Speech of Rients Abma, executive director of Eumedion, at the Simmons & Simmons seminar "The Dutch Takeover Panel", Kasteel De Wittenburg, Wassenaar, 16 January 2008

Ladies and gentlemen,

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"Nederland slaat internatinaal een pleefiguur", or, in plain English: Internationally, the Netherlands looks like a horse's ass. It was one of the statements made by a lawyer involved in the ABN AMRO case, cited in Het Financieele Dagblad, one day after the controversial ruling of the Enterprise Chamber in the ABN AMRO takeover battle. The ABN AMRO case was the starting point of a broad discussion about the feasibility of the Dutch takeover regulation. In the same article in Het Financieele Dagblad, some people pleaded for the introduction of a Dutch Takeover Panel, similar to the UK Takeover Panel. These people reasoned that a Takeover Panel could have prevented the long-term "bidding war" between Barclays and the Consortium with all its negative consequences. Already on April 11th, last year, Paul Koster opened the discussion during a roundtable in Dutch Parliament about the effects of hedge funds and private equity for our Dutch corporate governance model. The idea of Paul Koster was picked up by Dutch politicians. The Minister of Finance announced to start a consultation by the end of 2008 on the desirability and the potential role of such a Dutch Takeover Panel. I would like to congratulate Simmons & Simmons for starting this pre consultation debate in 2008 by organising this seminar. After a turbulent year with a lot of high profile takeovers, this is the right moment to discuss preliminary conclusions that we can draw from the year 2007. What went wrong with these high profile cases? Are there gaps in our takeover legislation? And are these gaps the causes of the problems with the recent takeovers? And is the introduction of the UK model a solution to our recent problems? These are the central questions which I will discuss in the next 20 minutes. As I am executive director of Eumedion, the Dutch corporate governance platform for institutional investors, I will discuss these questions from an investor's point of view.

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Before I will present some provisional answers, I will give you some background information on the history of takeover regulation in the Netherlands. Where are we coming from? After that I will give you an overview of the perceived problems with the Dutch takeover legislation, against the background of the high profile takeover cases in recent years. After that I will analyse whether the introduction of a Dutch Takeover Panel is the right answer to the problems experienced with these takeovers. I have some doubts whether a Dutch Takeover Panel would become as effective as the UK Takeover Panel. Our provisional position is that on some points we should strengthen and modernise our takeover regulation instead of rebuilding our model.

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Where are we coming from with the current Dutch takeover rules? You must realise that between 1970 and 2001 Dutch mergers and public offers were regulated by a code of conduct: the Merger Code of the Social and Economic Council, the SER. In 1996 this Council advised the Government that the rules for the protection of the shareholders' interests should be incorporated into law, and that the supervision of compliance with these legal rules should be assigned to an independent supervisory body. The Government followed this advice, also based on a very thorough study of Professor Gerard van Solinge and Professor Marco Nieuwe Weme of the Nijmegen University. These professors concluded that in the light of the internationalisation of the capital markets, the hardening of the takeover methods (an increase in hostile takeovers was foreseen), insufficient legal protection and limited possibilities for sanctioning and enforcement, legal binding offer rules were necessary. In September 2001, 5 years after the advice of the Social and Economic Council, the Dutch Takeover Act came into force. The Merger Code of Conduct was in its entirety implemented into law. The Netherlands Authority for the Financial Markets was appointed as the public supervisor on compliance with the offer rules. To ensure a smooth implementation and parliamentary discussion, no new rules were created. So in 2001, we ended up with rules that were designed for the 20th century, but maybe not for the 21st century. The Government said that just after the introduction of the Takeover Act, it would start a public discussion about modernising the offer rules. It lasted till 2007 before the offer rules were – in some kind - adapted to the needs of the 21st century …

Offer rules, by which I mean rules on transparency of the terms of the bid and on the timelines of the bid, are, however, just one element of takeover legislation. These rules are implemented in securities law. Takeovers have by its characteristics of course also consequences for the future control of the company. And for the employees of the target company. Especially in these circumstances, the board has to weigh the interests of the various stakeholders. This is a central provision in our company law. As a consequence, the judge has to rule on disputes about the weighing of these interests. And most of the times, the disputes are about the legitimacy of frustrating actions taken by the Board. In practice, stakeholders choose for the Enterprise Chamber to battle out their disputes. All in all we can state that takeover legislation is situated right on the demarcation of securities law and company law. As a consequence, not only the AFM, but also the Enterprise Chamber has to deal with public takeover bids.

