



# New statutory reflection period for Dutch listed companies adopted

23 March 2021

## The Reflection Period:

- is a maximum 250 day period in which shareholders cannot appoint, suspend or dismiss managing or supervisory directors. A new instrument in the already well-stocked defence toolkit of Dutch listed companies;
- can be invoked when an activist shareholder seeks a change in board composition or in case of a hostile offer, which the boards consider to materially conflict with the company's interest;
- must be used for making policy on the company's strategy and for assessing stakeholder consequences;
- does not block a hostile offer: the bidder can proceed and it ends when the offer becomes unconditional. Target companies may prefer to firmly reject an offer instead of invoking the Reflection Period because then they admit to the need for on-going review;
- has potential complications that can defeat its purpose: 3% shareholders can seek court-imposed termination on the grounds that there was or is no need for the Reflection Period, or if other protective measures are already in play; and
- underscores the challenges for unfriendly approaches in the Dutch listed environment and stakeholder governance model.

Today, the First Chamber of the Dutch Parliament adopted a bill on a statutory reflection period for Dutch listed companies.

Dutch listed companies can invoke a statutory reflection period of up to 250 days in response to shareholder activists seeking changes in the board composition and/or upon hostile takeover attempts (the **Reflection Period**). During this Reflection Period, shareholders may not appoint, suspend or dismiss managing directors or supervisory directors, effectively creating a stand-still or time-out in which to consider shareholder and takeover proposals and all stakeholders' interests. As such it does not prevent a hostile bidder from proceeding with the public offer process.

The act on the Reflection Period will enter into force on **1 May 2021**.

## Background

The introduction of the Reflection Period was fuelled by a succession of unsolicited takeover attempts in late 2016 and early 2017 for Dutch crown jewels PostNL, Unilever and AkzoNobel. Even though these takeover attempts were unsuccessful, they created the impression with various stakeholders that key Dutch enterprises needed more protection against short-term pressures and unfriendly takeovers.

This has led to the introduction of a Reflection Period, anchored in statutory law, that can provide a time-out, a pause or cooling-down period when needed. The management board and supervisory board of a target company can use such a period for policy making, reviewing the best strategy for the business and carefully considering and discussing various stakeholder interests.

## Scope

The Reflection Period applies to all NVs whose shares are listed on a regulated market or a multilateral trading facility in the Netherlands or abroad. The regime will therefore apply to Dutch companies that are listed at Euronext Amsterdam, but also on other regulated markets in the EU, LSE, NYSE and Nasdaq. The Reflection Period also applies to listed BVs, Dutch private companies with limited liability.

## Conditions

Dutch listed companies can invoke the Reflection Period if the following three conditions are met: there must be (1) a hostile offer or shareholder initiative to change the board composition, (2) which is deemed to materially conflict with the company's interest, and (3) a need for further policy making.

### 1. Hostile offer or shareholder initiative to change the board composition

*I. Hostile offer:* if a public offer is announced or made on the shares of a listed company without prior agreement between the bidder and the target. For example, this can be an unsolicited offer that is publicly announced before the company's boards have had time to carefully consider it, or one that has already been rejected based on a (preliminary) review of the merits.

*II. Shareholder request to change the board composition:* if one or more shareholders or depository receipt holders requests to put one of the following proposals on the agenda of a general meeting:

- a) a proposal to appoint, suspend or dismiss one or more managing directors or supervisory directors (in accordance with art. 2:114a or 2:110 lid 1 of the DCC or the articles of association), or
- b) a proposal to amend the provisions on these specific subjects in the articles of association.

## 2. Material conflict with the company's interest

The boards must deem such hostile offer or shareholder request to be materially contrary to the interests of the company and its business. In the Dutch governance system, the boards need to promote the sustainable success of the business and long term value creation, while taking into account the interest of all the company's stakeholders.

The trigger for invoking the Reflection Period is likely to be a proposal to deviate from the company's existing strategy, e.g. give up the stand-alone scenario and support the plans of the bidder or change strategy based on the proposal of a shareholder. It is up to the boards to determine what the best path forward is. The Reflection Period may provide more time to carry out the review process and make a careful decision on the merits. However, to invoke the Reflection Period, the boards must have already concluded that the proposal materially conflicts with the company's best interest. This material conflict can relate to the unfriendly nature or procedural aspects of the approach or the proposal, possibly combined with a preliminary view as to its merits on substance.

