

[informal translation from Dutch]
Amsterdam Court of Appeal
Enterprise Chamber
Application number: 200.215.330 OK
Hearing: 22 May 2017, 10.00 AM

STATEMENT OF DEFENCE

in the matter of:

AKZO NOBEL N.V.,
registered in Amsterdam,

defendant,

counsel: H.J. de Kluiver and J. de Bie Leuveling Tjeenk

versus:

1. **ELLIOTT INTERNATIONAL, L.P.**,
registered in Grand Cayman, Cayman Islands,

2. **THE LIVERPOOL LIMITED PARTNERSHIP**,
registered in Hamilton, Bermuda,

applicants,

counsel: J.W. de Groot and mr. M. Griffiths

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1 INTRODUCTION

1. The defendant ("**AkzoNobel**") has taken note of the application filed by the applicants ("**Elliott**") on 9 May 2017 seeking the ordering of an enquiry and the ordering of immediate measures of relief (the "**Application**").
2. The background to this action is the attempts of PPG Industries Inc. ("**PPG**") to acquire AkzoNobel. PPG has made unsolicited proposals to the management board and the supervisory board of AkzoNobel to acquire AkzoNobel by means of a public bid for all outstanding shares.
3. In accordance with their statutory duties and duties under the articles of association the management board and the supervisory board of AkzoNobel have at all times performed a thorough study of PPG's proposals and have determined whether these proposals were in the interest of AkzoNobel, in which context it weighed up the interests of its associated enterprise and stakeholders. Having performed a careful weighing up exercise AkzoNobel's management board and supervisory board have come to the conclusion that, with respect to PPG's three proposals, this was not the case and that the interests of AkzoNobel and of all its stakeholders, including its shareholders, are better served if AkzoNobel follows its own renewed strategy.
4. Elliott does not agree and since the middle of March 2017 has sought to force the management board and the supervisory board of AkzoNobel to enter into negotiations with PPG. This application fits into this pattern.
5. Elliott's application is far-reaching. An application has been made seeking an order directing the holding of an enquiry and the issuance of immediate measures of relief. According to Elliott there exist well-founded reasons for suspecting unsound policy because, in short, (i) AkzoNobel has failed to enter into serious discussions with PPG following PPG's unsolicited proposals and (ii) AkzoNobel has rejected Elliott's request for the calling of an extraordinary general

meeting of shareholders ("**EGM**") about the dismissal of the chairman of its supervisory board. By way of immediate measures of relief Elliott seeks, in summary (i) an order directing AkzoNobel to call an EGM within a very short term, the agenda being the dismissal of Mr Burgmans as member and chairman of AkzoNobel's supervisory board and (ii) the appointment of a supervisory board member who is to supervise "*the general course of affairs relating to the EGM*" and who "*for that purpose*" is to enjoy a decisive vote.

6. The Enterprise Chamber has ruled that in the course of the oral hearing of 22 May 2017 in principle only the application for the issuance of immediate measures is to be heard.
7. Elliott's application for the ordering of immediate measures of relief merits dismissal. There can be no scope for an interim finding to the effect that there exist well-founded reasons for suspecting unsound policy. In addition the immediate measures sought may not be awarded. This will be explained in this statement of defence.¹
8. In drawing up this statement of defence AkzoNobel has been able to take note of the statement of defence filed in the name of AkzoNobel's supervisory board. AkzoNobel concurs with that which is set out in that statement of defence.

2 AKZONOBEL'S STRATEGY

2.1 Introduction

9. For a proper understanding of the carefulness of the decision-making process relating to the rejection of the proposals of PPG and the request for an EGM, below we present you with a brief explanation of AkzoNobel's vision and strategy and the results achieved so far.
10. AkzoNobel formulated a clear vision following the appointment of Mr Büchner as CEO in 2012: "*Leading market positions delivering leading performance*".² In the realisation of its vision, AkzoNobel has

¹ Where, in this statement of defence, there are sections underlined and other additions placed between square brackets for the sake of comprehension it has not always been stated that this has been done by AkzoNobel's counsel. Unless stated otherwise this is the case.

² Annual Report AkzoNobel 2012 (**Exhibit 1**), p. 10.

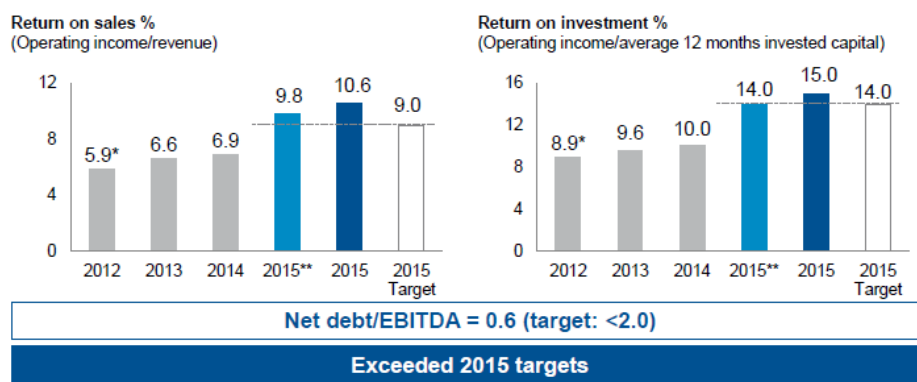
distinguished three strategic phases. As will become clear below, AkzoNobel completed the first two phases - laying a solid operational foundation and accelerating growth - earlier than expected, and did so successfully (see paragraph 2.2). The interests of stakeholders are of essential importance to AkzoNobel (see paragraph 2.3). The spin-off of the Specialty Chemicals division (see paragraph 2.4) and the focus on the Paints and Coatings (see paragraph 2.5), accompanied by significantly enhanced financial guidance and a structural increase of the dividend distribution of the remaining division form the core of the third phase of this strategy, which is endorsed by stakeholders (see paragraph 2.6). By doing this AkzoNobel creates long-term value for all its stakeholders, including shareholders (see paragraph 2.7).

2.2 AkzoNobel has created a solid base whilst accelerating growth

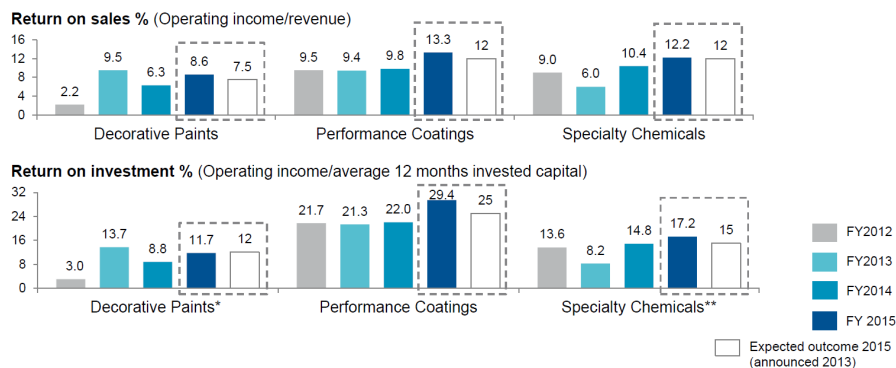
11. When streamlining the organisation and creating a solid operational base for the future, AkzoNobel sought to improve its business operations and strengthen and build its market positions.
12. In the context of the focus on leading market positions, AkzoNobel reduced its portfolio of business activities to the market positions in which it was already performing well and, with improved business operations, would be able to perform even more successfully.
13. AkzoNobel has additionally taken a large number of measures to improve its business operations. These were part of an extensive multi-year programme in which each of the business units are improved and strengthened. This has involved contributions from the entire company across the world, both from each of the Business Units and Business Areas and from each of the functions within the company. The aim here was to effect a cultural change, so that employees at each level and in each division would constantly seek to optimise their operational processes. For example, the worldwide implementation of the optimisation programmes *AkzoNobel Leading Performance System (ALPS)* and *Global Business Services (GBS)* have reinforced the organisation. In addition, the structure and management of working capital and investment capital have been optimised and the risks of the pension liabilities have been reduced.

14. The improved portfolio of business activities and optimised business operations have yielded fruits. At the presentation of the annual figures for 2015, AkzoNobel reported that it had not only amply matched the targets and corporate targets, 9% ROS and 14% ROI, formulated in 2013, but that the same was also true for the other targets, as shown by the graphs below.³

We delivered all 2015 financial targets



Performance improved in all businesses

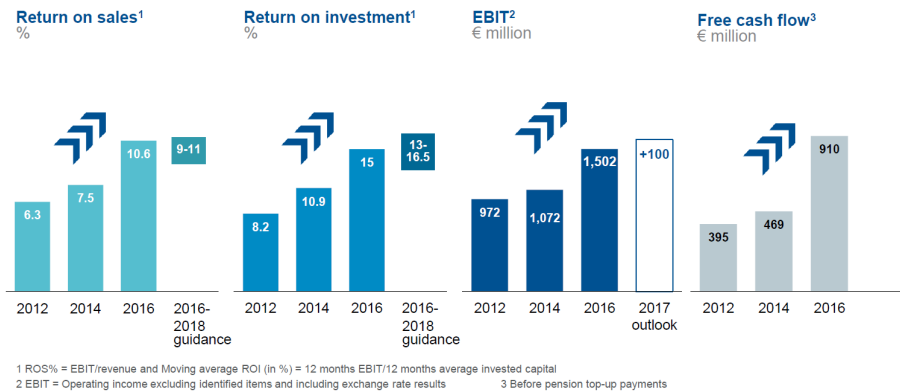


15. Also after 2015, AkzoNobel continued to outperform its own targets. In 2016 AkzoNobel reached the upper boundary of the range of the guidance it had announced for the period 2016-2018, as shown by the graphs below.⁴

³ Investor Update 10 February 2016 (Exhibit 2), p. 4 and 5.

⁴ Investor Update 19 April 2017 (Exhibit 3), p. 9.

Delivering on our commitments



16. The success of the strategy followed by AkzoNobel since 2012 is further underlined by the figures for the first quarter of 2017, in which a record profitability was reported. Clearly, AkzoNobel is experiencing a growth momentum. Mrs Castella, AkzoNobel's CFO, stated:

*"Our record performance continued this quarter, showing the substantial growth momentum we have across the business. Significant progress continues across all our Business Areas, reflecting both our strong customer focus and great portfolio of brands."*⁵

17. AkzoNobel has invested heavily in its corporate culture from 2012 onwards. The management has formulated common core values and rolled these out through the entire company. The core principles of safety, integrity and sustainability are the three pillars supporting the strategy and forming the basis of AkzoNobel's Code of Conduct (**Exhibit 5**). Common values have been introduced world-wide: Customer Focus, Winning Together, Deliver on Commitments, Passion for Excellence. These values have been introduced into the personal assessment systems applicable to all its employees across the globe.

2.3 Attention for all stakeholders is essential for AkzoNobel

18. Since 2012, the policy of AkzoNobel's management was naturally aimed at more than improving the financial performance. After all, AkzoNobel pays attention to the interests of all stakeholders. This is

⁵ Press release 19 April 2017, 'AkzoNobel reports record profitability in Q1 2017' (**Exhibit 4**).

naturally expressed in AkzoNobel's strategy, as will be explained below.

2.3.1 Sustainability champion

19. AkzoNobel has a long tradition in the area of sustainability. Where some companies only use smooth talk and make empty promises (see no. 51), AkzoNobel has developed into a market leader that sets an example to other companies. Attention to sustainability is ingrained in the organisations' DNA.
20. The focus on sustainability is not only characterised by idealism, but issues from a sincere conviction that sustainable business operations lead to better products, better service of customers and better results. Büchner formulated it as follows at the Investor Day on 19 April 2017:

*"[S]ustainability and innovation truly is something that we want to continue to lead the way. It does generate money. It does create value. We really see that in those products where we can differentiate from our competition, in benefits that we provide to our customer base, we can clearly look at additional margins because the actual benefit is so tangible for our customers."*⁶

21. AkzoNobel's sustainability performance is concrete, measurable and has been verified by independent organisations. AkzoNobel is an undisputed sustainability champion: in the past consecutive 11 years AkzoNobel has ranked in the top ten of the RobecoSAM Dow Jones Sustainability Index, ranking first in four of the past five years. The Carbon Disclosure Project has conferred leadership status on AkzoNobel by placing it on the "The Climate A List 2016", which demonstrates that AkzoNobel has "*a thorough understanding of risks and opportunities related to climate change*" and "*implemented strategies to mitigate or capitalize on these risks and opportunities*".⁷ The analyses of Sustainalytics, Global Reporting Initiative, Oekom, Vigeo, FTSE4Good, MSCI, STOXX and Ethibel also endorse AkzoNobel's performance in this field.⁸

⁶ Transcript Investor Day 19 April 2017 (**Exhibit 6**), p. 14.

⁷ Carbon Disclosure Project, 'Scoring Introduction 2016' (**Exhibit 7**), p. 9.

⁸ Annual Report AkzoNobel 2016 (**Exhibit 8**), p. 203.

22. With its ambitious 'Planet Possible' programme, AkzoNobel wishes to accomplish its aim of fully CO₂-neutral operations as from 2050. The Amsterdam head offices AkzoNobel took into use in 2016, for example, already meet this goal. The far-reaching integration of the sustainability policy is also apparent from the fact that the long-term remuneration of senior officers - including the board - depend for 30% on the position of the company in the RobecoSAM Dow Jones Sustainability Index.⁹

2.3.2 Strong customer focus

23. From 2012 onwards, AkzoNobel has applied a disciplined, customer-focused approach. In doing so, AkzoNobel has distinguished four segments of end-users: buildings and infrastructure, transport, consumer goods, and industrial application. This approach has enabled AkzoNobel to align its business processes to the wishes of its customers. In the 2012 Annual Report, Büchner writes:

*"This disciplined, customer-focused approach is fundamental to our continued success and forms a cornerstone of the new strategy we have adopted (...) which is based on end-user segmentation and is designed to further improve on our leadership positions in paints, coatings and specialty chemicals."*¹⁰

The good results and the growth momentum (see paragraph 2.2) show that customers appreciate this strategy.

2.3.3 Committed employees in a safe work environment



24. As stated above, from 2012 AkzoNobel sought to effect a cultural change, with employees at each and every level aiming to optimise business processes (see no. 13). AkzoNobel's Leading Performance System (ALPS) is a method of work that, amongst other things, means that employees, within their own teams and on a daily basis, determine what went well, what requires improvement and how these improvements can best be put in place. In addition to the increased profitability, this resulted in employees feeling increasingly committed to their work in the past six years. This also follows from the results of employee surveys (**Exhibit 9**). AkzoNobel invests in training and

⁹ Annual Report AkzoNobel 2016 (**Exhibit 8**), p. 125.

¹⁰ Annual Report AkzoNobel 2012 (**Exhibit 1**), p. 8.

facilitating the development of its staff, among other things via the AkzoNobel Academy.

25. AkzoNobel also explicitly pays attention to creating an as safe as possible work environment. Safety is the first pillar of AkzoNobel's code of conduct (Exhibit 10) – the other pillars being integrity and sustainability. The implementation of the 'Life-Saving Rules' and the 'Golden Principle' – "*We must always stop work if conditions or behaviour are unsafe*" – have contributed to the decrease in the number and seriousness of workplace accidents. The performance of AkzoNobel in the fields of safety and the environment are contrasted with those of PPG in the table below.¹¹

KPI			Comments
Total Recordable rate [TRR]	0.28	1.41	AN 5 times lower
Lost Time Injury rate [LTIR]	0.15	0.91	AN 6 times lower
Last fatality	2012	2013	
Million EUR fines since 2010	0.2	3.7	Source: violation tracker ¹
Manufacturing sites ISO 14001 certified	79%	26%	AN 53% more sites
Hazardous waste to landfill (per kt) ²	0.2	0.7	AN 3 times lower
Non Hazardous waste to landfill (per kt) ²	4.1	30.1	AN 7.5 times lower

¹ US based companies
² Coatings only – Chemicals activities excluded

2.3.4 Emphasis on innovation and ties with research institutes

26. AkzoNobel has set itself the goal of realising an innovative product portfolio. To this end it employs approximately 4,000 scientists and researchers that work in 130 laboratories across the world. AkzoNobel intends to invest at least EUR 1 billion between now and 2020 for the benefit of innovation in the Paints and Coatings divisions. AkzoNobel maintains close ties with universities, governments and research institutions in the countries where it is active, in particular in the Netherlands, the UK and Sweden. In doing so, the company takes account of the interests of the environment in which it operates. For example, AkzoNobel will be opening the Open Innovation Center on the premises of AkzoNobel in Deventer, in

¹¹ Presentation 'Health Safety Environment & Security (HSE&S) in AkzoNobel', 15 March 2017 (Exhibit 10).

collaboration with the province of Overijssel, the municipality of Deventer and local businesses: a breeding ground for chemical research, accessible to businesses, knowledge institutions, start-ups, investors and students.