Before analysing the 2007 problems with the takeover legislation that was based on a code of conduct of the 1970s, it is important for our further discussion to repeat the words of the Dutch Corporate Governance Committee on takeover regulation. In its notes to the Dutch Corporate Governance Code it stated that self regulation was too weak an instrument for takeover battles. Therefore the Tabaksblat Code was not suitable to issue best practice provisions on mergers and takeovers, including best practice provisions on using anti-takeover devices.

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In recent years, it became clear that the Dutch offer rules, based on the 1975 Merger Code, were not suitable for the new habits on the capital markets. On this slide I present some problems we have experienced with the Dutch takeover legislation. I have to underline that this is the experience before Dutch takeover legislation was modernised on 28 October 2007.

In the Stork case it became crystal clear that a mandatory bid rule was lacking in the Netherlands. First, Centaurus and Paulson, owning 33% of the voting rights, dominated the decision-making in the shareholders meeting but refused to launch a full takeover bid. After the Board reached a solution in the deadlock by supporting a

takeover bid by private equity firm Candover, Storks Icelandic rival LME built up a 43% stake but also refused to make a full bid on Stork. A new deadlock was born. Management's attention for the business was diverted for a very long time.

Another deficiency: the lack of rules on competitive bids. This became clear, first with the battle to takeover PinkRoccade in 2004 and 2005, by Getronics and Ordina. Last year, the lack of rules was noticeable in the ABN AMRO case. A level playing field in the way that a target has to provide the competitive bidders with the same kind of information was lacking, finality in the bid process is uncertain and a competitive bidder can have a tactical advantage in the case he launches a bid just before closing of the offer period of the first bidder.

Third, no clear rules in the pre bid period. In the VNU, ABN AMRO and Stork case and recently in the ASM International case some parties talked publicly about a possible takeover bid, in some instances even indicating an offer price, but it lasted very long before a formal bid was launched and in some cases a formal bid was never launched. Moreover, we have seen some examples of signs of insider trading (Numico, Vedior, Hagemeyer, Exact Holding) just before a formal bid was launched.

Fourth, the Netherlands does not have rules with regard to frustrating actions. This will lead to uncertainty in the market. In the Stork case, protective preference shares were issued to an independent Foundation, thereby frustrating the proposal of two major shareholders to fire the Supervisory Board. In the ABN AMRO case, the Board sold an important subsidiary as part of the deal with Barclays, thereby, initially, frustrating a possible bid by the consortium. It was unclear whether this transaction had to be adopted by the General Meeting of Shareholders.

Fifth, the acting in concert rules are not in clear in the Netherlands. The uncertainty at what time shareholders are acting in concert in stead of working together will give chances of tactical litigation by the listed company. In both the VNU and Stork case the Board accused some shareholders of acting in concert without notifying the supervisor of their joint shareholdings on time. These accusations will harm the reputation of the shareholders.

Sixth, we have experienced the use of the legal merger as an instrument to squeeze out the minority shareholder. More and more, the bidder warns shareholders that in case the bidder acquires less than the announced minimum percentage of the shares, he will use all legal means to acquire full control at the end. So, in theory it is possible that while 49% of the shareholders do not agree with the bid price, the bidder acquires full control by opening the box of legal tricks. Especially the legal merger is a popular instrument for bidders to acquire full control. As a result, in practice we experience that the threshold for major shareholders to squeeze out the minority shareholders is lower than the legal threshold of 95%.

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A couple of these problems will disappear because of new legislation. A milestone was the implementation of the Takeover Bids Directive on 28 October 2007; 18 months after the implementation deadline and more than 6 years after the Minister of Finance announced to modernise Dutch takeover legislation “rapidly”.