Accordingly, in practice, the boards will likely navigate these two requirements by indicating that in their preliminary assessment the proposals go against the company's interest, while at the same time indicating that further review of the proposals and (possible) viable alternative scenarios is required.

## 3. The boards must use the Reflection Period for policy making

The Reflection Period must be used for policy making. In other words, the boards must put a process in place that will lead to a final conclusion on the best way forward. The process may entail getting further advice on the proposal and/or alternatives, further internal deliberations, consultations with the works council and stakeholders and, if the boards choose to do so, interactions with the bidder or activists.

## Invoking the Reflection Period

The management board can invoke the Reflection Period in a reasoned decision, which requires the approval of the supervisory board if the company has one. Unless specifically provided for in the company's articles of association, no shareholder approval is required to invoke the Reflection Period.

The 250 days-period is a statutory maximum period. The boards may determine that they only need a shorter timeframe. In practice, the boards will likely invoke the full period and then continuously monitor whether it can end earlier if further policy making is no longer needed.

The works council does not need to be consulted before invoking the Reflection Period.

## Effect

During the Reflection Period, the general meeting may not **vote** on shareholder proposals to:

- appoint, suspend or dismiss management board and supervisory board members; and
- amend the provisions on these specific subjects in the articles of association.

The shareholders do, however, have the right to **discuss** the appointment, suspension or dismissal of management and supervisory board members or the amendment of the relevant articles in the general meeting.

However, if these proposals are put on the agenda at the initiative of the management board, the general meeting can vote on them. Accordingly, upon individual defective performance of a board member, the (other members of) the boards can continue to proceed with seeking dismissal of such board member.

## Request to terminate the Reflection Period

One or more shareholders together, representing at least 3% (or such lower percentage as set out in the articles of the company) of the issued share capital, can, at any time after it has been invoked, request the Enterprise Chamber of the Amsterdam Court to terminate the Reflection Period.

The Enterprise Chamber must decide to terminate the Reflection Period if:

- a) given the circumstances at the time of invoking the Reflection Period, the management board could not reasonably have come to the conclusion that the request or the public offer is materially contrary to the interests of the company and its affiliated enterprise (*ex tunc* assessment); or
- b) the management board can no longer reasonably conclude that the continuation of the Reflection Period contributes to careful policy making (*ex nunc* assessment); or
- c) one or more (defensive) measures apply that are similar to the Reflection Period in terms of nature, purpose and purport, and these measures are not terminated or suspended within a reasonable timeframe after a written request by these shareholders to terminate or suspend them (e.g. one week).

Reason b) above is meant to cover a (material) change in circumstances. This could be if the boards reach agreement with an activist shareholder, or if an unsolicited offer turns into a friendly offer, for example after significant improvement of the offer by the bidder. Another example is when the boards decide on the best strategic direction of the company, after following a careful process with relevant stakeholders and looking at alternative strategic options. In that case, the Reflection Period is no longer useful.

The possibility of court review of the Reflection Period should be taken into account by boards considering invoking it, as this creates a new avenue for challenge and unrest.

## Interaction with anti-takeover measures and response time in the Dutch Corporate Governance Code

### Anti-takeover measures

Reason c) above is introduced to prevent the Reflection Period being invoked while another protective measure applies. The most common protective measure in the Dutch context, is the structure in which an independent, protection foundation (*beschermingsstichting*) has a call option on protective preference shares. By exercising the call option, the foundation can typically acquire 50% of the outstanding votes and thereby neutralise the hostile bidder or activist's interest. The protection foundation can continue to protect the company beyond the 250 days maximum of the Reflection Period, as long as there is a serious threat.

The act does not prohibit the combination of the Reflection Period and other protective measures as such and leaves it up to the Enterprise Chamber to decide whether it is reasonable to have such a combination in each individual case. The legislation does not give clear examples as to when that could be acceptable. In practice, the protection foundation can wait and see whether the Reflection Period is invoked. If so, it could also – already before it activates its legal powers by exercising the option – play an important role by signalling its serious concerns about the situation, which can be a prelude to actual intervention. The foundation is independent from the company. So, if the foundation decides to activate its defence, the company may have to (re)consider whether the Reflection Period is still needed and be prepared for shareholders to argue that it needs to end.

If the conditions for invoking are met, the Reflection Period can be a useful tool for companies that have no (other) pre-existing defensive measures like the protection foundation.