2.3.5 Positive social contribution

27. AkzoNobel's corporate policy is also aimed at delivering a sustainable contribution to society by increasing the liveability in cities via its 'Human Cities' initiative and to make the sustainable targets set by the United Nations into permanent goals. On the one hand by revitalising urban areas with the 'Let's Colour' programme, for example the renovation of the old inner city of Jakarta, on the other hand by giving impulses to local communities via its 'Community Program', such as creating spaces for sports and games for children in poor districts of Rio de Janeiro. In this context AkzoNobel set up more than 300 projects in 2016 with the help of at least 7,200 volunteers, which have made a positive contribution to the lives of more than 9 million people. In 2016, AkzoNobel also initiated a public-private collaboration between businesses, government bodies, academics and social organisations focused on enhancing the liveability in mega cities in emerging countries.¹²

2.4 Spin-off Specialty Chemicals is a logical next step

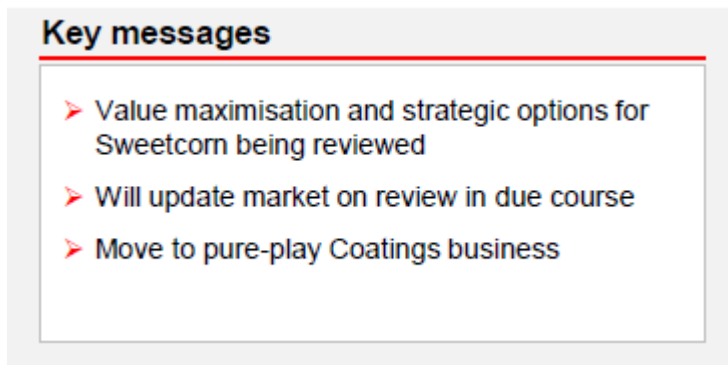
28. Contrary to what Elliott alleges, it ¹³ is not true that at the time of the Investor Update announcement of 28 March 2017 AkzoNobel had not yet given shape to its own strategy. The management board and supervisory board regularly discuss AkzoNobel's strategy, including the portfolio and possible acquisitions or disinvestments. In determining its strategy, AkzoNobel has been consistent throughout by its financial advisers, including HSBC and JP Morgan, and consultants from McKinsey, among others. After streamlining the existing portfolio the focus has continued to remain on improving the results of AkzoNobel's three existing divisions. As explained by CEO

¹² For an illustrative overview of the positive social contribution made by AkzoNobel, refer to **Exhibit 11**.

¹³ Application, no. 7.13.

Büchner during the Investor Day of 19 April 2017 the creation of two separate companies is a logical next step.¹⁴

29. A spin-off of the Specialty Chemicals division had been an express subject of discussion for some time, and well before the first unsolicited bid from PPG. For example, one of the essential points of a Management presentation, which for the remainder is business confidential, of 25 May 2016, was a "review of strategic options" for specialty chemicals (referred to in the presentation as "sweetcorn") with as the key messages:



30. AkzoNobel's management board and supervisory board considered and still consider the spin-off of Specialty Chemicals a logical next step after creating a solid operational base and accelerating growth. In the course of 2016 matters were further discussed in meetings of the supervisory board in September, October and December in preparation of a decision in 2017. This could also offset the possible value-lowering effect of the diversity of the AkzoNobel group. Elliott explicitly acknowledges that this effect had come to the market's attention well before PPG's first proposal of 9 March 2017¹⁵ and wanted to urge AkzoNobel to investigate the possibility of a spin-off of Specialty Chemicals:

"In fact, just prior to the [PPG] approach to Akzo Nobel, we were finalizing a presentation which we hoped to share with you about Elliott's views on the Company's value creation alternatives. Our conclusion was that Akzo Nobel should undertake a strategic review

¹⁴ Transcript Investor Day 19 April 2017 ([Exhibit 6](#)), p. 2-5.

¹⁵ Application, no. 4.16. Also see the series of newspaper articles dating from before PPG's first proposal of 9 March 2017, which Elliott has submitted to the Court as Exhibits 12 through 14.

with respect to the separation of its Specialty Chemicals business."¹⁶

"We understand that Akzo Nobel has in fact been evaluating its strategic alternatives since 2016. As previously noted by Elliott, the evaluation of a potential separation of the Specialty Chemicals business is worthy of shareholder support."¹⁷

31. The Specialty Chemicals division is fit to operate as a separate entity, independently from the Paints and Coatings division. In organising its internal organisation, AkzoNobel has deliberately avoided large interdependencies among divisions. For example, Paints and Coatings is not obliged to buy the chemicals it needs for its production process from Specialty Chemicals and a large number of the IT systems of the two divisions have not been integrated.
32. By the end of 2016 AkzoNobel had strongly reduced its pension top-up payments and the risks regarding the associated volatility had also been reduced strongly. By doing so, an important condition for the spin-off of Specialty Chemicals had been satisfied. In the autumn of 2016, AkzoNobel's management board asked its financial and legal advisers to explore the possibilities for such a spin-off. Though this process was sped up following the first unsolicited, non-binding and conditional bid of PPG on 3 March 2017; it follows from the foregoing that the decision-making on the spin-off of Specialty Chemicals was already in advanced stage of preparation.
33. In order to realise the highest possible value for shareholders and other stakeholders, and to retain as much freedom of choice with regard to the spin-off of Specialty Chemicals, AkzoNobel opted for a dual-track process: simultaneously preparing a private sale and listing of Specialty Chemicals. Given that a possible spin-off of Specialty Chemicals had already been factored in in respect of the internal organisation (see no. 31) and the spin-off had already been set in motion from the autumn of 2016, AkzoNobel expects to realise the spin-off of Specialty Chemicals within one year; faster than is usually the case.

¹⁶ Letter from Elliott to AkzoNobel of 15 March 2017 (Exhibit 29 Application).

¹⁷ Press release Elliott of 29 March 2017 (Exhibit 32 Application).

34. Analyst reports state that the spin-off of Specialty Chemicals will yield between EUR 8 billion and EUR 12 billion for AkzoNobel. Most of the net proceeds will be given back to the shareholders. AkzoNobel has so much confidence in the value it will realise with the spin-off that it will distribute a bonus dividend in the amount of EUR 1 billion (EUR 4 per share) to shareholders as early as in November 2017 - i.e. before the spin-off has been completed.
35. Because of the increased profitability of AkzoNobel as a whole, the annual dividend payment for 2017 will be increased to EUR 2.50 per share: a 50% increase relative to the usual annual dividend of EUR 1.65 per share. Thus the total amount AkzoNobel will pay out to its shareholders for 2017 comes to EUR 1.6 billion.

2.5 Paints and Coatings has significant growth potential

36. The spin-off of Specialty Chemicals and the dividend payments in 2017 are not a terminal point, nor are these or isolated aspects of AkzoNobel's strategy. On the contrary: after the spin-off, AkzoNobel will be able to fully focus on its paint and coating activities. The solid operational base AkzoNobel has created since 2012, the ongoing implementation of the ALPS and GBS programs, the future exclusive focus on these business units, and the accelerated growth momentum offer an opportunity to increase the profitability of the Paints and Coatings division.
37. For example, though ALPS has been implemented at 75% of AkzoNobel's production sites, it has only been implemented at 50% of the production sites of Paints and Coatings. The significant improvements and accompanying environmental and cost savings created by ALPS, therefore, can still be realised for the remaining division of Paints and Coatings to a significant extent.
38. Paints and Coatings' growth potential and opportunity for profitability are such that AkzoNobel expects that, after the spin-off of Specialty Chemicals in 2018, it will be able to pay out the same annual dividend of EUR 1.65 per share as before the spin-off. Thus also in the long run, the strategy is in the interest of the shareholders of AkzoNobel.

2.6 Support for AkzoNobel's own strategy

39. It became clear at the annual general meeting of AkzoNobel held on 25 April 2017 that AkzoNobel's strategy could count on broad support from stakeholders. Elliott further wrongly fosters the impression that its views received full support at the annual meeting.¹⁸ This is not the case:

*"Elliott also took the floor on Tuesday with a number of questions. A representative of the activist investor was greeted by boos and jeers from the main part of room."*¹⁹

*"Even though Elliott claims support from some other large investors, its intervention at the AGM was met with stony silence while the views of smaller investors, many of them worker shareholders, were met with tumultuous applause. (...) Under Dutch takeover law, the board is required to take account of all stakeholders, not just investors, when accepting a bid. (...) Elliott and PPG should get back in their box. They are not wanted."*²⁰

40. It is important to note that in the course of the recent shareholders' meeting all the points on the agenda, including the decision to grant release of liability to the members of the management board and supervisory board were carried by a large majority.²¹ In this context it should be noted that the voting registration date was 19 April 2017: when casting their vote at the meeting the shareholders had taken cognisance of, and had taken account of, the reaction of AkzoNobel's management board and supervisory board to two of the three proposals of PPG.
41. At the annual meeting employees, including the president of the central works council, also expressed their support for AkzoNobel's strategy:

"At a much discussed shareholders meeting of besieged AkzoNobel at the end of April, the president of the works council called on AkzoNobel's senior management 'not to yield to the hedge funds', referring to the Anglo-Saxon shareholders supporting PPG in the hope of big profits. According to him Akzo should 'hold firm and

¹⁸ Application, e.g. no. 7.52.

¹⁹ 'AkzoNobel laat zich niet opjagen door PPG', *De Telegraaf* 25 April 2017 (**Exhibit 12**).

²⁰ A. Brummer, 'Dulux maker needs some Dutch courage as predator threatens to go hostile', *Daily Mail* 25 April 2017 (**Exhibit 13**).

²¹ The diagram included by Elliott at no. 7.53 of its Application, gives a distorted picture in this regard because the y-axis starts at 60%.

*choose in favour of the employees who have made Akzo great. After his words - in essence: PPG go away- prolonged applause rang through the hall."*²²

*"This hedge fund does not act as a responsible shareholder", said an AkzoNobel employee "Elliott is not interested in the company itself. It is a share trader that wants to earn a lot of money in a couple of months' time. I ask you not to give in to an activist hedge fund." This was met by resounding applause."*²³

42. Employee support for AkzoNobel's strategy is further evidenced by the positions published by AkzoNobel's European works council and its central works council (**Exhibit 16**).
43. The Dutch government and the Dutch legislature have explicitly pointed to the importance of an independent AkzoNobel:

*"It is key that leadership of major Dutch multinationals stays within the Netherlands. The country's economic structure has a major interest in this being the case. It is a good thing that those running AkzoNobel plan to remain independent."*²⁴

According to Principle 1.1 of the Dutch Corporate Governance Code this is also a circumstance that is to be taken into account by a company when shaping a strategy aimed at long-term value creation.

2.7 Conclusion

44. AkzoNobel is a sound, flourishing company with a clear strategy constructed on the Dutch stakeholder model. AkzoNobel has successfully completed the first two stages designed to realise this strategy earlier than expected. It is now time for the following strategic phase: the creation of two focused, strongly performing businesses with sustainable growth plans. The net proceeds of the spin-off of Specialty Chemicals will in large part be returned to the shareholders.

²² W. Dekker, 'PPG verwijt AkzoNobel aanhoudend gebrek aan fatsoen, vijandige overname dreigt', *Volkskrant* 8 May 2017 (**Exhibit 14**).

²³ A. Meinema, 'Voor- en tegenstanders overname Akzo kruisen de degens', *NOS* 25 April 2017 (**Exhibit 15**).

²⁴ 'Kamp: Hoger bod of niet, AkzoNobel beter af in Nederlandse handen', *AD* 25 April 2017 (**Exhibit 17**).

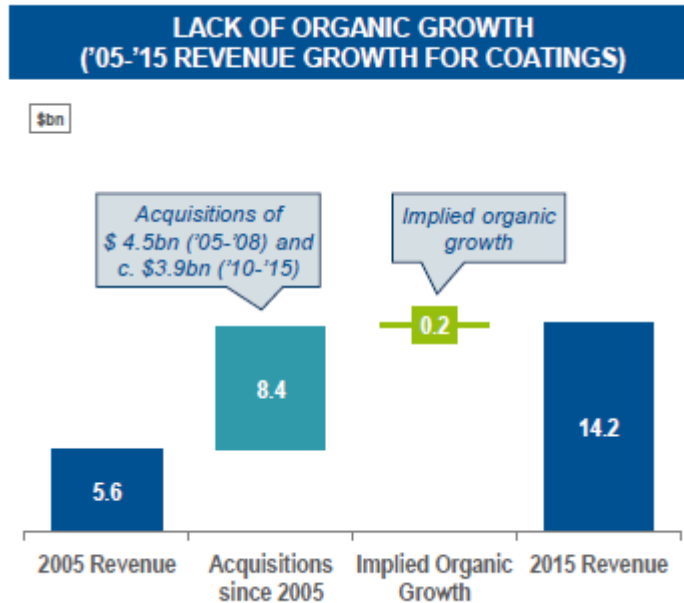
45. In realising its vision, the interests of all of AkzoNobel's stakeholders are important. The strategy is not only in the interest of shareholders – whose interests are structurally looked after and who will be paid a total of EUR 1.6 billion in dividend this year, will receive most of the proceeds of the spin-off of Specialty Chemicals, and subsequently will be looking forward to a structurally higher dividend – but at the same time enables AkzoNobel to maintain its leadership position in the area of sustainability, maintain its strong customer focus, continue to invest in the development and safety of its employees, continue to innovate in collaboration with research institutes, and continue to deliver a positive contribution to the communities in which it plays an active role. This will make AkzoNobel more attractive to its customers and suppliers which will reinforce its business results, which will again benefit its shareholders. AkzoNobel is a company that stands for long-term value creation.
46. It is against the background of this strategy that AkzoNobel's management board and supervisory board have assessed the proposals of PPG, as will be explained below.

3 EVALUATION OF PPG'S PROPOSALS

3.1 Background: PPG

47. PPG is a manufacturer and distributor of coatings. PPG was established in 1883 and has its head office in the American state of Pennsylvania.
48. PPG's strategy is targeted at being the global market leader in the coatings industry, and to lead the way in consolidation of this market. PPG is trying to achieve this primarily through takeovers, with which it can increase its turnover and market share.
49. Unlike Elliott alleges²⁵, PPG has only managed to show very limited organic growth since 2005. Of the turnover increase of USD 8.6 billion which PPG generated in the period from 2005 through 2015, USD 8.4 billion originated from takeovers, as is shown in the figure below:

²⁵ Application, para 5.2.



50. This means that, in the period from 2005 through 2015, PPG achieved an organic growth of just USD 200 million. Moreover, this picture has been strengthened even more in recent years: in 2015 and 2016, PPG reported a slight decrease in turnover, which would have been (much) lower without the takeovers completed by PPG in 2015 and 2016. For example, turnover in 2016 decreased by approximately USD 15 million, while USD 275 million in turnover that year originated from takeovers. This was even more the case in 2015, when turnover decreased by USD 25 million, and turnover from takeovers was USD 941 million. The same applies to the "growth" in the number of employees at PPG which PPG has suggested. If the takeovers (and the jobs taken over as a result of them) are ignored, then the number of jobs at PPG decreased.
51. PPG's sustainability performance continues to lag behind its peer group. In this regard, please refer to the positioning of PPG in 54th place and in the bottom quarter (Axel Noble: in the top 10 of the well-known RobecoSAM Down Jones Sustainability Index (**Exhibit 18**). This was also confirmed by the fact that PPG scored a D in 2016 in the global Carbon Disclosure Project. That score by PPG contrasts with the leadership status conferred by the Carbon Disclosure

Project on AkzoNobel (see no. 21).²⁶ In contrast to AkzoNobel, PPG's efforts towards sustainability are not embedded at the highest governance level in the organisation and sustainability is not part of the remuneration policy. In contrast to AkzoNobel, PPG also does not use integrated reporting audited by accountancy firms, which makes it difficult to see how PPG is operating sustainably and how its strategy, governance, performance and outlook create (social) value in the short, medium and long term. For example, PPG writes in its 2016 Sustainability Report:

*"We currently do not seek assurance for our report, as the scale of our operations and the resources required are prohibitive."*²⁷

52. It further is striking that no diversity policy can be seen in the PPG annual report for 2016.
53. PPG is strongly protected against unwanted and unsolicited interference from its shareholders. The governance of PPG includes all protective measures admissible under the laws of the state of Pennsylvania. There are many of these; the laws in Pennsylvania governing protective measures against unwanted takeovers are known as some of the most "defence-friendly" of the United States. The New York Times described this legislation as *"the nation's toughest anti-takeover measure"*.²⁸ When these laws were adopted in 1990, a large number of companies made use, to a greater or lesser extent, of what is known as an opt-out option. However, not for PPG, which openly stated: *"We support the anti-takeover measure"*.²⁹
54. PPG is known for the extent to which it has implemented protective constructions. PPG scores an 8 out of 10 on the ISS Governance Quality Score, where 10 stands for the highest governance risk.³⁰ In comparison: the ISS Governance Quality Score of AkzoNobel is 2.³¹

²⁶ Carbon Disclosure Project, 'Scoring Introduction 2016' ([Exhibit 7](#)), p. 9.

²⁷ 2016 Sustainability Report PPG ([Exhibit 19](#)).

²⁸ L. Wayne, 'Anti-Takeover Proposal Gains in Pennsylvania', *New York Times* 4 April 1990, ([Exhibit 20](#)).

²⁹ L. Wayne, 'Many Companies in Pennsylvania Reject State's Takeover Protection', *New York Times* 20 July 1990 ([Exhibit 21](#)).

³⁰ Profile of PPG ([Exhibit 22](#)).

³¹ Profile of AkzoNobel ([Exhibit 23](#)).

55. PPG is established in Pennsylvania, a state whose laws have strongly been criticised by Elliott. For example, Elliott has publicly characterised the governance of a another Pennsylvania-based company, Arconic, as a "governance horror".³² In this light, it is quite striking that Elliott is now the opinion that AkzoNobel should agree to a takeover by PPG, in which the acquisition price is to consist of PPG shares for a considerable part. Elliott has not said one word about this; corporate governance only appears relevant to Elliott if it thinks it can use it to make a profit.

3.2 The first proposal

56. Büchner was telephoned in March 2017 by the CEO and Chairman of PPG, Michael McGarry. During the telephone conversation, McGarry told Büchner that he would be in Amsterdam and proposed that they meet and catch up. In reality, the meeting turned out to have a totally different objective. During the meeting, which was held at Schiphol on 2 March 2017, McGarry – without any previous announcement – handed over a letter to Büchner, containing an unsolicited, non-binding and conditional proposal for a public offer for all issued and outstanding AkzoNobel shares (**Exhibit 25**).

57. In the course of this meeting Büchner asked McGarry if he really wished to proceed in this fashion. McGarry replied that he had already decided to do so, that this was backed by his Board and that he wanted to do this in this way, following which Büchner stated that he would only listen and would not give any further commentary. At the close of the meeting Büchner asked McGarry if he had any more information. When the answer to this was in the negative, Büchner terminated the meeting.

