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## The Dutch Defense: Flexible Anti-Takeover Mechanisms in the Netherlands

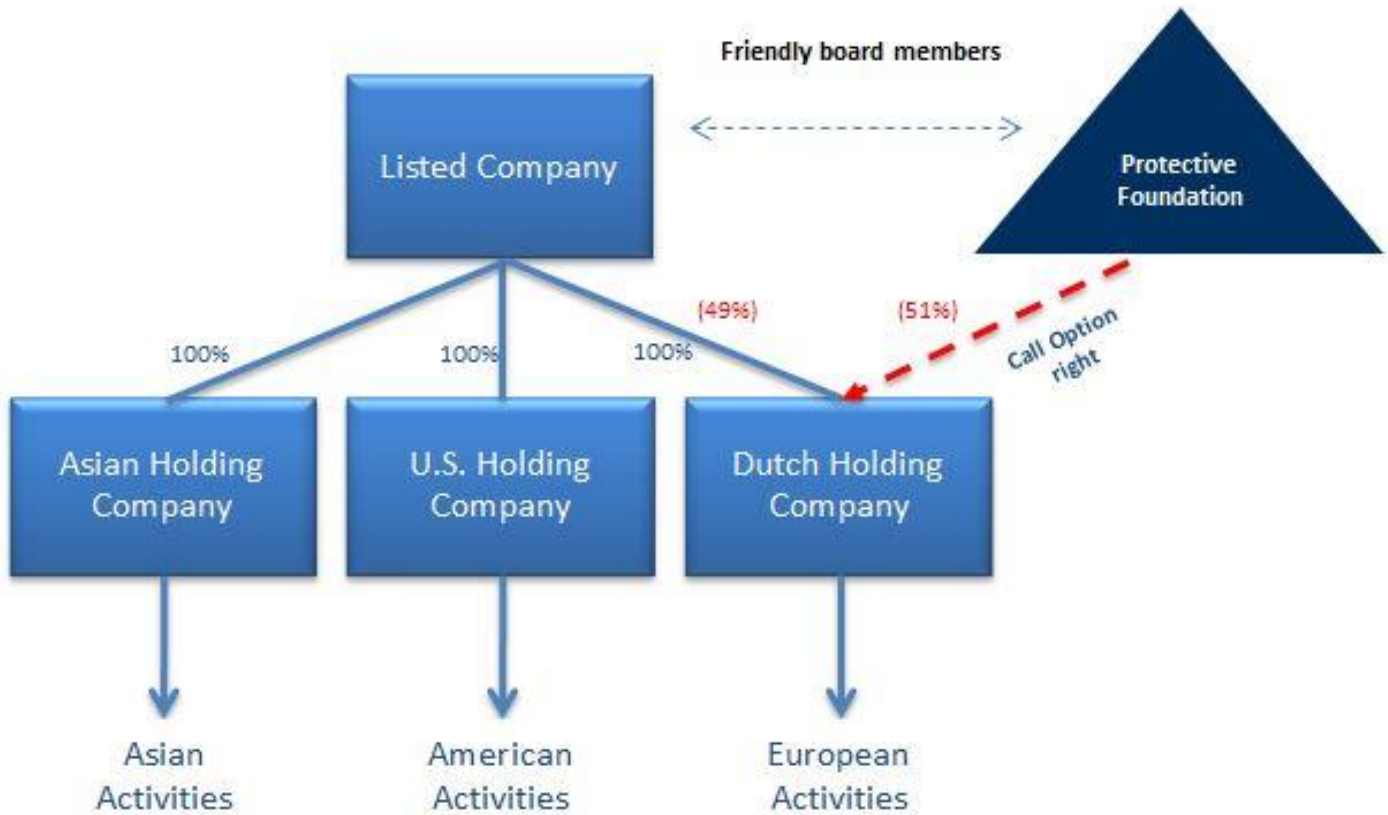
Anti-takeover mechanisms aim to prevent a publicly listed company from being taken over by a hostile bidder or an activist shareholder. For many years, flexible anti-takeover mechanisms have been established under Dutch corporate law, the most common of which is based on the issuance of preference shares to a Protective Foundation (*stichting beschermingsprefs*) corporate body of the publicly listed company.