First, the mandatory bid rule was implemented in the Dutch takeover legislation. Shareholders acquiring more than 30% of the voting rights have to launch a bid on all shares of the company. Therefore, shareholders cannot acquire control in the GMS without giving minority shareholders the possibility to exit against a reasonable and fair price. Moreover, the TBD forced the Dutch Government to draft rules on competing bids. The first bidder will always have the right to extend the tender period until the end of the tender period for the competing bids. As a consequence shareholders can have a real choice without too much time restraint on which bid they will tender their shares.

Moreover, since 28 October 2007 the offer rules are modernised. For example, to avoid new VNU, Stork and ABN AMRO cases, the public offer process will already start when a potential bidder discloses some concrete information regarding the possible offer, such as the name of the target company in combination with an indication of the possible offer price or an anticipated time line regarding the possible offer. Other statements may also qualify as concrete information regarding the offer. So, the AFM has the opportunity for an early interference.

A further improvement in the Dutch takeover legislation is the introduction of the so-called right of appraisal for minority shareholders in case of a legal merger between a Dutch company and a foreign company. This new right is part of the Bill to implement the 10th EU Directive on cross-border mergers, which is still pending in the Senate. The new right will lead to a better protection of the minority shareholder against the misuse of the legal merger instrument to squeeze out minority shareholders. The new right will allow dissatisfied shareholders to escape the financial effects of organic changes approved by shareholder majorities by selling their shares back to the company at a reasonable price. As a side benefit, the appraisal right also protects shareholders by making unpopular decisions more expensive for management to pursue.

So far the improvements. Which rules are we still missing? There is still uncertainty under what conditions anti-takeover devices can be erected and which frustrating transactions have to be adopted by the general meeting of shareholders. Moreover, a put up or shut up rule has not been implemented in Dutch takeover legislation. It is still possible to dawdle with launching a full bid on a company. And it is still possible that a bidder can launch a bid, although in an earlier instance he had publicly announced not to launch a bid. And there is still no guidance published under what circumstances shareholders are acting in concert.

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However, some people say the problems are even more fundamental. Takeover regulation in the Netherlands will never be up to date because of three fundamental problems. First, legislation reacts very slowly to changing circumstances on the takeover market. If the offer rules would be part of a takeover code of conduct, the rules can be changed more quickly in order to accommodate new developments on the takeover market and changing tactics of the players on the takeover market.
Second, as I have said earlier the supervision on public takeover bids is in practice a shared responsibility of the AFM and the Enterprise Chamber. According to some critics, this can lead to tactical litigation, conflicting rulings and a long takeover process.
This can add to the problem that, in theory, takeover battles can last indefinitely. The AFM does not have the power to rule that an auction will take place in order to

determine which competitive bidder can make a final public offer and the takeover battle can be finished. According to the Supreme Court ruling on ABN AMRO, the management board and the supervisory board have a very important role to play in every stage of the takeover process. This cannot be taken over by a public authority.

These, more fundamental problems have led to a debate to rethink our model and a public discussion about the merits to introduce a takeover code of conduct and a takeover panel that acts as a referee in takeover battles. Would these ideas be real answers to the perceived fundamental problems?

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In other words: is the UK model a solution? To answer this question from an investor's point of view it is important to define the criteria to test this possible solution for the Netherlands. First of all it is for all interested parties important to have clear bidding rules and predictable behaviour of the supervisor. Second, we should have enough legal protection for the parties involved. Third, it should shorten the takeover bids process and fourth, we should have an independent and professional supervisor.

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I have some doubts whether the UK model would be effective in the Netherlands. Firstly, the necessary independence of the panellists. Do we really have independent persons in this small country? If we choose to have a takeover panel that regulates the public offers and that consists of professional people with a lot of experience, in a new high profile case there is a big chance that a majority of the panellists would have conflicts of interest.