58. This unfortunate course of affairs, which was not especially suited to the creation of confidence, did not get any better when it became apparent on reading that under the heading of 'Terms of the

³² See press release Elliott 13 April 2017 (**Exhibit 24**), on Arconic Inc.: "(...) numerous outdated and substandard corporate governance practices lurking in Dr. Kleinfeld's House of Horrors [...] include: (...) a staggered Board; (...) a combined CEO and Chairman role; (...) a super-majority voting threshold to remove directors; (...) Pennsylvania incorporation, as opposed to reincorporation in a more shareholder-friendly jurisdiction such as Delaware. After all this, what governance horror could possibly be next?"

Proposal' in the letter it was explicitly stated that the intention was for a public takeover bid for all shares, "preferably recommended by both the Board of Management and the Supervisory Board" (emphasis added, counsel; counsel). In other words; right from the start the possibility of a hostile bid was explicitly set out.

59. The price which PPG was prepared to pay under the proposal for each AkzoNobel share was EUR 54.00 in cash plus 0.3 PPG shares. Based on the PPG share price and the USD/EUR exchange rate of 28 February 2017, this was equivalent to a value of EUR 83.00 (cum dividend) per AkzoNobel share. In its letter of 2 March 2017, PPG only devoted a limited number of paragraphs to the nonfinancial aspects of its proposal.

3.2.1 AkzoNobel carefully assessed the first proposal

60. The management board and supervisory board of AkzoNobel then studied PPG's proposal closely and carefully. They discussed PPG's proposal in detail with one another and assessed carefully whether this proposal served the interest of the company and all the stakeholders involved in it. They worked thoroughly and closely in this respect:
- (a) The management board of AkzoNobel notified the supervisory board about PPG's proposal immediately after it received it.
 - (b) AkzoNobel obtained detailed advice from its financial advisers HSBC and Lazard – two renowned merchant banks – about the financial aspects of the proposal. In this context, HSBC and Lazard were asked to draw up their own valuation of AkzoNobel, among other things. At that moment, HSBC had been active as financial adviser to AkzoNobel for several years already. So as to proceed with care, AkzoNobel additionally engaged Lazard on account of Lazard's solid knowledge of the American market.
 - (c) AkzoNobel asked the legal adviser of the company (De Brauw) and the legal adviser of the supervisory board (Stibbe) to assess PPG's proposal from a legal perspective, including an analysis of the antitrust law aspects and the conditions of the proposal, and

obtained advice on the legal and corporate governance obligations of the company, the management board and the supervisory board.

- (d) The management board and the supervisory board discussed PPG's proposal extensively on two occasions, namely 3 March 2017 and 8 March 2017, during special supervisory board meetings called for this purpose.

61. In line with their statutory duties and duties under the articles of association, the management board and supervisory board of AkzoNobel focused, in their evaluation of PPG's proposal, on the interests of the company and of all stakeholders involved with it. Against this background, the management board and supervisory board concluded, after extensively studying the proposal, that there were substantial objections to it. This led them to conclude that they could not support the proposal. The management board and the supervisory board were acting in this on the advice of their financial and legal advisors.

62. To summarise and as explained below, the proposal from PPG was inadequate for the following reasons: it was based on a substantial undervaluation of AkzoNobel (see paragraph 3.2.2), the share component of the proposal brought with it risks for the shareholders of AkzoNobel (see paragraph 3.2.3), there were competition law objections to the proposal (see paragraph 3.2.4) and objections in connection with the consequences of the envisaged takeover for various stakeholders of AkzoNobel (see paragraph 3.2.5), the proposal does not take account of AkzoNobel's existing pension agreements (see paragraph 3.2.6) and PPG did not seem to have any experience of such transactions (see paragraph 3.2.7).

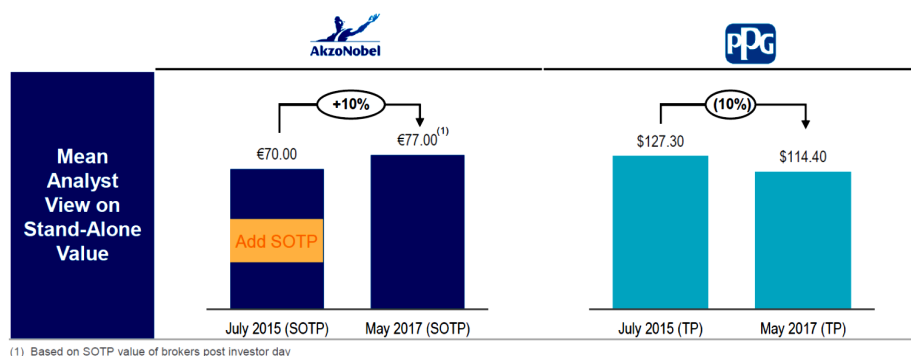
3.2.2 Undervaluation of AkzoNobel

63. The PPG proposal was based on a substantial undervaluation of AkzoNobel. In particular, it did not reflect the long-term value creation of AkzoNobel and the strategy it was pursuing (in this regard, see chapter 2). The financial advisers of AkzoNobel drew up valuations of AkzoNobel independently of one another on the basis of various valuation methods and points of departure. These

analyses demonstrated to the management and supervisory boards that PPG's proposal undervalued AkzoNobel considerably. In their advices the financial advisors clearly stated their approach that already supported the decision of the management and supervisory boards to reject the proposal on financial grounds. Elliott and other shareholders of AkzoNobel also endorsed this conclusion as such. For instance, Elliott wrote in its letter of 15 March 2017 that it also considered the PPG proposal to be inadequate.³³

3.2.3 Risks of the share component of the proposal

64. The proposal involved PPG paying a substantial part of the offer price in PPG shares. This involved multiple risks for AkzoNobel's shareholders.
65. It was uncertain what value the PPG proposal would truly represent at the time the shareholders of AkzoNobel would receive the PPG shares. There was a real risk that PPG's share price would decrease before that time – certainly given the fact that analysts have significantly adjusted their expectations downwards regarding the PPG share in the last two years (see figure below).



66. Moreover, the actual value represented by the proposal was also dependent on the USD/EUR exchange rate, as the PPG shares are listed in USD. This also added the necessary uncertainty. That this uncertainty was not unjustified, is already shown by the fact that the

³³ Letter from Elliott to AkzoNobel of 15 March 2017 (Exhibit 29 Application), p. 2: "While we agree with you that the proposed EUR 83 per share was an inadequate price for AkzoNobel, we are very disappointed that Akzo Nobel did not engage with PPG."

USD / EUR exchange rate has decreased by [3.3%] in just over two months since the first PPG proposal.³⁴

67. The the share component also meant that the value actually offered depended on the success of the combined enterprise, in view of the fact that AkzoNobel shareholders would become PPG shareholders after the takeover. In this context, it was highly uncertain whether the synergy advantages suggested by PPG could actually be realised, particularly given the fact that a number of business units would have to be disposed of in the context of the required approval by the antitrust authorities (see no. 69).

3.2.4 Objections under competition law

68. The activities of PPG and AkzoNobel overlap worldwide in a large number of markets which are already highly concentrated. The expectation is that the takeover of AkzoNobel by PPG will have to be approved by some 30 competition authorities. The competition law advisers of AkzoNobel have carried out an extensive analysis of the risks, with the help of specialised economists and legal advisers from United States, Canada, Mexico, Brazil, India, China, South Korea and Australia. They have studied a large number of internal strategic documents of AkzoNobel which were drawn up in recent years and which address the various markets and the competition between AkzoNobel and PPG. Most competition authorities require that such documents be submitted during the approval procedure. They also consulted external information sources for the various relevant markets. They also interviewed various people who are responsible for strategy or business development, among other things, or for the organisation of specific value chains. What are known as bidding data were analysed in order to be able to assess what the intensity of the competition between AkzoNobel and PPG is, and what effect the removal of this competition would have on prices in various markets. Finally, attention was paid to the innovation programmes of both companies, and the risk that a merger of PPG and AkzoNobel would have a negative effect on the total innovation in the market.

³⁴ The USD/EUR exchange rate was 0.95170 on 2 March 2017 and 0.92017 on 10 May 2017.

This is a subject to which competition authorities have been paying a great deal of attention recently.

69. This extensive competition law analysis, which contains a large quantity of extremely confidential business and competition data about AkzoNobel, revealed the following, among other things:
- (a) The overlap between the activities of PPG and AkzoNobel in a large number of concentrated markets means that the entire value chain of these overlapping business units of AkzoNobel or PPG will have to be divested before closing in order to be able to obtain the approval of the competent competition authorities. Such disposals are inevitably linked to the risk that part of the value of these business units will be lost, also because it will concern compulsory divestments. Furthermore, these divestments will have a negative effect on the performance of other business units which do not need to be sold, because many business units are interwoven with one another in areas such as R&D, production or distribution.
 - (b) The expectation is that a period of 16 to 18 months would be needed for obtaining approval from all the relevant competition authorities, in view of comparable processes. During this period, there will be major uncertainty regarding the future of AkzoNobel and its various business units. This uncertainty will have a highly negative influence on the shareholders, customers and employees of AkzoNobel, among others.
 - (c) The divestment of a significant number of business units will be necessary in a large number of jurisdictions, including several jurisdictions in which the antitrust authorities have less experience of evaluating these types of transactions. Agreement would have to be reached in all these jurisdictions with the appropriate competition authorities regarding the business units to be divested, or not, which will result in an additional risk of delay.

70. The strong competition law objections associated with PPG's proposal to take over AkzoNobel contributed to the conclusion of the management board and the supervisory board of AkzoNobel that the proposed takeover is more likely to have a negative effect on the long-term value creation for the stakeholders of AkzoNobel than a positive one. PPG's proposal did not give cause to see this differently. PPG only wrote that it looked forward to the antitrust process with confidence (*"[W]e are confident that, working together, our two companies will be able to address any competition issues that might arise without impairing the value that a combination would achieve"*). The basis of that confidence was not revealed. It was thus characteristic and at the same time a matter of concern that PPG had not represented that it is prepared to make its offer irrespective of the competition law consequences – by offering the customary clauses in this respect – and therefore wanted to reserve for itself the right to withdraw from the takeover if it did not like the consequences in retrospect.

3.2.5 Consequences for AkzoNobel's stakeholders

71. A takeover of AkzoNobel by PPG would, for various reasons, have major consequences for AkzoNobel's stakeholders. AkzoNobel places great value on the interests of all its stakeholders, and the role it plays in society. Against this background, and in line with its statutory responsibilities, the management board and supervisory board of AkzoNobel assessed whether PPG's proposal was in the interest of the various stakeholders of AkzoNobel.
72. The management board and supervisory board of AkzoNobel encountered various objections with regard to the expected consequences of the proposal for AkzoNobel's stakeholders. According to PPG, its proposal offered considerable synergy benefits of at least USD 750 million per year. It is evident that this will have major consequences for the stakeholders of AkzoNobel, including for a start it's employees and that these consequences will only become more invasive as the synergy benefits pursued increase. That will mean that a takeover of AkzoNobel by PPG will result in significant job losses. Fully in line with this, PPG did not devote a single word in its proposal to the retention of jobs post-acquisition. The few words

PPG did devote to the consequences of its proposal for the 46,000 employees of AkzoNobel do not contain any concrete undertaking whatsoever. The only thing PPG said about the future for AkzoNobel employees is the following.

"We view the employees of AkzoNobel as an important asset in which we plan to continue to invest and we anticipate there will continue to be attractive career opportunities for employees of AkzoNobel at the combined company. PPG will respect the existing employment terms of the employees of AkzoNobel, including any existing social plans, pension plans and covenants, as well as the terms of the existing individual employment agreements between AkzoNobel and its employees, in accordance with their terms."

73. Accordingly, what was primarily notable in PPG's proposal was what it did not contain about the consequences for the employees. PPG said nothing about retention of employment at AkzoNobel. Its proposal therefore involved huge uncertainty for AkzoNobel's employees. The proposal therefore did no justice to the important role the more than 46,000 employees play and have played in AkzoNobel's success. Because of this absence of concrete undertakings on the future of the employees of AkzoNobel, it was also not likely that the works councils and trades unions that AkzoNobel needs to deal with in the Netherlands, Germany, France, Sweden and the United States, would support a takeover of AkzoNobel by PPG.
74. Added to this, the combined business would be faced with a high debt burden as a consequence of PPG's proposed takeover. PPG would have had to pay a large part of the takeover amount with borrowed money, in view of the fact that it only has USD 1.8 billion in cash and cash equivalents on its balance sheet, according to its 2016 annual accounts. As a result, the remaining billions would have to be paid with borrowed money. This loan will then be a debt owed by the combined enterprise, in which context AkzoNobel's assets will have had to be used as part of the collateral. The associated risks but then again be borne by the various stakeholders of AkzoNobel. In this connection reference is made to a a critical report issued by credit rating agency Fitch on 13 March 2017 on PPG's proposal (**Exhibit 26**), in which Fitch writes, among other things:

"[W]e believe both companies lack significant financial headroom under credit metrics for a merger of this size."

75. Additionally, PPG's proposal would have considerable consequences for the countries in which AkzoNobel is active. AkzoNobel has a long history in the countries in which it is active, going back more than four centuries. Particularly in the Netherlands, the United Kingdom and Sweden, AkzoNobel has strong links with various institutions, including universities and scientific research centres. AkzoNobel's contribution to innovation and sustainability inside and outside its sector is significant. AkzoNobel is one of the Netherlands' leading enterprises, and is therefore of great importance to the Netherlands and the Dutch economy.
76. The management board and supervisory board also had major concerns with respect to the consequences for the sustainability policy of AkzoNobel. AkzoNobel scores far better in that field than PPG (see no 2.3.1). AkzoNobel has worked hard for many years to make its products and production processes as sustainable as possible, and has been particularly successful in this. For example, AkzoNobel has, for many years, held a leading position in the RobecoSAM Dow Jones Sustainability Index (see no. 21). The same cannot be said of PPG.
77. In its proposal, PPG also did not make any concrete undertaking whatsoever with regard to any of these interests. The AkzoNobel management board and the supervisory board were therefore left with no alternative than to conclude that PPG's proposal would greatly weaken the important role AkzoNobel plays in various societies and would have a significant negative effect for all AkzoNobel's stakeholders, whether in the social, economic or scientific field. Moreover, all of this implied that PPG's proposal also met strong political resistance.

3.2.6 Consequences for AkzoNobel's pension agreements

78. PPG's proposal also took no account of the pension agreements which AkzoNobel entered into during recent years with the trustees of various pension funds. The sensitivity of this point is already apparent from the wording of PPG's proposal itself, given that this

incorporated as an important condition an 'amicable agreement' with the pension trustee.

3.2.7 Experience with similar transactions

79. In their assessment of PPG's proposal, the AkzoNobel management board and the supervisory board also looked at the extent to which PPG has experience with similar transactions. This revealed that PPG does not have any experience with transactions of this size and complexity. The acquisition proposed by PPG turned out to be more than five times the magnitude of any other acquisition ever performed by PPG and in terms of total value over three times more than the total of all acquisitions made by PPG in the past decade.

3.2.8 Conclusion regarding the first proposal of PPG

80. After a careful study and weighing up of PPG's proposal, taking into account the long-term interests of all the various stakeholders of AkzoNobel, including the shareholders, the management board and the supervisory board of AkzoNobel therefore reached the unanimous conclusion that it had to be rejected. This happened at a meeting on 8 March 2017 at which the management board and the full supervisory board were present. The management board and the supervisory board were convinced that PPG's proposal was not in the interests of the company and all the stakeholders involved in it, and that the objective of long-term value creation for all stakeholders could best be served by following its own strategy.
81. AkzoNobel notified PPG of the unanimous decision of the management board and the supervisory board by letter on 9 March 2017, there explaining the reasons on which the rejection of the proposal had been based (**Exhibit 27**). In response to rumours in the market which revealed that confidentiality was no longer secured, and that therefore a statutory disclosure duty obtained – AkzoNobel also published a press release on 9 March 2017 in which it explained that it had rejected PPG's proposal (**Exhibit 25 Application**). In its press release of 9 March 2017, AkzoNobel also publicly disclosed the strategic review, which is discussed more extensively above, with respect to spinning off its Specialty Chemicals division.

3.3 The second proposal

82. After the rejection by AkzoNobel of the first proposal of PPG on 9 March 2017, PPG made it known in a press release on the same day that it still wanted to take over AkzoNobel, and that it would be considering its position and any response to the rejection by AkzoNobel (Exhibit 27 Application).
83. In a letter of 20 March 2017, PPG then made a second unsolicited, non-binding and conditional proposal to AkzoNobel (**Exhibit 28**). The second proposal assumed a price per AkzoNobel share of EUR 56.22 in cash and cash equivalents plus 0.331 PPG shares. Based on the PPG share price and the USD/EUR exchange rate of 20 March 2017, this was equivalent to a value of EUR 88.72 per AkzoNobel share (excluding the announced dividend). In its second proposal, PPG again did not make any substantial undertakings with regard to the consequences of its second proposal for AkzoNobel's stakeholders, let alone that PPG substantively addressed the objections which AkzoNobel had expressed with regard to the consequences of the first PPG proposal for the company and its stakeholders.

3.3.1 AkzoNobel carefully assessed the second proposal

84. The management board and supervisory board of AkzoNobel then studied PPG's second proposal carefully, and discussed it in detail during a supervisory board meeting called specifically for this on 22 March 2017 (a day after AkzoNobel had received the proposal). However, it quickly became clear from the review of PPG's second proposal that, aside from the price, it barely differed from PPG's first proposal. That price had been raised in the second proposal. However, the nonfinancial aspects of PPG's proposal are not changed, certainly not materially.
85. PPG's second proposal certainly did not foresee an increased price to such an extent that it did justice to the current and future value of AkzoNobel. As stated, HSBC and Lazard had already carried out extensive analyses of AkzoNobel's value in the context of PPG's first proposal. Given the limited time that had passed between PPG's first

and second proposals, there was no reason to revise this valuation. The management board and the supervisory board were therefore able relatively quickly to take advice on the offer price in the second proposal, given the valuations made, independently of each other, by AkzoNobel's financial advisors on the basis of differing valuation methods and differing points of departure. These analyses demonstrated to the management and supervisory boards that PPG's proposal still clearly undervalued AkzoNobel. In their advices the financial advisors clearly stated their approach that already supported the decision of the management and supervisory boards to reject the proposal on financial grounds.