## Response time in the Dutch Corporate Governance Code

The Dutch Corporate Governance Code already provides for a response time (Best practice pf 4.1.6 and 4.1.7). If one or more shareholders intend to request that an item be put on the agenda that may result in a change in the company's strategy (e.g. as a result of the dismissal of one or several management board or supervisory board members), the management board should be given the opportunity to stipulate a reasonable period in which to respond (the **Response Time**).

The Reflection Period can be invoked against all requests for changes in the board composition (even though it is not notionally related to a strategy change), and the Response Time can also be invoked against other shareholder requests that may result in a change in strategy, e.g. to amend the articles of association on other topics than the board composition for example by removing other defensive measures.

The relevant shareholder(s) should respect the Response Time stipulated by the management board. The stipulated Response Time should be a reasonable period that does not exceed 180 days.

The Response Time must be used for further deliberation and constructive consultation, in any event with the relevant shareholder(s), and the board should explore alternatives. The management board should report on this consultation and the exploration to the general meeting at the end of the Response Time.

The minister explained that if a board has first invoked the Response Time and subsequently invokes the Reflection Period, it is reasonable that the number of days lapsed for the Response Time shall be deducted from the maximum number of days of the Reflection Period.

## Duration and end of the Reflection Period

The Reflection Period can be invoked for a maximum of 250 days. The start date to calculate these 250 days is not (necessarily) the date on which the management board invokes the Reflection Period. For an *unsolicited public offer*, the start date to calculate the maximum of 250 days is ultimately the day after the date on which the public offer is launched, so after the offer document is approved by the Dutch Authority for the Financial Markets (AFM) and made available to all shareholders. In any event, the Reflection Period ends on the day after the offer is declared unconditional. When, after the unsolicited offer is declared unconditional and the Response Period invoked against the offer has ended, the bidder, that now has a controlling stake in the company proposed to dismiss one or more directors, the boards could again invoke the Response Period in relation to such proposal.

If the boards invoke the Reflection Period for a *shareholder proposal* to appoint, suspend or dismiss one or more managing directors or supervisory directors, or for a proposal to amend the articles in relation thereto, the period of 250 days starts one day after the ultimate date on which such a request must have reached the management board. If the court grants authorisation to activist shareholders to convene a general meeting<sup>1</sup>, the 250 day period starts on the date of such authorisation by the court.

An indicative timeline for invoking the Reflection Period for an unsolicited public offer in combination with a subsequent activist shareholder agenda request can be found in **Annex 1** at the end of this document.

The management board may decide to terminate the Reflection Period at any given time, subject to the approval of the supervisory board.

## Consultation with shareholders and works council

The management board must use the Reflection Period to gather all information it requires for careful policy making. The boards should in any event consult any shareholders representing at least 3% of the outstanding

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<sup>1</sup> On the basis of articles 2:110 and 2:111 of the Dutch Civil Code.



share capital and the works council. Points of view provided by these parties must be published on the website of the company as soon as possible, provided the parties agree to such publication.

## Report on the Reflection Period

The management board must prepare a report on the policy pursued and the course of affairs since the start of the Reflection Period. The report must be published on the website within a week after the end of the reflection period. The report should be a discussion item on the agenda of the next general meeting.

### To invoke or not to invoke the Reflection Period:

The introduction of the Reflection Period gives a powerful signal, also to audiences outside of the Netherlands, on the powers of Dutch boards to determine and defend the company's strategy against unfriendly approaches.

However, while invoking the Reflection Period can result in postponement of shareholder initiatives to dismiss the board(s), it only has a messaging function but does not have meaningful legal effect against a hostile offer. The offer can proceed and the Reflection Period ends when the offer is declared unconditional.

Also, invoking the Reflection Period has potential complications, as there are strings attached. The Reflection Period is no simple 250 days pause, but must actually be used for policy making and 3% shareholders can go to court to challenge the need to invoke and continue the instrument, which creates unrest and distraction. Furthermore, there are various consultation and disclosure obligations that then need to be met (which would not otherwise apply if the instrument had not been invoked).

Company's boards will have to carefully assess the pros and cons of invoking the Reflection Period and see whether the existing powers of the boards do not suffice. These include the power to determine the strategy and reject proposals - after a careful open-minded process - if the existing strategy is deemed superior, and take defensive measures that are already available (like the protection foundation if the company has one established, the right not to cooperate and to take other ad-hoc defensive measures). Often a firm, well-considered rejection (*just say no*) and reaffirmation of the own convincing strategy will be preferable over admitting that the boards have not yet made up their minds, which may appear weaker and give (extra) ammunition to the hostile and activist parties. In addition, such a rejection may be more straightforward than complying with the procedural and disclosure obligations attached to the Reflection Period.