Second: would this panel have enough authority, so that the parties involved conform to the decisions taken by the takeover panel with the effect that the takeover process can be shortened? Also with regard to this criterion I have my doubts. The success and authority of the Takeover Panel have for a part their roots in the rather high degree of "clubability" in the London City. Still some 40% of the UK shares are owned by UK institutional investors and all advisors of the UK listed companies and of UK investors are based in the City. The social control in the London City is so strong that the parties involved conform to the rulings of the Takeover Panel. This degree of

social control can be questioned in the Dutch context, as 75% of the shares of our largest companies are owned by foreign institutions and more than 50% of the members of the management boards and supervisory boards of these companies have a foreign nationality. Therefore, I have my doubts whether all parties involved will conform to the rulings of a Dutch takeover panel. It is not imaginary to think that parties involved will appeal to the rulings of the panel and that an independent judge has to make a final ruling. As a consequence: quick finality would still be a problem. Certainly in high profile cases, so in situations that the company's future is at stake and the takeover battle is fierce and ferocious, the chances are high that one of the parties involved will ask a judge to come up with a ruling. This will especially be the case in disputes about the distribution of power: which transactions should be approved by the GMS and was the Board right to erect anti-takeover devices? Moreover, especially in such cases it would be very difficult for a takeover panel to give a ruling. Concrete guidance whether it is acceptable to erect an anti-takeover device is not available. The unambiguousness of the UK model will make it relatively easy to judge board decisions. In the Netherlands, the board has to weigh the interests of the shareholders against the interests of the other stakeholders, like employees and customers. As we have seen in the Supreme Court ruling in the ABN AMRO case, the management board and supervisory board have a central role in weighing these interests, also and especially in takeover situations.

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So what would be the outline of the model that investors would prefer?
First, there should be a powerful and professional AFM that supervises compliance with legally binding offer rules. The AFM can decide herself to appoint advisors or and advisory committee, if that is helpful to take decisions. However, the AFM has final responsibility for decision-making.
Secondly, we should further modernise our offer rules. For example, the introduction of the put up or shut up rule. Moreover, it is very important that the AFM will publish guidance under what circumstances shareholders are acting in concert, so that they are obliged to notify their joint shareholdings. Moreover, guidance is also needed what acting in concert means in the light of the obligation to launch a full bid if a group of shareholders jointly own 30% of the voting rights. We can expect that

disputes about the enforcement of the mandatory bid rule will deal with especially this question.
Finally, we have to think about increasing the checks and balances within the Enterprise Chamber. What do I mean by this? Maybe we should think of a fast track procedure at the Supreme Court in the case parties involved ask to nullify the ruling of the Enterprise Chamber. Another idea could be that disputes about the distribution of powers within a company should be handled by a lower court, after which parties involved can appeal to the Enterprise Chamber. Also such a procedure should be a fast track procedure. Moreover, not only shareholders should have the possibility to ask for an inquiry for possible mismanagement and for immediate measures, but also the management and supervisory board of a company. Whether the behaviour of particular shareholders or of the AGM is in line with the reasonableness and fairness rule could be a subject to investigate.

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It is time for a conclusion. In 2001, the Government decided to implement the Merger Code of the Social and Economic Council into legislation. There were good reasons for doing that. Given that in takeover situations the company's future is at stake and that takeover battles are often fierce and ferocious, the Social and Economic Council, independent researchers, the Tabaksblat Committee and the Government were of the view that these situations must be regulated by law. Self regulation through a code of conduct is too weak an instrument for this purpose and therefore not suitable. This is a huge difference with the corporate governance code which gives guidance to members of the management board, members of the supervisory board and to shareholders what we mean by the legal phrases "reasonableness and fairness" and "decent management". A hardening of the takeover methods was one the reasons to transfer the Merger code of conduct provisions into law. It would be quite strange to transfer the rules back to a code of conduct in a time that the takeover methods become even fiercer.

With the new takeover legislation, the AFM has become more powerful in their supervision on offer rules. In a rather early phase, the AFM can interfere in the negotiating process and can start the legal timelines for an offer. Moreover, the AFM

has the power to grant exemptions in individual cases from the rules laid down in the Takeover Act. So, all in all we can conclude that we already have a ‘Market Master’.

Our model in which the supervision on public offers is ultimately a shared responsibility of the AFM and the Enterprise Chamber is possibly not the most distinguished one, but fits well in our beloved stakeholder model. I think it is preferable to putting more energy into modernising our offer rules - where we can inspire us with best practices from other countries - instead of trying to rebuild our model. I have dropped some suggestions this afternoon. I hope the policy makers will follow up.

Thank you for your attention.