86. PPG's second proposal did not in any way satisfy the extensive concerns and objections which AkzoNobel had expressed in its letter of 9 March 2017 with regard to the consequences of the envisaged acquisition for the company and its stakeholders.
87. The introduction of PPG's letter of 20 March 2017 made it clear how PPG viewed these concerns. In that introduction PPG wrote:

"We also believe strongly that none of the objections stated in your letter or your press release are obstacles to a transaction.

As I indicated in my call with Mr. Burgmans and my subsequent email, we are prepared to significantly increase the price we are offering to AkzoNobel's shareholders in an effort to encourage your immediate engagement. Our revised proposal is set out below."

88. PPG was therefore of the opinion that the consequences of the envisaged takeover by PPG for AkzoNobel's stakeholders should not form an obstacle to entering into a transaction, and was of the opinion that a higher offer price should win over AkzoNobel. PPG was clearly not interested in the serious objections which AkzoNobel expressed in its response to the first PPG proposal. PPG's letter of 20 March 2017 showed that PPG thought that the interests of stakeholders would be sufficiently served if these stakeholders were "reassured". This was shown from PPG's response to the concerns expressed by AkzoNobel regarding the consequences of any transaction for its employees. In their letter of 9 March 2017, the management board and supervisory board of AkzoNobel wrote the following in this context:

"We are, at our core, a "people" business that has succeeded by effectively motivating our more than 46,000 employees. Our employees and other stakeholders continue to contribute significantly to the success of AkzoNobel. Your Proposal brings uncertainties for our employees and fails to properly address the value our employees add to our business. We do not believe the proposal is in the interest of our employees, particularly in relation to the uncertainty your Proposal will bring for thousands of jobs worldwide. This of course will be of high interest to our works councils and unions, including in the Netherlands, Germany, France, Sweden and the US, who we believe will not support it."

89. PPG's response to this in its proposal of 20 March 2017 was illustrative for its attitude towards AkzoNobel's stakeholders:

"With your cooperation, we are confident we can substantially alleviate any uncertainties that employees may feel with respect to a business combination with PPG. (...) PPG will respect the existing employment terms of the employees of AkzoNobel, including any existing social plans, pension plans and covenants, as well as the terms of the existing individual employment agreements between AkzoNobel and its employees, in accordance with their terms."

90. PPG therefore manifestly thought that it could remove the concerns regarding the thousands of jobs which would be at stake at AkzoNobel as a result of a takeover by PPG with the mere undertaking that it would not break the existing contracts with employees – which is already a legal obligation. PPG did not say one word about the expected job losses at AkzoNobel. Equally, PPG failed to make any concrete, substantive undertakings with regard to the other objections expressed by AkzoNobel against the first proposal (see paragraph 3.2.2-3.2.7).
91. The above shows clearly that, in its second proposal, PPG did not actually address concerns and objections as these were expressed and explained by AkzoNobel on 9 March 2017, let alone that PPG proposed possible solutions for these. On the contrary, it became clear PPG looks fundamentally differently at the interests of stakeholders than AkzoNobel does.

3.3.2 Conclusion regarding the second proposal of PPG

92. The management board and the supervisory board of AkzoNobel were therefore able to assess the second proposal from PPG relatively quickly. The meticulous assessment and deliberation,

taking into account the long-term interests of all stakeholders of AkzoNobel, had already taken place after the first proposal from PPG and the second proposal was not fundamentally different from the first proposal. Following their assessment of the second proposal and once again in accordance with the advice of their financial and legal advisors, the management board and the supervisory board of AkzoNobel came to the unanimous conclusion that this PPG proposal must also be rejected.

93. Given the statutory framework, and this state of affairs it was appropriate that AkzoNobel provide the market with clarity on its position as quickly as possible. It informed PPG by letter on 22 March 2017 of its unanimous decision to reject the second proposal (**Exhibit 29**) and issued a press release. AkzoNobel again furnished an extensive explanation for this rejection. This can be read in the letter as follows.

"The Board unanimously reject PPG's Revised Proposal and decline your invitation to discuss the Revised Proposal. The Board have concluded that the Revised Proposal not only fails to reflect the current and future value of AkzoNobel, it also neglects to address the significant uncertainties and risks for our shareholders and other stakeholders. As such, it does not address with tangible steps and commitments the concerns and considerations expressed by the Board in their rejection of 9 March 2017.

First of all, your Revised Proposal; is not in the best interest of our shareholders. It substantially undervalues AkzoNobel and fails to reflect the value creating opportunities (...). The Revised Proposal also contains significant risks related to the increased stock component and the high leverage of the proposed combined business.

Secondly, the Revised Proposal does not address the uncertainty created by the significant anti-trust implications (...).

Thirdly, the Revised Proposal still does not adequately address and safeguard the interests of all of AkzoNobel's stakeholders (...).

Finally, the Revised Proposal does not meaningfully address our concerns of a significant culture gap (...)."

94. Because PPG's second proposal also provided no basis at all for dialogue between AkzoNobel and PPG, the interests of the company and all its stakeholders also furnish no occasion to enter into talks negotiations with PPG. The problem was not that PPG's second

proposal was incomplete or unclear, and therefore could not be assessed. The problem was that the proposal was still not in the interests of AkzoNobel's stakeholders. The concerns of the management board and supervisory board of AkzoNobel on PPG's proposed treatment of stakeholders had only increased, while the offer continued to fall short in financial terms too.

3.4 The third proposal

95. On 19 April 2017 AkzoNobel presented the third phase of its own strategy to its shareholders. On 24 April 2017 – one day before the annual general meeting of shareholders of AkzoNobel took place – PPG then made a third proposal to take over AkzoNobel by means of a public offer (Exhibit 54 Application). PPG's third proposal was for a price of EUR 61.50 in cash and cash equivalents and 0.357 PPG share. Based on the PPG share price and the USD/EUR exchange rate of 21 April 2017, this was equivalent to a value of EUR 96.75 (cum dividend) per AkzoNobel share. In its letter of 24 April 2017, PPG also made several comments which in its view were intended to address the objections expressed by AkzoNobel with regard to PPG's first and second proposals.

3.4.1 AkzoNobel carefully assessed the third proposal

96. In response to PPG's third proposal, AkzoNobel published a press release the same day in which it announced that it would carefully study and consider PPG's third proposal (**Exhibit 31**). The management board and supervisory board of AkzoNobel then took necessary the time for this.

97. On 25 April 2017, the day after AkzoNobel received the third proposal from PPG, the annual general meeting of AkzoNobel (the "**AGM**") was held. The management board and the supervisory board had intended to focus in the AGM on the two proposals from PPG and to provide an account of how they had responded. However, when the third proposal was issued, this was overtaken by events and they had to the new proposal. However, there had been no time for this at all. They also announced this at the AGM. In response to questions asked at the AGM about the third PPG proposal,

Burgmans explained that the management board and the supervisory board had carefully studied and considered the first two proposals from PPG and eventually had rejected them unanimously and that they had very extensively explained this rejection. Burgmans also referred in that context to the extensive press releases published by AkzoNobel. Burgmans also replied that the management board and the supervisory board would also carefully study and consider the third proposal from PPG, which had been received the previous day, in the course of which they would take into account all relevant aspects of the proposal and its consequences for the company and its stakeholders, of course including the shareholders. Burgmans asked for understanding for the fact that there could be no further discussion of the third proposal during the AGM, because it would take time to study and analyse the proposal, including in the light of the own strategy and the improved financial outlook.

98. After the AGM, the management board and supervisory board of AkzoNobel focussed their attention on PPG's third proposal. In this, the management board and supervisory board of AkzoNobel went to work thoroughly and carefully. PPG's third proposal was discussed extensively at multiple moments and in various forums, as will be described in greater detail below.
99. On **29 April 2017**, a meeting of the supervisory board of AkzoNobel was held at which the central subject was PPG's third proposal and all relevant aspects of it. In addition to the members of the supervisory board, the members of the management board of AkzoNobel and the financial and legal advisers of AkzoNobel were also present. During this meeting, the financial conditions of PPG's third proposal were discussed extensively, including on the basis of a new analysis which HSBC and Lazard made independently of one another on the basis of AkzoNobel's own strategy. Additionally, extensive discussions took place regarding the nonfinancial conditions of PPG's third proposal, including PPG's "undertakings" with regard to the required merger control, the consequences of the proposal for AkzoNobel's employees, the governance of the merged company, pensions, R&D, the link with the Netherlands and the cultural differences between AkzoNobel and PPG.

100. Another meeting of the supervisory board of AkzoNobel was held on 1 May 2017, which also focused on PPG's third proposal. In the first part of the meeting the supervisory board discussed in detail the proposal and the possible next steps of AkzoNobel. In the second part of the meeting, which the management board and the General Counsel attended, an extensive discussion was held about AkzoNobel's own strategy and questions on this subject put by the supervisory board were answered by the management board.
101. A third combined meeting took place between all members of the management board and of the full complement of the supervisory board of AkzoNobel on 2 May 2017, which again discussed the various aspects of PPG's third proposal in detail and the various options open to the management and supervisory boards. Given that these various points still needed to be fleshed out, the supervisory board took no decision concerning PPG's third proposal at these meetings.
102. On 4 May 2017 Burgmans was called by Mr Grant (Lead Independent Director of PPG), who proposed that the chief executives of PPG and AkzoNobel should meet one another to discuss PPG's proposal, in the form of a "brief dialogue", according to Grant. A brief request by email preceded this telephone call on 3 May 2017. Burgmans told Grant that he will get back on his request, as he needed to discuss it with the management board and supervisory board of AkzoNobel. (see no. 101).
103. A fourth meeting of the supervisory board of AkzoNobel was held on 5 May 2017, which again discussed PPG's third proposal in detail. The management board and AkzoNobel's financial and legal advisors also attended this meeting. At this meeting the proposal for a discussion with PPG, as proposed on 4 May 2017 by Grant, was discussed. It was decided that in the context of the evaluation of the third proposal a discussion should take place at which PPG would be able to provide further details of its third proposal and could raise any matter that it might desire. After the end of the meeting, Burgmans notified PPG that Büchner and he would be available for a meeting with PPG the next day. Burgmans and Grant discussed during this telephone conversation that the objective of the meeting

would be to offer PPG the opportunity to further explain the third proposal in the context of its evaluation by AkzoNobel and to express its wishes in that regard.

3.4.2 The meeting between AkzoNobel and PPG

104. On 6 Mei 2017, a meeting took place between Burgmans and Büchner on behalf of AkzoNobel and McGarry and Grant on behalf of PPG. Burgmans and Büchner entered into the meeting with McGarry and Grant with an open-minded attitude, to see whether new insights regarding PPG's proposal would be put forward during this meeting. The purpose in this meeting was to give PPG an opportunity to provide a further explanation of its proposal and the consequences of it for the shareholders, customers, employees and other stakeholders of AkzoNobel. This fits perfectly with the exact wording with of the PPG press release dated 5 April 2017, in which PPG's proposal to AkzoNobel was "*to meet us to learn more about our specific proposals*".³⁵ As noted, this objective of the meeting was communicated in the telephone conversations with Grant and was also accepted by PPG. Burgmans and Büchner had no mandate to negotiate given that this concerned matters touching on the management and supervisory boards as a whole, but were indeed open to anything that PPG wished to share with them in respect of the third proposal. Nor did AkzoNobel indicate a time limit for the discussions.³⁶
105. At the start of the meeting, McGarry and Grant set the agenda by handing over to Burgmans and Büchner a 40-page slide deck (**Exhibit 32**), which they used to again explain PPG's third proposal. However, the slide deck did not contain new information, but gave yet another overview of the third proposal. However, it did not add anything essentially new:
- (a) The first 18 slides provided a profile of PPG.
 - (b) On slides 19 through 23, PPG briefly laid out the strategic rationale for its proposal, as this can also be read in the letter of 24 April 2017.

³⁵ Press release PPG, 5 April 2017 (Exhibit 38 Application).

³⁶ Unlike PPG suggested in its press release of 8 May 2017 (Exhibit 71 Application).

- (c) This was followed on slides 24 through 36 with a description of PPG's proposal, mainly using the exact same wording as in the letter of 24 April 2017.
- (d) Slides 37 through 40 set out the possible next steps.
106. No new insights were shared during the meeting itself either. McGarry and Grant were mainly focused on drawing attention to the strengths of PPG. Furthermore it is incorrect, as PPG later publicly stated³⁷, that no specific questions were asked. Questions were asked by Burgmans and Büchner and furthermore relating to core subjects. These include the situation of "*specialty coatings and materials*", the strategy of PPG behind first selling its Specialty Chemicals business and now buying a company of which that business forms a considerable part;³⁸ the competition law problems and the question as to how PPG wanted to generate synergies of at least EUR 750 million and what the effects of that would be on the enterprise and all stakeholders. Finally, the point was also specifically raised that the attitude and approach taken by PPG had not contributed to a basis of trust that would be crucial for a good and balanced deal.. The relationship with Elliott was also raised in this context.
107. In the discussion Burgmans and Büchner once again referred to the concerns of AkzoNobel that had already been explicitly stated in response to PPG's first and second proposal. On this crucial subject McGarry and Grant utterly failed to dissipate the concerns expressed by AkzoNobel. In the discussion concerning problems of competition law it turned out to be confirmed that indeed a large number of business units would indeed have to be sold, although the list of business units they named was not complete.
108. Therefore the conclusion of the meeting on 6 May 2017 could not be anything other than that PPG had tabled no new ideas in comparison with the letter of 24 April 2017 containing the third proposal. This was

³⁷ Press release PPG, 8 May 2017 (Exhibit 71 Application).

³⁸ The response from McGarry and Grant during the meeting showed that PPG has no clear strategic vision in relation to Specialty Chemicals; PPG has sold its chemical division under the management of McGarry.

a choice that PPG had made. When making a public takeover bid it is in fact for the bidder to provide further details of his bid or to supplement it. This was not done. Later on PPG would complain about this in a press release,³⁹ but no blame can be attached to AkzoNobel on this matter. It is not the task of the target company to prepare the takeover proposal for the bidder.

109. After the meeting with McGarry and Grant had taken place, the management board and supervisory board of AkzoNobel again called a meeting on **7 May 2017** to discuss PPG's third proposal and AkzoNobel's response to it. At this supervisory board meeting Burgmans and Büchner extensively reported on the meeting with McGarry and Grant on 6 May 2017. The conclusion of the management board and the supervisory board was that PPG had not supplied any essentially new information.
110. The management board and the supervisory board compared PPG's third proposal with AkzoNobel's own strategy as presented on 19 April 2017 (see paragraphs 2.4-2.5). Against this background, AkzoNobel assessed four facets of PPG's third proposal: (i) valuation, (ii) timing, (iii) certainty and (iv) the interests of stakeholders. The result of this assessment is that PPG's third proposal is not in the interests of AkzoNobel and the stakeholders, including its shareholders, and that these interests are best served by AkzoNobel's strategy as this was presented on 19 April 2017. This will be explained in greater detail below.

3.4.3 Valuation

111. The AkzoNobel management board and supervisory board reached the conclusion, partly on the basis of and in line with extensive analyses and valuations by HSBC and Lazard, that PPG's third proposal still does not reflect the current and future value of AkzoNobel. Independently of one another, HSBC and Lazard drew up valuations of AkzoNobel on the basis of various methods and points of departure. These analyses demonstrated to the management and supervisory boards that PPG's third proposal still

³⁹ Press release PPG, 8 May 2017 (Exhibit 71 Application).

undervalues AkzoNobel. In their advices the financial advisors clearly stated their position that supported the decision of the management and supervisory boards to reject the proposal on financial grounds.

112. This third proposal also does not provide a premium for a change of control transaction which does justice to AkzoNobel's new strategy and the new financial prospects associated with this. PPG's proposals and the premium which PPG says it is offering assume AkzoNobel's share price on 8 March 2017, while AkzoNobel had not yet published its new strategy and new financial objectives at that moment. After AkzoNobel published this information on 19 April 2017, a number of analysts significantly increased their target prices for AkzoNobel.
113. PPG's proposal also implies a valuation of AkzoNobel's Paints and Coatings division which assumes a multiple lower than that used in recent comparable transactions.
114. Finally, PPG's proposal involves PPG paying a substantial part of the offer price in PPG shares. As has already been described in detail above (see paragraph 3.2.3), this involves various risks for AkzoNobel's shareholders.
115. On the basis of the above, AkzoNobel came to the following conclusion with regard to the valuation of AkzoNobel on which PPG's third proposal is based:

"AkzoNobel's analysis concludes that PPG's proposal:

- *Undervalues AkzoNobel; it fails to provide appropriate value to AkzoNobel shareholders and does not reflect AkzoNobel's current and future value*
- *Does not include an appropriate change of control premium, which needs to be based on a valuation reflecting AkzoNobel's strategy, including the recently announced plans to separate Specialty Chemicals and accelerate growth in Paints and Coatings*
- *Implies a value for AkzoNobel's Paints and Coatings business at a multiple below recent comparable transactions*
- *Contains risks as a result of its stock component*
- *Risks loss of value from regulatory remedies*

- *Risks potential leakage of value through loss of customers, key employees and partners."*

3.4.4 Timing

116. AkzoNobel's strategy offers a clear marching route for the creation of value in the short, medium and long term (see paragraphs 2.4-2.6).
117. Set against this, PPG's proposal does not provide any clarity regarding its timing, other than the general comment that the necessary merger control can be completed in good time. In its proposal, PPG did not indicate how long it estimates this process will take. As already explained above, an extensive and time-consuming process must be undergone in order to obtain approval for the takeover by PPG from the antitrust authorities in a large number of jurisdictions worldwide. Based on comparable transactions, it must be assumed that 16-18 months will be needed for this. Furthermore, significant business units will have to be sold in order to obtain the required approval, and it must be assumed that part of the value of these business units will be lost. Furthermore, the disposal of business units will be accompanied by a disruption of business operations as a result of the forced unbundling of currently integrated business units, production facilities and value chains. This in itself will already have a negative impact on the business operations of AkzoNobel and its stakeholders. These concerns were also not removed by PPG during the meeting on 6 May 2017.
118. On the basis of the above, AkzoNobel reached the following conclusion with regard to the timing of PPG's proposal.

