) exercise their controlling rights. Therefore the Parliamentary Documents with regard to the amendment to Section 2:114a of the Dutch Civil Code discussed above no longer feature the word "dialogue".

This means that in the respective judgement a purport is given to the right to place items on the agenda different to that prescribed by the Shareholder Rights Directive. This is in contravention of EU law (see par. 3.1).

[37] Cf De Jongh, (quoted, no. 218, view 1 and 3.
[38] See Immermans, quoted.

4.4 Section 2:8 subsection 2 of the Dutch Civil Code

Finally, the Judge for Interim Relief held that according to the principles of reasonableness and fairness it is unacceptable for Boskalis to use its right to place items on the agenda by putting the motion of a recommendation to the vote. This opinion lacks an independent justification so that we assume that anything held before in the judgement is also covered by this application of Section 2:8 subsection 2 of the Dutch Civil Code. Unfortunately it is not shown (in a recognizable way) in this judgement how this relates to Art. 6 Shareholder Rights Directive. In that respect the judgement is already unsatisfactory.

Neither can we imagine that the present application of Section 2:8 subsection 2 of the Dutch Civil Code is in accordance with the Directive (see par. 3.1 and 3.2). In those paragraphs it was discussed that national courts should not interpret the right to place items on the agenda differently from the purport of the Directive, whereas this did take place in the respective judgement (see par. 4.3). It was also discussed that the objectives of the right to place an item on the agenda should not be threatened by application of Section 2:8 subsection 2 of the Dutch Civil Code. These objectives were discussed in par. 2 and imply that more is required of shareholders than nodding in agreement with the policy conducted by the Board. These objectives will already be generally threatened if the right to place an item on the agenda cannot be used and particularly if it cannot even be used to pursue a legitimate purpose such as urging the Board to take certain legitimate actions.

Also apart from the European context we think that it is undoubtedly acceptable that the right to place an item on the agenda is used to urge the Board to conduct a certain policy by making it clear in an organised way the extent to which certain ideas are supported by the shareholders' meeting. Even if the Board feels that it is being put under pressure by this.

5. And finally

The right of shareholders to place an item on the agenda and their associated control is still a sensitive issue in the Netherlands. The objections to this which exist in some sections of society also echo in case law despite the clear EU Directive and Dutch legislative history. As far as we know since the amendment to Section 2:114a of the Dutch Civil Code two lawsuits have been brought involving this provision and twice the court held it unacceptable according

to the principles of reasonableness and fairness that the right to place an item on the agenda was exercised.[39]

This is striking because courts should apply restraint with regard to those judgements,[40] in particular if it involves the acceptability of exercising the legal powers.[41]

The resistance to the right to place an item on the agenda could indicate that the liberal course, which the Dutch State deployed in the European context by committing to the Shareholder Rights Directive, is only supported to a limited extent. However, there is no longer room for these sensitivities induced by Dutch culture.

No change appears to be forthcoming in this respect. It is true that on 9 April 2014 a proposal to amend this Directive was published by the European Commission,[42] but this proposal did not fiddle with the right to place an item on the agenda. But this proposal aims to encourage shareholders with a long investment horizon, such as institutional investors, to be more (effectively) involved in the management of the company.[43] However participation will then also be a central issue.

[39] Apart from the present interim injunction proceedings the right to place an item on the agenda was also judged in the Enterprise Section 6 September 2013, *JOR* 2013/272 with annotation by Josephus Jitta (*Cryo-Save*).

[40] See Maeijer, 'De corrigerende werking van de goede trouw, in het bijzonder in het rechtspersonenrecht' [The corrective operation of good faith, in particular in the law of legal persons], in *Verspreide geschriften van J.M.M. Maeijer*, VHI series no. 100, Deventer: Kluwer 2009, p. 251 and Assink quoted, p. 199.

[41] Hartkamp and Sieburgh, *Asser 6-III* Algemeen overeenkomstenrecht* [General law of contract], Deventer: Kluwer 2010, no. 417, Assink quoted, p. 200 and Supreme Court 28 January 2011, *NJ* 2011, 167, with annotation of Van Schilfgaarde, *JOR* 2011/70 (*Staalbankiers*).

[42] See in this respect Kuijpers, 'Voorstel Europese Commissie wijziging richtlijn aandeelhoudersrechten' [Proposal of the European Commission to amend the Shareholder Rights Directive], *Ondernemingsrecht* [Business law] 2014/89.

[43] See Kuijpers quoted.