### The Issuance of Preference Shares to a Foundation

The most common Dutch defense mechanism against a hostile bidder or shareholder aiming to seize control over a publicly listed company is structured around a call option right, which is granted by the listed company for the issuance of preference shares to a target-friendly Protective Foundation. The Protective Foundation can call for the issuance of shares at its discretion and at nominal value, which is substantially lower than the value for which the shares are traded at the stock exchange. The articles of association of the foundation typically stipulate that the purpose of the foundation is to protect the continuity of the listed company and to safeguard its interests. After exercising the call option, the equity interest of all other shareholders dilutes to such extent that the foundation holds a majority (50+ percent) of the voting rights. Due to its effectiveness and flexibility, this construction is very popular amongst Dutch public companies listed on the Dutch Stock Exchange. Currently, more than 40 percent of the Dutch companies listed on the Dutch Stock Exchange have this – or a comparable – anti-takeover mechanism in place.

The same defense mechanism may also be incorporated at sub holding levels in international group structures. Typically, a top holding company, located outside the Netherlands and listed on a foreign stock exchange, has a Dutch sub holding company (often for tax purposes) heading its European group. In such a structure, the call option for the issuance of preference shares is in the Dutch holding. If there is a threat of a hostile takeover bid on the shares of the listed top holding company, the call option can be exercised, allowing the Protective Foundation to obtain a 50+ percent stake in

the European activities of the group. This results in the bidder's inability to exercise control over the European activities and provides leverage for the management board of the listed entity to enter into negotiations with the bidder on, for example, a higher bid price. The Protective Foundation typically has a board of directors that consists of the same individuals as the directors of the listed company. This can be demonstrated as follows:



*Variations of this structure are, of course, conceivable.*

Dutch case law has established that an anti-takeover mechanism is permissible if it is necessary to protect the continuity of the company and the interests of all stakeholders concerned. If the company is part of a group, the group interest will be taken into account. The test is whether or not the mechanism is adequate and proportionate in light of the threat of a hostile takeover. In general, anti-takeover mechanisms may not be maintained for an unlimited period of time.

***The following are proven examples of how Dutch anti-takeover mechanisms thwarted a hostile bidder:***

Public Bid on the Outstanding Shares of a Dutch Listed Telecom Provider Thwarted

A Dutch Listed Telecom Company (DLC) successfully used its anti-takeover defense mechanism to repel the unsolicited approach of a Large Foreign Telecom Corporation (LFC). The LFC acquired a 29.8 percent stake in the DLC through a partial offer of € 8 per share in 2012. This offer was not supported by the board of directors of the DLC because the board considered the offer too low and the motive of LFC was unclear. On Aug. 9, 2013, the LFC launched a full offer on all the shares of the DLC to reinforce its European presence. The Protective Foundation of the DLC exercised its call option and subsequently issued preference shares to the foundation. This course of affairs forced the LFC to enter into negotiations with the board of directors of the DLC. After failing to agree to the conditions of a potential acquisition, the Protective Foundation upheld its defense and the LFC withdrew its offer on Oct. 16, 2013, and has since reduced its stake in the DLC. Subsequently, when the threat of a hostile takeover ceased to exist, the Protective Foundation requested that the DLC cancel the issued preference shares and thereby reverse the defense mechanism to allow it to be used again in the future.

### \$40 Billion Hostile Takeover Bid Thwarted

On Feb. 27, 2015, a U.S. based pharmaceutical company converted into a Dutch public limited liability company (*naamloze vennootschap*) in order to successfully thwart a hostile \$40 billion takeover bid by a multinational pharmaceutical corporation. After conversion, a Protective Foundation was created on April 3, 2015, which was granted a call option for preference shares. When it was rumored that the multinational corporation planned to make a \$40 billion hostile bid during the summer of 2015, the Protective Foundation exercised its call option and gained a 50 percent interest in the U.S. based company. Four days after the Protective Foundation exercised its call option, the multinational corporation withdrew its offer and dropped its pursuit of the U.S. based pharmaceutical company.

### Conclusion

Dutch corporate case law provides anti-takeover defense mechanisms which are not only highly effective, but flexible as well. These defense mechanisms put a board of directors in a position to resist hostile bidders and activist shareholders, and can also position them to be able to negotiate a higher offer price or specific demands.

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