"AkzoNobel's analysis concludes that PPG's proposal:

- *Would entail significant time to implement while containing inherent risks of completion*
- *Provides limited visibility in relation to the closing of the transaction and subsequent integration of the two businesses*
- *Would require substantial and complex structural changes and be vulnerable to regulatory-led delays"*

3.4.5 Certainty

119. The required approval of the antitrust authorities in a large number of jurisdictions will involve a degree of uncertainty for the various

AkzoNobel stakeholders. This uncertainty is not addressed in the third PPG proposal. PPG only writes that it has performed a "significant review and analysis of the expected antitrust approval risks and requirements". In its third proposal and during the meeting with Burgmans and Büchner, on 6 May 2017, PPG also did not address how the interests of AkzoNobel's stakeholders can and will be represented in this process and after the proposed takeover. PPG has only made the undertaking that it is prepared to agree on a "significant reverse break-up fee", without being specific about the level for this which it has in mind. A reverse breakup fee means that, if PPG were to decide not to fulfil its offer for AkzoNobel, for example because the antitrust authorities demand certain disposals with which PPG does not wish to comply, PPG will have to pay a certain fee to AkzoNobel. However, PPG is not satisfying the interests of AkzoNobel's stakeholders with this; at most, it can offer small amount of compensation for the financial loss caused by the transaction not going ahead to the market position of AkzoNobel and its stakeholders.

120. Another source of uncertainty regarding PPG's proposal is that PPG does not have any clear vision for the Specialty Chemicals division, and in fact the takeover of this division by PPG contradicts the strategy previously implemented by PPG to leave this market. This means that it is simply unclear what the consequences of PPG's proposal will be for the stakeholders of AkzoNobel's Specialty Chemicals division.
121. Set against this, AkzoNobel has presented a clear plan with its strategy, that offers certainty to its shareholders and its other stakeholders (see paragraphs 2.4-2.6).

3.4.6 Interests of stakeholders

122. Finally, PPG's proposal does not do any justice to the interests of AkzoNobel's various stakeholders. In its response to PPG's first and second proposals, AkzoNobel indicated in clear wording which objections it had to PPG's proposals in view of the interests of the various stakeholders of AkzoNobel (see paragraph 3.2.5 and no. 86-91). PPG's response to this does not take away these concerns. In

its letter of 24 April 2017, PPG acknowledges that a broad range of interests must be taken into account by the management board and supervisory board in assessing PPG's proposals. Nevertheless, PPG does not make any concrete, or sufficient, undertakings which actually mitigate the uncertainties and risks involved with a takeover of AkzoNobel by PPG.⁴⁰ The comments in PPG's letter are in reality extremely limited in nature and tenor, or they are undertakings to respect existing obligations. This will be explained in greater detail below. That PPG refers to these comments as "*significant and highly-specific commitments that we are confident AkzoNobel's stakeholders will find compelling*", creates the impression that PPG is only making these undertakings as window dressing, and is in reality unwilling to make any actual undertakings.

123. The lack of hard undertakings which actually serve the interests of AkzoNobel's stakeholders cannot be viewed separately from the synergy benefits of USD 750 million per year which PPG intends to achieve. Despite PPG saying that it made significant and specific undertakings with regard to AkzoNobel stakeholders, it did not downwards adjust the intended synergy benefits in its third proposal. This is difficult to reconcile: it cannot be understood how PPG says that it will be able to realise these synergy benefits on the one hand, while on the other pretending that the interests of AkzoNobel's stakeholders, and in particular the employees, will not suffer as a result.
124. That PPG does not wish to make any hard undertakings which could limit it in realising the intended synergy benefits is also shown from the fact that PPG's proposals do not include a method for enforcing compliance with its "undertakings", while this is normal practice in such transactions. It is market practice in public offers that independent directors or supervisory directors are given seats on the management board or supervisory board of the company taking over, to supervise compliance with the nonfinancial covenants, and to have a right of veto in decisionmaking on them.

⁴⁰ Unlike Elliott asserts in the Application, no. 2.3.

125. In short: While PPG devoted the necessary words in its third proposal to so-called "undertakings" with which the interests of AkzoNobel's stakeholders would allegedly be served, the reality is that this is a sequence of vague words which have not mitigated the uncertainties and risk for AkzoNobel's stakeholders. This will be explained in greater detail below on the basis of the objections which AkzoNobel has already expressed with regard to PPG's first and second proposals.

Employees and pensions

126. AkzoNobel has said multiple times that PPG's proposals involve great uncertainty for thousands of jobs worldwide. This follows, among other things, from the press release of 22 March 2017 (Exhibit 34 Application):

"The proposal does not address the concerns expressed by the Boards in their initial rejection of 9 March 2017. The revised proposal:

(...)

Will lead to significant job cuts. It includes synergies which can be expected to result in the restructuring of the combined employee base, leading to job losses. PPG provides no substantive commitments to employees, creating potential uncertainty for thousands of jobs worldwide."

127. PPG does not address these, however. In its third proposal, PPG makes the following comments about the interests of AkzoNobel's employees:

- The combined company will continue to respect the existing rights and benefits of AkzoNobel's employees (...)*
- PPG is willing to commit that no AkzoNobel employee currently working in a Netherlands specialty chemicals plant will lose their job as a direct result of this acquisition.*
- PPG will extend its charitable matching gifts program to all employees of the new company (...)*
- Any displaced PPG or legacy AkzoNobel employee will be eligible to apply for any current vacancy (...)*
- Existing redundancy arrangements of AkzoNobel (...) will be respected by the post-closing combined company (...)*
- The mitigated large company regime (...) will be maintained."*

128. It is immediately clear that PPG has not addressed AkzoNobel's objection with this. The only "undertaking" which PPG is making regarding the retention of jobs at AkzoNobel is that *"no AkzoNobel employee currently working in a Netherlands Specialty Chemicals plant will lose their job as a direct result of this acquisition".* This "undertaking" is meaningless. Firstly, this only pertains to a very limited part of the jobs at AkzoNobel (namely approximately 1,000 of the 46,000), and does not pertain to the employees in the Paints and Coatings industry. Secondly, this "undertaking" does not offer any guarantee due to the qualification that no jobs will be lost *"as a direct result of the acquisition"*. It is never the transaction as such that results in job losses, after all, but the restructuring plans which follow it. PPG also explicitly refused subsequently, in the media, to even expand this qualified "undertaking" to include AkzoNobel's Paints and Coatings division.⁴¹
129. The other "undertakings" do not address the objection expressed by AkzoNobel. Also, a large number of these "undertakings" have no meaning whatsoever, because they only involve recognising evident and fundamental obligation that existing rights of employees must be honoured.⁴² These concerns are evidently not removed by the "undertaking" that employees of AkzoNobel who lose their jobs after the takeover by PPG will have the freedom to apply for vacancies in the merged enterprise (*"Any displaced PPG or legacy AkzoNobel employee will be eligible to apply for any current vacancy"*). Even apart from the fact that it is difficult to see why employees of AkzoNobel would not be able to apply for such vacancies without this undertaking, this comment confirms that AkzoNobel's employees will suffer a significant number of redundancies, without PPG making any announcement about this.

⁴¹ M. Pooler & A. Massoudi, 'PPG attacks Akzo but tables final friendly bid of €27bn', *Financial Times* 24 April 2017 (**Exhibit 33**): *"Although PPG promised that no Akzo Nobel employee working in a Netherlands speciality chemicals plant would lose their job as a result of the combination, [McGarry] declined to extend the commitment to workers in Akzo's paints and coatings units on the grounds it would be "inappropriate" ahead of any regulatory settlement with the European Commission."*

⁴² This pertains to the following comments: *"The combined company will continue to respect the existing rights and benefits of AkzoNobel's employees (...)"*, *"Existing redundancy arrangements of AkzoNobel (...) will be respected by the post-closing combined company (...)"*, en *"The mitigated large company regime (...) will be maintained."*

130. PPG also has not made any concrete undertakings which address the concerns of AkzoNobel regarding pensions, other than that PPG will respect the existing obligations. This does not remove the concerns described above in paragraph 3.2.6, however.

Research and development (R&D)

131. AkzoNobel has the strategic ambition to be a global leader in the area of innovation, and the products it offers. AkzoNobel is an organisation in which a great deal of attention is paid worldwide to R&D, and which has committed itself to investing in innovation. This is already expressed in the fact that AkzoNobel employs almost 4000 scientists worldwide, and has more than 130 laboratories. AkzoNobel's vision is to invest more in innovation in the future, which has resulted, among other things, in it committing to invest EUR 1 billion in R&D in the Paints and Coatings division between now and 2020. In response to PPG's first proposal, AkzoNobel expressed its concerns regarding the consequences of it for AkzoNobel's R&D policy and the value this has for the communities in which it is active:

"AkzoNobel has a long history in the societies in which it operates, going back over four centuries. Especially in the Netherlands, the United Kingdom and Sweden, AkzoNobel has strong ties with numerous communities, including universities and other scientific bodies. AkzoNobel's contribution to innovation and sustainability within and beyond its sector is significant. (...)

AkzoNobel is embedded in all the societies in which it operates - for instance in relation to supporting R&D initiatives at major European universities and research centres - and we believe the proposal would materially weaken that deeply-held, long term commitment. "

132. In its response to PPG's second proposal, AkzoNobel again emphasised that this proposal does not address these concerns:

"[The revised proposal] does not address with tangible steps and commitments the concerns and considerations expressed by the Boards in their rejection of 9 March 2017."

133. The third proposal still did not remove the concern that the intended takeover by PPG will have major consequences for AkzoNobel's R&D policy, and thereby its stakeholders. While AkzoNobel wants to intensify its R&D investments, PPG is only giving an "undertaking" not to reduce the current investments in the Netherlands and the

United Kingdom for the foreseeable future (*"PPG would commit to, for the foreseeable future, research and development spending in the Netherlands and the U.K. of an amount at least equal to AkzoNobel's current research and development spending in the Netherlands and the U.K."*) and not to reduce the investments in a single specific facility (*"That it will not reduce the current research and development capital related spending commitments related to the Felling, U.K. facility."*)

134. This is in stark contrast to the policy AkzoNobel has implemented, which is rather targeted at intensifying its R&D investments. Furthermore, this "undertaking" says nothing about R&D investments outside the Netherlands and the United Kingdom. Other "undertakings" of PPG with regard to R&D on this point also boil down to them only respecting the existing obligations.

Sustainability

135. AkzoNobel has repeatedly emphasised that it places a high value on sustainability in its business. AkzoNobel is of the opinion that sustainability belongs to the core of its strategic principles, and is crucial to the success of its customers and business, society and the environment (see paragraph 2.3.1 and no. 76). It is also the case that AkzoNobel has made it clear that PPG's first two proposals did not address the concerns which AkzoNobel had regarding the consequences of a takeover for its sustainability policy. For example, in its letter of 22 March 2017, AkzoNobel writes:

"[The revised proposal] does not address with tangible steps and commitments the concerns and considerations expressed by the Boards in their rejection of 9 March 2017."

136. PPG also did not make any concrete undertakings on this point in its third proposal. If possible, it was even more vague about this than about other subjects:

"PPG and AkzoNobel share a commitment to sustainability and corporate social responsibility, and the best practices of each will be applied to the combined company."

137. A comparison of sustainability policies of PPG and AkzoNobel does not create any confidence that the course set by AkzoNobel towards sustainability would be continued (see paragraph 2.3.1 and no. 51).

Head office, locations and communities

138. AkzoNobel has strong links with the countries in which it is active. These historic links sometimes go back more than four centuries. Particularly in the Netherlands, the United Kingdom and Sweden, AkzoNobel has deep roots in the society and close links to universities and research institutes, among other institutions. Furthermore, AkzoNobel is one of the leading and successful businesses in the Netherlands, and as such has an important role in Dutch society and the Dutch economy. AkzoNobel has repeatedly emphasised this in its letters to PPG.
139. However, PPG has not made any undertakings which do justice, in the long term, to the role of AkzoNobel in the countries in which it is active, including the Netherlands, the United Kingdom and Sweden. PPG's comment that the head office of the Architectural/Decorative Coatings and Specialty Chemicals divisions would remain located in the Netherlands and the Protective Coatings Division in the United Kingdom and the Netherlands, contains no undertaking regarding the scale and duration for which this would be applicable. Furthermore, PPG itself dilutes this by writing that this is an anticipation. ("PPG anticipates that AkzoNobel's current European locations will continue to play an important and meaningful role in the combined company.").⁴³ In other words: things could all be very different in a year's time. The same applies to the undertaking that PPG would not move any production facilities from Europe to the United States. This "undertaking" does not have any actual meaning, in view of the fact a move is not an option either way, as many of AkzoNobel's products are, by definition, produced and distributed in the vicinity of the relevant sales market. Moreover, this 'undertaking' does not exclude PPG from closing production facilities in Europe. So yet again, pretty words, without any meaning.

⁴³ Third proposal of PPG, 24 April 2017 (Exhibit 54 Verzoekschrift), p. 8. Also see press release PPG, 24 April 2017 (Exhibit 54 Application), p. 2.

140. With regard to the interests of its stakeholders, AkzoNobel therefore concludes as follows:

"AkzoNobel's analysis concludes that PPG's proposal:

- *Creates significant risks and uncertainties for thousands of jobs worldwide*
- *Does not recognize or substantiate any commitments to bridge the significant cultural differences between both companies*
- *Fails to sufficiently address significant stakeholder concerns, uncertainties and risks*
- *Lacks meaningful commitments or solutions customary in major transactions"*

3.4.7 Conclusion regarding the third proposal of PPG

141. After a careful study and weighing up of PPG's proposal, taking into account the long-term interests of all the various stakeholders of AkzoNobel, including the shareholders, the management board and the supervisory board of AkzoNobel, in accordance with the advice of their financial and legal advisors, reached the unanimous conclusion they could not support PPG's proposal and must conclude that PPG's proposal is not in the interest of the company and all its stakeholders and that the object of long-term value creation for the benefit of all stakeholders can best be served by pursuing its own strategy.

142. AkzoNobel notified PPG of its unanimous decision to reject the third proposal in a letter dated 8 May 2017 (**Exhibit 34**). In that letter, AkzoNobel gave a very detailed explanation of the reasons for its decision. AkzoNobel also published a press release on the same day to inform the market about its rejection of the third proposal from PPG.⁴⁴

143. In response to the rejection of its third proposal, PPG published a press release on 10 May 2017 (**Exhibit 35**) in which it indicated that if there was no "*productive engagement*" from AkzoNobel: "*PPG will assess and decide whether or not to pursue an offer for AkzoNobel*".

⁴⁴ Exhibit 70 Application.

4 THE ASSESSMENT OF THE REQUEST FOR AN EXTRAORDINARY MEETING OF SHAREHOLDERS

4.1 Background: Elliott

144. Elliott is an activist hedge fund with one objective only: realising as much profit as possible for its investors in the short term. Elliott has accrued a reputation of sailing very close to, and sometimes transgressing, the boundaries of the permissible.⁴⁵ Elliott attempts to manipulate circumstances to its advantage as much as possible. Elliott is quite clear about this, as is apparent from its own brochure (**Exhibit 37**):

"Elliott is an active trader of securities and often will take a leading role in event-driven situations to create value (...) Elliott uses a global investment approach that is both opportunistic and value-added."

145. In realising the highest possible profit on its investments Elliott does not shy away from any means. From aggressive media campaigns to protracted proxy wars and endless judicial proceedings; Elliott's reputation is such that the mere fact that it has acquired a participation can result in the management board of a company going along with the whims of the hedge fund. The circumstance that in such a case the interests of other stakeholders may be adversely affected, is irrelevant for Elliott.

4.2 Elliott's activist campaign against AkzoNobel

146. Also with respect to AkzoNobel, Elliott has acted in accordance with its usual plan of attack: opportunistically, and with a leading role in playing the circumstances. Contrary to what Elliott appears to suggest, it is not one of the "*largest and most loyal shareholders*" of AkzoNobel.⁴⁶ In its own words Elliott only bought shares in AkzoNobel for the first time in late 2016.⁴⁷ Initially Elliott was even in favour of AkzoNobel's strategy and even urged a spin-off of Specialty Chemicals. After PPG's first proposal – which indeed made a condition of retaining Specialty Chemicals – Elliott however

⁴⁵ See the overview submitted as **Exhibit 36**.

⁴⁶ Application, no. 2.5.

⁴⁷ Letter from Elliott to AkzoNobel of 15 March 2017 (Exhibit 29 Application).

changed course immediately. In a series of letters – for example of 15 March 2017 and 20 March 2017⁴⁸ – Elliott stated very clearly that AkzoNobel was obliged to negotiate with PPG and did not refrain from ominously referring to its *"track record in active shareholder ownership"*. The management board and supervisory board of AkzoNobel have stated to Elliott in various letters of response to, in accordance with their duties, take account of the interests of all stakeholders and to attach much value to a constructive dialogue with shareholders.⁴⁹

147. Elliott did not shy from media attention. By its own account, Elliott had researched AkzoNobel for more than eighteen months before first acquiring a holding in late 2016.⁵⁰ During that research, Elliott apparently took no account of the Dutch stakeholder model. In countless press releases the Anglo-Saxon hedge fund expressed its discontent about the – in its view – limited attention to shareholder interest. In addition, Elliott opened the website 'valuecreationatakzo.com', in which it by means of selective copy-and-paste incorrectly tries to give the impression that AkzoNobel is not performing well and that the presentation of its own subsequently was not well-received. Elliott's sudden concern for the alleged loss of jobs in the event of an independent strategy for Akzo should be viewed in that same light. The Elliott presentation concerned was received with the necessary scepticism in the media.⁵¹

4.3 The parallels between Elliott and PPG

148. There is a parallel between the actions of PPG and Elliott in respect of AkzoNobel. When PPG CEO McGarry was in the Netherlands on 23 March 2017, there was suddenly a public announcement from Elliott at around midday asserting that Elliott it was not in line with

⁴⁸ Respectively Exhibit 29 Application and Exhibit 31 Application.