There may, however, be circumstances where a company needs to undertake a strategic reorientation, whether or not triggered by the takeover bid or shareholder proposals, for example when such proposals coincide with a material change of circumstances like the Covid-19 pandemic. Particularly in those circumstances, where actual reflection is needed, the Reflection Period can be useful (*just say not now*).

Also, when activists seek to impose their own opinions about the company's strategy going forward by dismissing the boards, the Reflection Period can be a forceful instrument to delay and remove the oxygen from the activists' campaign. The Reflection Period can also be effective when activists team up with a hostile bidder or act separately to change the board composition, to force the company towards accepting the offer. Finally, the Reflection Period may be invoked after a hostile offer is declared unconditional, if the conditions are met, also by companies that do not have pre-existing defensive measures in place. The Reflection Period may allow the boards to seek improvements in the bidder's plans and can delay the moment the bidder can acquire effective control over the target company.

Please feel free to contact us if you have any questions



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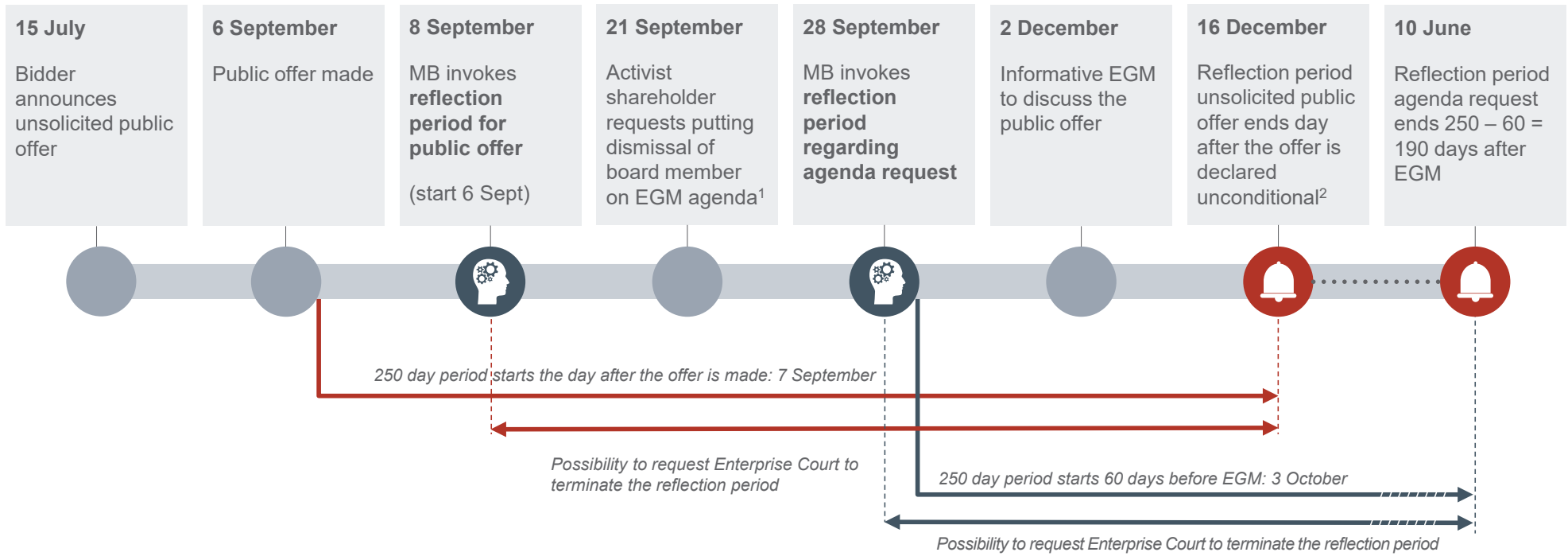
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# Annex 1: Indicative timeline involving a combination of an unsolicited public offer and an agenda request by an activist shareholder



<sup>1</sup> Generally there will be no added value to invoke a second reflection period if one has already been invoked, e.g. against a hostile offer and a subsequent shareholder request, because during the ('first') Reflection Period no board changes upon a shareholder request can be realised anyhow

<sup>2</sup> If the bidder, after completion of the offer, requests putting dismissal or appointment of a board member on the agenda, a new reflection period can, subject to the applicable conditions being satisfied, be invoked.