⁴⁹ Letters from AkzoNobel to Elliott of 16 March 2017 (Exhibit 30 Application) and 25 April 2017 (Exhibit 56 Application).

⁵⁰ Letter from Elliott to AkzoNobel of 15 March 2017 (Exhibit 29 Application).

⁵¹ M. Niewold, 'Door Elliott betaald onderzoek: Akzo is beter af met PPG', *RTLZ* 5 May 2017 (Exhibit 38).

the fiduciary duties of AkzoNobel and its CEO, not to speak with McGarry.⁵²

149. The further events of 22 March 2017 also testify to this parallelism. After AkzoNobel had made a public announcement that the second non-binding proposal was unacceptable, and had valued the proposal at EUR 88.72, excluding the announced dividend, Elliott published at approximately 11.51 CET a detailed public announcement; when the market was communicating 88.72, Elliott was working on the basis of a cum dividend bid of EUR 90 (cum dividend). This was how PPG presented its offer. However, this was not presented by PPG before its press release which appeared at 13.09 CET.
150. Also interesting in this context is that on 11 April 2017, e-mail correspondence to AkzoNobel became available which specifically shows that there are close links between Elliott and PPG. In the e-mail in question, Gordon Singer, head of the London office of Elliott, wrote – after the letter was sent to AkzoNobel requesting an extraordinary general meeting to dismiss Burgmans, but before this was made public – to the Elliott associate working on AkzoNobel (Wiktor Sliwinski): "*Also, wiktór- you should call ppg and let them know that we have sent the EGM request and that now may be an opportune time for ppg to reach out and try to engage.*" This gives a behind-the-scenes view of the modus operandi. AkzoNobel has filed a report of this to the AFM.

4.4 Contacts between AkzoNobel and Elliott

151. In contrast to other Elliott has alleged, AkzoNobel has great respect for its shareholders and is always mindful of their interests . AkzoNobel maintains very intensive contacts with all of its shareholders. That also applies in relation to recent times.
152. Those intensive contacts were also maintained with Elliott. On 10 March 2017, when Elliott manager W. Sliwinski telephoned to request a telephone consultation with the CEO of AkzoNobel and

⁵² Press release Elliott, 23 March 2017 (**Exhibit 39**).

also indicated that he would like to have a personal meeting with the management board, AkzoNobel recently granted that request. On 14 March 2017, a telephone conference took place between the board of AkzoNobel and Elliott, which lasted approximately half an hour. This was followed on 24 March 2017 by personal meeting for which the directors and the head of Investor Relations of AkzoNobel travel to London and met Elliott at their London office. When a request was then made during that meeting for discussion with Burgmans, that request was also granted. That meeting took place on 29 March 2017. Three weeks later, on 21 April 2017, the management board of AkzoNobel had a further meeting with Elliott in London. Therefore it cannot be stated that AkzoNobel did not seek dialogue.

153. Unfortunately, the same cannot be said of Elliott. The common denominator of all these meetings with Elliott was that Elliott was focused primarily on making threats, veiled or otherwise, against the managing and supervisory director is. From the outset, the recurring theme was that Elliott threatened the managing and supervisory directors with dismissal and reputational repercussions for their future. Recurring themes were that the directors might have a little less rosy future if they resisted Elliott (under the motto: "*You are still young, what do you think you can do after this?*"). In the first meeting Elliott stated that in its view the members of the management and supervisory boards had a choice "between two doors": "*Engage, or you get an EGM request.*" In order to put muscle into that request a letter was specifically flourished that was supposed to be sent on 3 April 2017 if the members of the management and supervisory boards did not opt for 'engagement', in which letter, allegedly, the specific names of those members of the management and supervisory boards whose dismissal would be tabled would be set out.
154. Also in the letter from Elliott dated 10 April 2017. It is specifically pointed out under "*Verbal Communication between Elliott and AkzoNobel*", that at the meeting on 24 March 2017 in London "*Elliott clearly spelled out*" that Elliott planned "*to seek the dismissal of obstructive member(s) of the Board(s).*" This could not be any clearer. But before that, on 22 March 2017, Elliott also emphasised

in a public publication that shareholders who independently or jointly held 10% of the capital could convene an EGM and "*remove Management and Supervisory Board members by a majority vote.*" There was a specific addendum to this, that this threat would also become reality "*[t]o the extent that AkzoNobel is not responsive to the desires of its shareholder base for engagement*" with PPG.

155. At the same time, Elliott acknowledged that it had originally invested because it saw opportunities to separate Specialty Chemicals and that this was precisely what was at the centre of AkzoNobel's own proposal. Elliott acknowledged on 29 March 2017 in the meeting with Burgmans, that it invested in AkzoNobel at the end of 2016 because of the potential of separating Specialty Chemicals and "*because we believed in management and leadership of the company*". That was in line with the acknowledgement in the letter of 15 March 2017 from Elliott that it "*initially invested (...) because we believed that while the Company was significantly undervalued, fundamentally it owns good businesses that can generate long term value.*" This again was linked to a specific threat, namely the dismissal of Burgmans, again with the threat that his reputation would be deliberately damaged and the remark that Elliott did not understand why Burgmans "*would want to damage his reputation*".
156. That is not what springs to mind where Dutch law mentions constructive consultation by a shareholder. Seemingly, however, Elliott did want to create that impression when it wrote in its letter of 28 April 2017rijft: "*In all its communications, Elliott seeks to be courteous, but clear.*"

4.5 The supervisory board has at all times been informed about the contacts with Elliott

157. During the supervisory board meeting of 27 March 2017, Büchner reported on the meeting with Elliott of 24 March 2017, including the threat regarding dismissal of the members of the management board and the supervisory board (see no. 152). At the same meeting, the legal advisers of AkzoNobel provided extensive information to the supervisory directors on the formal procedure for a possible EGM

request aimed at the dismissal of one or more members of the management board or the supervisory board.

158. During the meeting of 29 March 2017 in Amsterdam, between representatives of Elliott and Burgmans, Elliott somewhat mitigated its threats: if AkzoNobel did not immediately enter into negotiations with PPG, Elliott would "only" target the dismissal of Burgmans and perhaps the dismissal of Büchner. Elliott's representatives noted with this that if directors and supervisory directors would be willing to negotiate with PPG they could "guarantee" that PPG could increase its offer and that PPG would "take care of" the current management. When Burgmans challenged Elliott about this, this "guarantee" was withdrawn.
159. That Elliott had repeated its threat – albeit in a weakened form – was reason to give extensive consideration in the supervisory board meeting of 31 March 2017 to the possible responses to a possible EGM request by Elliott. The legal advisers of AkzoNobel informed the management board and supervisory board about the relevant legal standard, namely that Elliott would have to have a reasonable interest in such a request and that the request should not be in breach of principles of reasonableness and fairness. Extensive consideration was given to the way in which the company should respond to such a request.
160. After the first introductory discussions, Burgmans left the meeting at a certain moment to give the other supervisory directors, under the leadership of vice-chairman Grote, the opportunity to deliberate regarding the response to a possible request to put the dismissal of Burgmans on the agenda. The conclusion of that deliberation was that the other supervisory directors considered that Burgmans had provided excellent leadership to the meetings and that AkzoNobel would face an unacceptable risk if it were to lose its chairman of the supervisory board during this crucial and turbulent phase in its existence, partly in view of Burgmans's experience and expertise – which have also been explicitly recognised by Elliott.⁵³ Furthermore, the request of Elliott ignored the fact that the contested decisions of

⁵³ Application, no. 8.33.

the supervisory board were all taken unanimously. The proposed agenda point was also out of proportion to the way in which Burgmans had fulfilled his tasks, as he had, indicated full willingness to consult with shareholders, including Elliott (see no. 158) and at all times had acted in the interests of the company and its stakeholders. The supervisory directors accordingly came to the unanimous conclusion that they would fully support Burgmans and would reject a possible agenda item regarding the dismissal of Burgmans, but that AkzoNobel would carefully consider the request to hold an EGM. The management board and supervisory board then extensively discussed which text could be included in a press release as a response to a possible EGM request by Elliott. After having reached agreement about this, the supervisory board authorised the management board to publish the supervisory board's position regarding Burgmans if such a request by Elliott to put his dismissal on the agenda were to arrive.

4.6 The EGM request of Elliott

161. Elliott eventually made the request to hold an EGM, with its sole agenda item the dismissal of Burgmans as member and chairman of the supervisory board of AkzoNobel on 10 April 2017 (Exhibit 49 Application): 10 days after AkzoNobel's supervisory board had determined its response to a possible agenda item with such a purpose (see no. 159) and 19 days after the supervisory board had first been informed of Elliott's threat (see no. 157).
162. AkzoNobel received the EGM request on 10 April 2017 at 11:59 PM, effectively eight days before the Investor Day would take place. This made it clear that, despite the earlier request to this effect by AkzoNobel, Elliott was not prepared first to give AkzoNobel the opportunity to present its renewed strategy as had been announced on 28 March 2017. Instead of this, Elliott again chose its own short-term agenda.
163. Elliott has wrongly argued that the EGM request was supported by a "considerable proportion" of AkzoNobel's other shareholders.⁵⁴ In

⁵⁴ Application, no. 7.33 and 8.36(f).

Exhibit 49 of the Application, Elliott had redacted 33 lines, by which it created the impression that this many shareholders would support its request.⁵⁵ In reality, five other shareholders – via a range of different companies – support Elliott's request. As part of its careful decision-making process, AkzoNobel asked the shareholders to substantiate their interests with evidentiary documents. The letters the shareholders then sent to AkzoNobel in response to this show that these other shareholders supporting the request (i.e. without Elliott) only represent an interest of approximately 5%.⁵⁶ And therefore certainly not "a major interest", as Elliott is suggesting⁵⁷.

164. Elliott also quotes two pieces of research that are said to show that "*An overwhelming majority of AkzoNobel shareholders thinks that dialogue with PPG is sensible*".⁵⁸ As for the Bernstein research Elliott itself acknowledges "*the statistical imperfections of this survey, the low sample size, and the fact that not all respondents were Akzo Nobel shareholders*".⁵⁹ As for the Boudicca research, while 300 shareholders of AkzoNobel were approached representing in aggregate almost 50% of the issued share capital, Elliott fails to recognise that a complete interview was received from only 31 shareholders.⁶⁰ Elliott's claim that the "respondents" represent almost half of the capital is therefore wrong.
165. Elliott further wrongly fosters the impression that its objections received "full support" at the annual meeting of 25 April 2017.⁶¹ The spokesman for the Dutch institutional investors quoted by Elliott (APG, National Nederlanden, De Goudse, Menzis and Robeco) specifically stated that tabling Burgmans' dismissal was not in the interest either of the company or of the shareholders or of other stakeholders.
166. The reason for Elliott's request was, as already discussed extensively above and briefly summarised here, that AkzoNobel,

⁵⁵ Exhibit 49 Application, p. 6-7.

⁵⁶ Together with Elliott, the shareholders represent an interest of 10.0941%.

⁵⁷ Application, no. 8.36(f).

⁵⁸ Application, no. 7.6.

⁵⁹ Exhibit 31 Application, p. 4.

⁶⁰ Exhibit 32 Application, p. 3.

⁶¹ Application, no. 7.52.

according to Elliott, was supposedly obliged to start negotiations with PPG on PPG's unsolicited proposal and that Burgmans would be responsible for the fact that these negotiations had not taken place. In the first six pages of the eight-page letter Elliott summarised its earlier messages to AkzoNobel about the situation surrounding PPG. Elliott subsequently attached to this the conclusion that it had no other option but to request a general meeting of shareholders and the dismissal of Burgmans, because AkzoNobel was refusing to listen to Elliott. AkzoNobel frustrated a potential transaction with PPG and thus a potential maximisation of the shareholder value, so alleged Elliott.

"Akzo Nobel's repeated and outright rejections of PPG's proposals jeopardize a potential transaction with PPG that could be value maximising for shareholders."

167. Because Burgmans is allegedly responsible for this course of events, as Elliott went on, "to its regret" it saw no other option but to request AkzoNobel to convene a general meeting of shareholders at the shortest notice possible with as item on the agenda the dismissal of Burgmans.

"Although we would have strongly preferred otherwise, at this stage we see no other option than to request the dismissal of Mr. Burgmans as member of and Chairman of the Supervisory Board. Given that time is of the essence, an [EGM] needs to take place at which a shareholder resolution to that effect can be voted upon at the shortest term possible."

168. Elliott made its request with reference to Article 2:110 DCC and article 46.5 of AkzoNobel's articles of association and it concluded the letter with the statement that if AkzoNobel were to refuse the request, Elliott would take AkzoNobel to court.

4.7 AkzoNobel carefully assessed the EGM request

4.7.1 The supervisory board's position regarding the requested agenda item

169. Contrary to that asserted ⁶²by Elliott, it is not "remarkable" that the supervisory board was already able to make its position known regarding the requested agenda item on 12 April 2017. After all, Elliott had already been threatening to request an EGM, including agenda item, since the discussion of 22 March 2017 with the board of AkzoNobel. Elliott subsequently did not fail to remind AkzoNobel of this threat in any of its letters, press releases or subsequent discussions. The ultimate request therefore in no way came as a surprise, as Elliott herself also noted in the first paragraph of the request:

*"This letter should not be a surprise to Akzo Nobel."*⁶³

170. In the context of Elliott's repeated threats, the supervisory directors (with the exception of Burgmans) had on 31 March 2017 – a week and a half before the EGM request of Elliott – already determined their position regarding a possible request to put the dismissal of Burgmans on the agenda (see no. 159). The supervisory directors concluded as follows in this respect in AkzoNobel's press release 12 April 2017:

*"[T]he Supervisory Board wants to make it very clear that it strongly supports Mr. Burgmans in his role as member of the Supervisory Board and Chairman. His unique experience of international business and global transactions is crucial to the Company. He has played an important role in overseeing and supporting management in the transformation of the Company in recent years, contributing to its significantly improved performance. The view of the Supervisory Board is that the removal of Mr. Burgmans would be irresponsible, disproportionate, damaging and not in the best interests of the Company, its shareholders and other stakeholders."*⁶⁴

171. The position of AkzoNobel's supervisory board, made known on 12 April 2017, regarding the agenda item proposed by Elliot was therefore nothing more than a reflection of the position which the

⁶² Application, no. 7.39.

⁶³ Letter from Elliott to AkzoNobel of 10 April 2017 (Exhibit 49 Application).

⁶⁴ Press release of AkzoNobel of 12 April 2017 (Exhibit 50 Application).

supervisory board had already taken on 12 days earlier on 31 March 2017, for the event the dismissal of Burgmans would be demanded, at which time the supervisory board also authorised the management board to make this decision known (see no. 159).

172. In summary, in its letter to Elliott on 12 April 2017 (Exhibit 50 Application), AkzoNobel did nothing more than announce the position determined by the supervisory board – in Burgmans's absence – on 31 March 2017, namely that the proposed agenda item would be rejected and that AkzoNobel would carefully consider a request to call an EGM.

4.7.2 The careful assessment of the EGM request

173. As with the assessment of PPG's proposals (see no. [●]), AkzoNobel was assisted in its assessment of the EGM request by its financial and legal advisors, the latter of which assessed the legal grounds of the EGM request at the request of AkzoNobel, and advised AkzoNobel on the legal and corporate governance obligations of the company, the management board and the supervisory board. 3 In this context, reference is also made to the statement of defence submitted by counsel for the supervisory board.
174. In the context of the public statement Elliott had made on 22 March 2017, the supervisory board was already informed during the meeting of 27 March 2017 about the formal procedure for an EGM request (see no. 157).
175. During the supervisory board meeting of 31 March 2017 – at which the supervisory directors, in Burgmans's absence, determined their position regarding a possible agenda item on his dismissal – the relevant legal standard was explained by AkzoNobel's legal advisers, and the possible responses of the company were discussed (see no. 159).
176. The EGM request was discussed three days after the request of Elliot, during the supervisory board meeting on 15 April 2017, but no decision was taken in the matter at that time.

177. The EGM request of Elliot was discussed in further detail during the supervisory board meetings of 22 April 2017 and 25 April 2017. The legal advisers of AkzoNobel again explained about the relevant legal standard, namely that Elliott would have to have a reasonable interest in such a request and that the request cannot be made contrary to principles of reasonableness and fairness and that the interest of the company and the interests of all stakeholders are also relevant. After extensive discussion AkzoNobel unanimously decided that a dismissal of Burgmans does not relate to any of the stated criteria in any proportion. It was again found that putting the dismissal of Burgmans on the agenda – in view of the situation of the company, the actions of Burgmans and the unanimous decision in the supervisory board – would be irresponsible, disproportionate and damaging, and not in the interest of the company and its stakeholders (see no. 159). Then, on 25 April 2017, the decision was taken not to convene EGM and AkzoNobel rejected the EGM request of Elliot and explained its decision to Elliott in a letter of 25 April 2017 (Exhibit 56 Application). Moreover, the rejection of Elliott's request was also extensively explained by Byron Grote, the vice-chairman of AkzoNobel's supervisory board, during AkzoNobel's annual general meeting on 25 April 2017.

5 NO SCOPE FOR IMMEDIATE RELIEF

5.1 Legal framework

178. In pressing cases Article 2:349a(2) DCC authorises the Enterprise Chamber to grant immediate measures where this is required in the light of all the interests related to the situation of the legal person or in the interest of the enquiry. The Enterprise Chamber is to apply this power with restraint:

*"It may be deduced from Supreme Court case law in respect of immediate measures that such measures are only to be granted with restraint and when paying heed to the principle of proportionality. (...) The immediate measure may not be disproportionate."*⁶⁵

⁶⁵ *Kamerstukken II*, 2010-11 session, 32 887, no. 3, p. 32. Compare also *Kamerstukken II*, 2011-12 session, 32 887, no. 6, pp. 16 and 23.

179. In the memorandum following the report preceding the recent amendments made to the law of enquiry the Minister stressed "(...) *that in all cases the Enterprise Chamber must seek to prevent unnecessary (or unnecessarily profound) intervention that uses the route of immediate measures to interfere in existing relationships.*"⁶⁶
180. Article 2:349a paragraph 3 DCC provides that where no enquiry has yet been ordered, an immediate measure may only be granted where, in the provisional view of the Enterprise Chamber, there exist well-founded reasons for suspecting that there exists either unsound policy or an unsound course of affairs. If still no enquiry is ordered, this strengthens the requirement for the Enterprise Chamber to exercise restraint in terms of its power to order immediate measures of relief:

*"Restraint is called for when exercising the power to grant immediate measures prior to the ordering of an enquiry because, among other reasons, at that stage only an interim determination as to the existence of whether there exist well-founded reasons for suspecting that sound policy was not followed is possible. It will only be possible at the appropriate moment to rule as to whether, dependent upon the results of such investigation as may be ordered, the award of Article 2:356 DCC measures will be warranted. In the stage prior to the ordering of an enquiry, recourse to the power to grant immediate measures will only be made where, in connection with the situation of the legal person or in the interest of the enquiry, there exist reasons of sufficient weight favouring them."*⁶⁷

181. Below follows an argument showing that in the present matter the Enterprise Chamber may not arrive at the finding, not even at the interim finding, that there exist well-founded reasons for suspecting that sound policy was not followed. Accordingly, for this reason already, there is no scope for granting immediate measures.

5.2 Elliott's allegations

182. Elliott claims that there exist two separate reasons for suspecting that sound policy has not been followed:

⁶⁶ *Kamerstukken II*, 2011-12 session, 32 887, no. 6, p. 23.

⁶⁷ Supreme Court 25 February 2011, *NJ* 2011/335, with note Van Schilfgaarde (Inter Access), paragraph 3.6. Compare also Supreme Court 14 December 2007, *NJ* 2008/105, with note Maeijer (DSM), paragraph 3.6.

- (a) AkzoNobel's "leadership" is said to be under an obligation to carefully consider PPG's proposals and enter into reasonable consultation with PPG and supposedly have failed to do this.⁶⁸
- (b) The management board and the supervisory board of AkzoNobel are supposedly conducting themselves imprudently towards their shareholders by refusing an extraordinary meeting of the shareholders to discuss Burgmans' dismissal.⁶⁹
183. The discussion below first shows that the Enterprise Chamber may only apply restrained scrutiny to the conduct of AkzoNobel's management board and the supervisory board (see paragraph 5.3). In paragraph 5.4 AkzoNobel explains that its management board and supervisory board carefully reviewed the proposals of PPG and that AkzoNobel had no obligation to enter into negotiations with PPG. The conclusion is that AkzoNobel's conduct when assessing PPG's proposals does not furnish well-founded reasons for suspecting that sound policy was not followed.
184. Following this, paragraph 5.5 features an explanation showing that the refusal of the management board and supervisory board to call an extraordinary shareholders' meeting the agenda of which is that of dismissing Burgmans as member and chairman of the supervisory board cannot furnish well-founded reasons for suspecting unsound policy.

5.3 Standard for assessment

5.3.1 The interest of the company and long term value creation

185. Where a potential bidder tables a proposal for a public takeover bid, the management board and supervisory board must determine whether that proposal is in the interest of the company and of its linked stakeholders.⁷⁰ In the ABN AMRO decision the Supreme Court confirmed that even in the context of a public takeover bid (whether

⁶⁸ Application, no. 8.1-8.23.

⁶⁹ Application, no. 8.36-8.37.

⁷⁰ Article 2:129 paragraphs 5 and 2:140 paragraph 2 DCC.

real or possible), the company's interests are to be central when the management board performs its task under law and under the articles of association:

*"(...) When fulfilling the duties laid upon it under law or under the articles of association, the management board is to place first and foremost the interests of the company and of its affiliated enterprise and, when proceeding to decisions, is to pay heed to the interests of all interested parties, including those of the shareholders."*⁷¹

186. The interest of the company is not merely to be identified with that of (only) the shareholders, but extends to the interests of all stakeholders. Finally, it is the interests of all stakeholders (including the shareholders) which are to determine the discharge of duties by the management board and the supervisory board.
187. Determination of the strategy of a company is a matter reserved to its management board, subject to scrutiny by the supervisory board. Against see the Supreme Court's ruling in ABN AMRO:

*"The Enterprise Chamber rightly found that the first point to be noted (and this has not been challenged before this Court) was that (i) determination of the strategy of the company and of its affiliated undertaking was in principle a matter for the management board of the company (ii) which the supervisory board was to scrutinise and (iii) that the general meeting of the shareholders may express their views on these matters by exercising the rights conferred upon them under law and in the articles of association."*⁷²

188. The management board and supervisory boards must aim for long-term value creation for the company and its affiliated enterprise. This was explicitly recognised in the recent revision to the Corporate Governance Code in Principle 1.1:

The management board is responsible for the continuity of the company and its affiliated enterprise. The management board focuses on long-term value creation for the company and its affiliated enterprise, and takes into account the stakeholder interests that are relevant in this context. The supervisory board monitors the management board in this."

⁷¹ Supreme Court 13 July 2007, JOR 2007/178, paragraph 4.5.

⁷² Supreme Court 13 July 2007, JOR 2007/178 with note Nieuwe Weme (ABN AMRO), paragraph 4.3. See also Amsterdam Court of Appeal (Enterprise Chamber) 17 January 2007, JOR 2007/42 with note Blanco Fernández (Stork), paragraph 3.14 and Supreme Court 9 July 2010, JOR 2010/228 with note Van Ginneken (ASMI), paragraph 4.4.1.

189. The emphasis on long term value creation also finds expression in the duty of the management board (set down in Principle 2.5 of the Corporate Governance Code) to ensure a culture that effects this:

"The management board is responsible for creating a culture aimed at long-term value creation for the company and its affiliated enterprise. The supervisory board should supervise the activities of the management board in this regard."

190. The importance of long-term value creation is thus central to the Code. The Monitoring Committee notes that *"long term value creation on the part of management and supervisory board members [calls for] them to act sustainably by making deliberate choices about the sustainability of the strategy over the long term."* For this, so the Monitoring Committee found, *"it is essential that heed also be paid to stakeholders' interests"*.⁷³

191. Management and supervisory board members are therefore expected to pay heed to the consequences of decisions over the long term and their impact on the stakeholders in the undertaking.⁷⁴

192. Elliott fails to recognise that AkzoNobel's management board and supervisory board are under a duty to direct themselves towards the interest of the company and of all stakeholders involved in order to endeavour to create value over the long term. This is apparent from its letter of 10 April 2017 (Exhibit 49 Application):

"Akzo Nobel's repeated and outright rejections of PPG's proposals jeopardize a potential transaction with PPG that could be value maximising for shareholders."

5.3.2 The autonomy and discretion to determine policy enjoyed by the management board and supervisory board

193. Save where the articles of association otherwise provide, the management board and the supervisory board enjoy independence and a discretion to determine policy. This discretion to determine

⁷³ Monitoring Commissie Corporate Governance Code, *Verantwoording van het werk van de commissie*, 8 December 2016, p. 5.

⁷⁴ Monitoring Commissie Corporate Governance Code, *Verantwoording van het werk van de commissie*, 8 December 2016, p. 5.

policy is essential so as to permit the management and supervisory boards to perform their duties in the company's interest.⁷⁵

194. This discretion to determine policy enjoyed by the management and supervisory boards also applies, without any doubt, when assessing a public takeover bid, whether real or possible. Leijten writes:

*"The starting point when assessing conduct on the part of a management board in takeover situations [must therefore be] that management and supervisory boards enjoy a great degree of discretion to determine policy when dealing with, and making choices between, the different and sometimes contradictory interests that are at stake in a takeover."*⁷⁶

195. The discretion to determine policy that the management and supervisory boards of a target company enjoy in the context of a takeover bid or threat thereof means that they are free to conduct a policy directed at avoiding changes in the control of the company. For example, the Enterprise Chamber found in respect to a hostile takeover bid in the Uni-Invest decision:

*"In such case the starting point here is that the target company is free to conduct a policy designed to prevent control of it from being taken over and that such a policy therefore does not, neither of itself and nor automatically nor without more, furnish a well-founded reason for suspecting that sound policy of that company was not followed and hence that this may warrant an enquiry into that policy."*⁷⁷

196. This also follows from the subsequent case law of both the Enterprise Chamber and of the Supreme Court in which it has been ruled that a target company may take protective measures in the case of the threat of a takeover, hostile or not, that endangers the continuity of the company.⁷⁸

⁷⁵ See for example: Asser/Maeijer & Kroeze 2-I* (2015), no. 190.

⁷⁶ A.F.J.A. Leijten, 'Tegenstrijdig belang en openbaar bod', in: M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have & L.J. Hijmans van den Bergh (red.), *Handboek openbaar bod*, Deventer: Kluwer 2008, p. 344.
Amsterdam Court of Appeal (Enterprise Chamber) 11 March 1998, *JOR* 1999/89 (Uni-Invest), paragraph 4.2.
See for example Supreme Court 18 April 2003, *JOR* 2003/110 with note Blanco Fernández (RNA), paragraph 3.7.

5.3.3 A marginal test

197. In view of the discretion described above, the Enterprise Chamber is to observe restraint when scrutinising management board conduct. It is not for the Enterprise Chamber to scrutinise board decisions on the basis of content, and certainly not when this has been founded on a proper decision-making process.
198. This follows, for example, from the Explanatory Notes of 1 January 2013 attached to the Enquiry Law [Amendment] Act about which the Minister of Justice wrote:

*"In principle it is not for the Enterprise Chamber to venture into the merits of management decisions when these are founded on a proper decision-making process with a proper weighing up of the advantages and disadvantages. When making a commercial judgment the management board is under a duty to act in the interest of the company and of the affiliated enterprise. The management board may therefore not direct itself exclusively towards the interest of the shareholders of the company. (...) The management board is under a duty to ensure it is properly informed before proceeding to a commercial evaluation and, in so doing, before coming to an estimation of the possible risks to the company and before evaluating that risk. Existing case law provides sufficient guidelines for this. It is for a court to determine whether there exist well-founded reasons for suspecting that sound policy was not followed (or even gross mismanagement) by reference to the circumstances of the case. In my view it is self-evident that in doing so the court will draw a distinction between those cases where the management board has a conflict of interest and where it does not. (...) Where a personal interest is absent, then the court must take good care to avoid stepping into the shoes of the entrepreneur. In that case the issue of primary importance is whether the decision was arrived at with a sufficient degree of prudence."*⁷⁹

199. Case law shows that in connection with the discretion to determine policy enjoyed by the management and supervisory boards there is only place for restrained scrutiny. In Getronics the Enterprise Chamber found that the management of a company enjoyed a wide discretion to determine policy and that, where this concerned issues on which opinions might vary, caution was to be observed before making findings of unsound policy or signs thereof.⁸⁰

⁷⁹ *Kamerstukken II* 32 887, number 3, Explanatory memorandum, pp. 20-21.

⁸⁰ Amsterdam Court of Appeal (Enterprise Chamber) 2 September 2004, *JAR* 2004, 235 (*Getronics*), paragraphs 3.9, 3.13, 3.16.

200. In its final judgment in HBG the Enterprise Chamber explicitly touched on the question of whether the management board of HBG could reasonably have arrived at its decision rejecting a takeover bid for the shares of a subsidiary:

"The Enterprise Chamber will first review the question of whether the impugned policy of HBG and the decision frequently referred to may, in terms of content, be ranked as mismanagement or, respectively, must so be ranked. The specific issue here is whether HBG could reasonably have decided to reject the takeover bid of Boskalis and to enter into a joint venture/collaboration with Ballast Nedam. (...) The marginal comments noted above and the corrections supplied cannot obscure the point that it is impossible to understand how, taking the perspective of a balanced and objective comparison, specifically of the financial consequences when measured in shareholder value of the Boskalis takeover bid and the joint venture/collaboration with Ballast Nedam, HBG should not reasonably have been free to choose the last option. (...) The bare comparability of the alternatives available means, amongst other things, that a financial comparison between these alternatives is not only to be examined with a certain degree of caution in itself but aside from this is only of relative importance; or, otherwise, a decision which is not based either exclusively or in the first place on this is not for that reason alone one that may or must be ranked as manifestly unreasonable. (...) Both all quantitative and qualitative aspects (the weight of some of which is not to be foreseen with utter clarity) that are pertinent to an assessment based on the content of the policy of HBG that is at issue in this case and its decision to reject the Boskalis takeover bid and taking account of its decision to conclude a joint venture/collaboration with Ballast Nedam, the Enterprise Chamber, in summary, endorses the (...) finding of the (...) enquiry members (...) "that HBG's management board could reasonably have come to what the Enterprise Chamber reads as being its choice in favour of the joint venture."⁸¹

201. It follows from the foregoing that the conduct of the management board and of the supervisory board may only be performed with restraint, in which context the issue is that of whether the management and supervisory boards might reasonably believe that they could conduct themselves in the way in which they conducted themselves.⁸² A further degree of rendering account by the management board and supervisory boards before the court would

⁸¹ Amsterdam Court of Appeal (Enterprise Chamber) 21 January 2002, ARO 2002/19 (HBG), paragraphs 3.5-3.6, 3.28, 3.34-3.35, 3.37.

⁸² See e.g. B.F. Assink, *Rechterlijke toetsing van bestuurlijk gedrag*, Deventer: Kluwer 2007, p. 53.

be to the detriment of a discretion to determine policy.⁸³ Also see Van Ginneken and Timmerman, *Ondernemingsrecht* 2011/123:

"18. From the foregoing it follows that the court must observe restraint when performing scrutiny. The fact that a decision requires an evaluation, which may differ from person to person, demands restraint. A court must be exceedingly careful before placing its evaluation of the interests involved above that of the management board. If a court provides an evaluation of interests that is other than that of a management board director, this of itself cannot furnish a reason for declaring the decision of the management board to be unacceptable. A court must therefore perform only marginal scrutiny, and must allow the management board a margin of appreciation. Marginal scrutiny means, amongst other things, that a court does not position its own judgment (or evaluation) such that it replaces that of the management board. It is only when it is evident that the analysis of the interests at play has been unreasonable that a court may correct the evaluation made by the management board. In addition, the lack of an evident test permitting the weighing up of interests that do not lend themselves to comparison imposes restraint on the court. If there are no rational arguments for the management board to select the one or the other option, then the same applies to the court. In such a case there are no arguments permitting it to elevate its choice above that of the management board. For this reason alone the court cannot perform a complete scrutiny, but only a marginal scrutiny. Its only duty is to ask itself whether the conduct was manifestly unreasonable."

202. In addition to the restraint to be observed in the aforementioned test to be applied, the position here is, moreover, that this applies purely to the application for the grant of immediate measures. This requires an additional level of restraint. Restraint is called for when exercising the power to grant immediate measures prior to the ordering of an enquiry because at this stage only an interim determination as to the existence of whether there exist well-founded reasons for suspecting that sound policy was not followed is possible.⁸⁴
203. It already follows from all of the above that the management board and the supervisory board acted prudently and in accordance with the duties imposed upon them under law and the articles of association. As, subsequent to this prudent decision-making process,

⁸³ B.F. Assink, *Rechterlijke toetsing van bestuurlijk gedrag*, Deventer: Kluwer 2007, p. 12.
⁸⁴ Supreme Court 14 December 2007, *NJ* 2008/105, with note Maeijer (DSM), paragraph 3.6; Supreme Court 25 February 2011, *NJ* 2011/335, with note Van Schilfgaarde (Inter Access), paragraph 3.6; and Article 2:349(3) DCC.

they could reasonably have arrived at their decisions there are no reasons for suspecting that unsound policy was followed.

5.4 The PPG proposals were given a very careful review. There is no obligation to confer with PPG

204. When evaluating PPG's proposals the management board and the supervisory board of AkzoNobel on each occasion performed a prudent evaluation as to whether the proposal concerned was in the interest of the company and of its linked stakeholders. When taking their decisions they carefully weighed up against each other the interests of the company and the interests of the shareholders and those of other shareholders. These have already extensively been set out above. That, as a result of this prudent analysis of the interests at play, the management board and the supervisory board finally took decisions that Elliott then disagreed with is self-evidently unable to furnish a reason for suspecting that sound policy was not followed.⁸⁵
205. Elliott claims that AkzoNobel is obliged to enter into reasonable discussions with PPG given that this is supposed to be necessary so as (in summary) to perform a satisfactory evaluation of the takeover bid.⁸⁶ This is not correct.
206. As the preceding extensive analysis has shown, PPG's proposals have been prudently studied by AkzoNobel's management board and supervisory board. On each occasion the management board and supervisory board gave detailed reasons explaining the reasons for the rejection of the proposals coming from PPG.
207. Although under no obligation whatsoever to do so, on 6 May 2017 a meeting took place between Burgmans and Büchner in the name of AkzoNobel and McGarry and Grant in the name of PPG (see

⁸⁵ See for example Amsterdam Court of Appeal (Enterprise Chamber) 13 July 2006, ARO 2006/133 (Audilux), paragraph 3.6 and Amsterdam Court of Appeal (Enterprise Chamber) 29 June 2006, ARO 2006/115 (CMM Holding), paragraph 3.7 in which, in essence, the Enterprise Chamber found that the mere fact that the management board director set priorities in the policy that was followed that differed from those that the applicant may have contemplated did not mean that there existed Article 2:350(1) DCC 'well-founded reasons for suspecting that unsound policy was being followed'.

⁸⁶ Application, no. 8.10-8.11.

paragraph 3.4.2). At this meeting PPG could put forward whatever it wished about this third proposal. Nevertheless PPG supplied no additional information and no new ideas.

208. Quite aside from the fact that indeed a meeting took place, Elliott's propositions can be reduced to the claim that AkzoNobel was under an obligation to enter into negotiation and to conclude a deal with PPG. These propositions find no basis in law. As has been discussed above, determination of the strategy of the company is a matter reserved to the management board, the management and supervisory boards are under duty to direct themselves to the interest of the company and of all linked stakeholders and to endeavour to create long-term value, while the management and supervisory boards enjoy independence and the discretion to determine policy. Given these points of departure it is inconsistent for there to be an obligation incumbent on AkzoNobel to enter into negotiation with PPG. Nor can such an obligation be deduced from the academic commentary to which Elliott refers.⁸⁷ This sparse academic commentary (that incidentally fails to support Elliott's propositions) that only airs private opinions without these enunciating the law finds no basis either in statute or in case law. This is explained briefly below:

(a) In the article of C.J.C. de Brauw and Noome (2015)⁸⁸ the authors make no mention of an obligation on the target company to conduct discussions with a bidder. The passage in which they write that a "strict policy of not talking" is inappropriate referred to their personal opinion that where those running a company have adopted an obligation to support the bid of a given bidder, they should retain the contractual latitude that would allow them to accept a competitive but materially better bid. This of course is not the case here. The quotation that Elliott takes from the article of C.J.C. de Brauw (2008)⁸⁹ refers to the situation where a competing bidder gives notice to the target company and for this reason alone is not relevant.

⁸⁷ Application, no. 8.4-8.11.

⁸⁸ C.J.C. de Brauw and M. Noome, 'Concurrerende openbare biedingen anno 2015, *Ondernemingsrecht* 2015/121, at 2.2 and 4; Application, no. 8.4 and no. 8.9.

⁸⁹ Application, no. 8.6.

- (b) The Raaijmakers article that is quoted does not in any way at all concern situations such as this one: it is the *RNA* case that is central. This turned on an analysis of anti-takeover measures. Elliott's application conveniently entirely omits this context. That anti-takeover measures were taken is the essential point in this story. The complete text reads as follows:

*"Save in exceptional circumstances, protection may not be maintained forever. This rule would appear also to apply in the case of substantial minority participations. A target company can 'not just say no'. It has an obligation for reasonable dialogue to further its own interests and the stakeholders involved ."*⁹⁰

The present matter does not involve protective measures as at issue in the *RNA* case whatsoever.

- (c) Nor does the ruling in the Supreme Court's decision in *RNA* cited by Elliott furnish any basis whatsoever for an obligation of consultation or negotiation. Elliott refers to the Supreme Court's ruling that the Enterprise Chamber's finding that *RNA* had not sufficiently entered into consultation with a majority shareholder was incomprehensible, given that the Enterprise Chamber did not find that the failure of the consultation was a consequence of an unfavourable approach taken by *RNA* and that *RNA* had insufficient grounds for rejecting Westfield's plans.⁹¹ Yet the deduction to made here is that no obligation of consultation exists.
- (d) The ruling in *Uni-Invest v. Breevast* shows that, at the most, a company must be prepared to take cognisance of the intentions of this third party and to be prepared to examine these.⁹² And this is precisely what AkzoNobel did, and very carefully too. Contrary to

⁹⁰ M.J.G.C. Raaijmakers, 'Gedrag norms voor overnamegevechten', *SV&V* 2003-6, p. 222; Application, no. 8.5

⁹¹ Supreme Court 18 April 2003, *JOR* 2003/110 (*RNA v. Westfield*), paragraph 3.10; Application, no. 8.7.

⁹² Amsterdam Court of Appeal (Enterprise Chamber) 11 March 1999, *NJ* 1999/351, paragraph 4.16; Application, no. 8.6.

what Elliott claims,⁹³ an obligation of consultation or negotiation does not follow at all from this ruling.

209. It follows from the foregoing that there is no obligation to enter into discussion with PPG. Insofar as this nevertheless might be so, AkzoNobel met that obligation on 6 May 2017. Because, in the course of this discussion PPG adhered to its previous positions although it had every opportunity to enter into a meaningful discussion about the clear objections and concerns raised by AkzoNobel, it failed to specify its proposition any further (if it specified them at all) and entirely failed to dissipate AkzoNobel's justified concerns, AkzoNobel decided to reject the third proposal as well.
210. Elliott then does the necessary job with the statements that Burgmans is said to have made as CEO of Unilever in 2000, in the context of the attempts to acquire Bestfoods.⁹⁴ Quite aside from the fact that in those articles Burgmans never talks about an obligation to enter into reasonable discussions, the Bestfoods acquisition is not to be compared with this situation, if only because Bestfoods had placed itself in the shop window itself. Nor did it involve a hostile bid.
211. The management of AkzoNobel adopted an open approach when evaluating PPG's proposals. Each proposal was given a careful review. On each occasion it was stated in detail why AkzoNobel considered itself obliged to reject the proposal and, ultimately, a discussion between PPG and AkzoNobel was held as well.
212. Apparently for Elliott the issue does not seem to so much about (just) a discussion between PPG and AkzoNobel. Where it previously urged for a meeting between AkzoNobel and PPG, which took place on 6 May 2017, is apparently now wishes that AkzoNobel not only enters into dialogue, but immediately enters into negotiations with PPG on a possible deal. This true position of Elliott is further

⁹³ Application, no. 8.8.

⁹⁴ Application, no. 8.17-8.21.

underlined by the fact that in its Application it talks about a "*possible (positive) negotiating result*".⁹⁵

213. As has been noted it is plain that no such obligation exists under Dutch law.

5.5 Evaluation of the EGM request made by Elliott

214. Elliott contends that the rejection of its application addressed to AkzoNobel's management and supervisory boards requesting the calling of a general meeting, the sole point on the agenda being the dismissal of Burgmans as member and chairman of the supervisory board (because he is said to be responsible for the fact that at the time AkzoNobel had yet to enter into discussions with PPG about its proposals despite there being a purported obligation to do so) furnishes well-founded reasons for suspecting that unsound policy was followed.⁹⁶ In this context Elliott contends that the power of dismissal enjoy by the general meeting is a power that obtains at all times and that by definition therefore shareholders have an interest meriting respect by the legal person in the holding of a meeting at which the dismissal of a supervisory board director has been tabled.⁹⁷

215. The authority to call a general meeting is enjoyed by the management and the supervisory boards and, in the absence of a provision to this effect in the articles of association, is not enjoyed by the shareholders (Article 2:109 DCC). Elliott's argument that the management and supervisory boards were under a duty to comply with its request fails because the managing and supervisory boards of a public company are not obliged to comply with a request to call a general meeting. When deciding whether or not to comply with the

⁹⁵ Application, no. 8.22(e).

⁹⁶ Application, no. 8.24-8.37

⁹⁷ Application, no. 8.28. At number 8.29 of the Application Elliott attempts to fortify its contention by quoting something written by AkzoNobel's general counsel out of context and incompletely, because prior to this he specifically writes: "*The management board and the supervisory board assess the request, each individually, by reference to the given issues. When doing so they direct themselves to the interest of the company and its enterprise (Article 140/250). If the request is in accordance therewith, then, as I see it, it must be granted. (...) If the request appears to the management and supervisory boards to be wholly or partially unreasonable, then they must refuse the convocation (...)*" This reference is made to S.H.M.A. Dumoulin, *Besluitvorming in rechtspersonen* (diss. Groningen), Kluwer: Deventer 1999, p. 135.

request to call a general meeting the management and supervisory boards must address themselves to the interest of the company and of all its linked stakeholders.⁹⁸ If this balancing exercise results in the conclusion, as is the case here, that the calling of a general meeting is not in the interest of the company and of all its linked stakeholders, then the management and supervisory boards reject the request and the shareholder may address himself to a court in summary proceedings.

216. Elliott's fails to appreciate that the management board and the supervisory board are not obliged to comply with a request to call a general meeting. It may occasion an action before a court in summary proceedings but is unable to furnish well-founded reasons for suspecting that sound policy was not followed. Neither a management nor a supervisory board are under an obligation to call a general meeting because a shareholder has so requested. Contrary to Elliott alleges,⁹⁹ there is no supposed breach of a duty of care vis-a-vis the shareholder requesting a general meeting, if after careful deliberation an EGM is not convened.
217. Article 2:111 DCC provides that shareholders seeking the authority to call a general meeting must have a "reasonable interest" therein. Elliott does not have a "reasonable interest" in the calling of a general meeting. AkzoNobel's management and supervisory boards have conducted an exceedingly prudent policy when assessing PPG's proposals. In addition a request must always be consistent with the principles of reasonableness and fairness. Lastly Elliott fails to recognise that at issue here are the policy and strategy of the company and that the rejection of Elliott's request was a unanimous decision in both the management and the supervisory boards. As the decision, desired by Elliott, dismissing Burgmans is directed at a fundamental change of strategy, it is unacceptable for that reason alone.

⁹⁸ S.H.M.A. Dumoulin, *Besluitvorming in rechtspersonen* (diss. Groningen), Deventer: Kluwer 1999, p. 135.

⁹⁹ Application, no. 8.36.

5.5.1 No blame attaches to Burgmans

218. Contrary to the contention made by Elliott¹⁰⁰ no legitimate objections in law have been raised against the conduct of the management and supervisory boards and, specifically, no such objections have been raised against Burgmans.
219. As noted at no. 153 in its press release of 22 March 2017 (Exhibit 36 Application) Elliott flourished a request for the calling of a general meeting (to permit a vote to be taken about the dismissal of managing and supervisory board directors). In each of the following discussions Elliott deployed the threat of dismissal of members of AkzoNobel's management board and supervisory board although, in a discussion of 29 March 2017, Elliott amended its position in the sense that in any case it would seek the dismissal of Burgmans, but maybe also that of management board directors or other supervisory board members.
220. When assessing PPG's proposals the management board and supervisory board (including Burgmans) made exceptionally careful evaluations of interests and took carefully thought out decisions and, contrary to what Elliott contends, there was specifically no obligation incumbent on AkzoNobel to enter into discussion with PPG about its proposals.¹⁰¹ For this, reference is made to paragraph 5.4.
221. Nothing in the letters from Elliott of 10 April (Exhibit 49 Application, pages 4 and 5) and 13 April 2017 (Exhibit 51 Application) points to any legitimate objections in law against Burgmans' conduct. In these letters Elliott refers only to a discussion of 29 March 2017 between representatives of Elliott and Burgmans, to a public statement of Burgmans in de Telegraaf newspaper (Exhibit 3 Application) and to a telephone conversation of 31 March 2017 between representatives of Elliott and AkzoNobel (including Burgmans). These points cannot of course provide a basis for the point on the agenda proposed by Elliott.

¹⁰⁰ Application, no. 8.36(a).

¹⁰¹ Application, no. 8.36(a) and (b).

222. Elliott is effectively reproaching Burgmans for having taken a decision to not negotiate with PPG. Here Elliott entirely neglects the point that the supervisory board decided unanimously and with an abundance of care that this was not in the interest of the company and its stakeholders, with the result that a legitimate interest in the dismissal of Burgmans is lacking.
223. The conclusion is that the shareholders who sought a general meeting have not put forward any objections of merit challenging the prudent policy pursued. Effectively, Elliott's action is aimed at forcing through a power grab of AkzoNobel. However, such an attempt to take power does not constitute a reasonable interest.

5.5.2 Elliott is attempting to influence AkzoNobel's strategy

224. The proposed point on the agenda is simply in breach of the law and of the approach to good corporate governance that prevails in the Netherlands.
225. AkzoNobel is under no obligation to negotiate with PPG (see paragraph 5.4). The underlying objective is to force AkzoNobel to negotiate with PPG about its unsolicited proposals and to close a deal by threatening the dismissal of Burgmans. The crucial point here is that Elliott has no interest in how Burgmans has discharged his duties so far. This is apparent from the letter from Elliott to AkzoNobel of 10 April 2017 (Exhibit 49 Application, page 4, at the bottom) in which Elliott flourishes the threat of dismissal if those running AkzoNobel persist in their decision not to negotiate with PPG.¹⁰² if AkzoNobel's management board and supervisory board were to give in to Elliott and in the interim were to negotiate with PPG, then no dismissal of Burgmans would be sought.
226. The proposed point on the agenda is thus improper and a direct attempt on the part of Elliott in order to influence AkzoNobel's strategy for the benefit of short-term financial gain. An approach of

¹⁰² The quotation at the bottom of page 4 of the letter from Elliott to AkzoNobel of 10 April 2017 reads as follows: "*Mr. Sliwinski [of Elliott] again reiterated what was stated during the meeting on 24 March 2017: should members of Akzo Nobel's Boards continue to refuse to engage with PPG, and therefore obstruct the due and fair corporate governance process required to evaluate the two alternatives on a fair and adequate basis, then Elliott, would have no choice but to propose and seek the dismissal of obstructive member(s) of such Board(s).*"

this nature fails to recognise that a basic principle of Dutch corporate law is that corporate strategy is a matter reserved to its management board, subject to scrutiny by the supervisory board.¹⁰³ That a general meeting may in any way be called with, as its agenda, the point proposed by Elliott is, without more, in breach of this fundamental principle. This fallacy is all the more strident given that AkzoNobel is a publicly quoted company with a diversified and widespread shareholder base and given the situation of the threat of a takeover bid which mean the management and supervisory boards of company must, more than ever, be in a position to perform their powers and duties under the law in a correct fashion in the interests of all those involved.

227. AkzoNobel's strategy is a matter for its management and supervisory boards and in so doing they must orient themselves to the long-term value creation of AkzoNobel and of its affiliated enterprise and in so doing they take into account the stakeholder interests that are relevant in this context.¹⁰⁴ It is for those running the company to determine whether, and if so to what degree, it is desirable to enter into consultation with a bidder. In this connection it is again recalled that the Elliott request is exclusively aimed at achieving short-term returns without carefully weighing the interests of other stakeholders. This means that the objective of the request cannot be ranked as a reasonable and legitimate interest of Elliott.¹⁰⁵ A request of this nature is not in the interest of the company and of its affiliated enterprise, nor does it comply with the requirements of reasonableness and fairness that must be taken account of in respect of the legal person. The request must therefore be dismissed on these grounds as well.

¹⁰³ Amsterdam Appeal Court (Enterprise Chamber) 17 January 2007, JOR 2007/42 with note J.M. Blanco Fernández (*Stork*), paragraph 3.14. See also Supreme Court 13 July 2007, JOR 2007/178, with note Nieuwe Weme (ABN AMRO), paragraph 4.3 and Supreme Court 9 July 2010, JOR 2010/228, with note Van Ginneken (ASMI), paragraph 4.4.1.

¹⁰⁴ Supra note 104 and Principle 1.1 of the Dutch Corporate Governance Code.

¹⁰⁵ Cf. Rotterdam District Court, (President) 13 January 2006, JOR 2006/39 (DIM Vastgoed), paragraph 5.1.

5.5.3 The request for an extraordinary meeting is not efficient

228. The proposed point on the agenda is neither suitable nor fitting to achieve the goal that Elliott apparently has in mind. For this reason as well a reasonable interest in the request for the calling of a general meeting is lacking.
229. Burgmans enjoys the complete support of all members of AkzoNobel's supervisory board. Every decision of Burgmans that is ascribed to him by Elliott is a decision unanimously taken by the supervisory board. The conclusion is that the proposed point of the agenda is only directed as a threat and is completely devoid of sense, and is thus not only out of place but also meaningless. The dismissal of Burgmans will not achieve the effect sought by Elliott. This too disposes of the "reasonable interest" in Elliott's request and this request could not be complied with.

5.6 No scope for an interim ruling to the effect that there exist well-founded reasons for suspecting unsound policy

230. It follows from the foregoing that on this point there exist no well-founded reasons for suspecting unsound policy.

6 CONCLUSION

231. Elliott's requests must be dismissed and Elliott must be ordered to pay the costs with immediate effect.

counsel

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LIST OF EXHIBITS

Exhibit 1	Annual Report AkzoNobel 2012, p. 8 and 10
Exhibit 2	AkzoNobel Investor Update of 10 February 2016
Exhibit 3	AkzoNobel Investor Update of 19 April 2017
Exhibit 4	Press release AkzoNobel, 19 April 2017
Exhibit 5	AkzoNobel Code of Conduct
Exhibit 6	Transcript Investor Day, 19 April 2017
Exhibit 7	Carbon Disclosure Project, Scoring Introduction 2016
Exhibit 8	Annual Report AkzoNobel 2016, p. 125 and 203
Exhibit 9	2016 ViewPoint results
Exhibit 10	HSE&S presentation AkzoNobel, 15 March 2017
Exhibit 11	Fact sheet societal impact
Exhibit 12	De Telegraaf, 25 April 2017
Exhibit 13	Daily Mail, 25 April 2017
Exhibit 14	Volkskrant, 8 May 2017
Exhibit 15	NOS, 25 April 2017
Exhibit 16	Positions of the central works council and European works council
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Exhibit 18	RobecoSAM Dow Jones Sustainability Index
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Exhibit 20	New York Times, 4 April 1990
Exhibit 21	New York Times, 20 July 1990
Exhibit 22	Profile of PPG
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Exhibit 24	Press release Elliott, 13 April 2017
Exhibit 25	Letter from PPG to AkzoNobel, 2 March 2017
Exhibit 26	Report Fitch, 13 March 2017
Exhibit 27	Letter from AkzoNobel to PPG, 9 March 2017
Exhibit 28	Letter from PPG to AkzoNobel, 20 March 2017
Exhibit 29	Letter from AkzoNobel to PPG, 22 March 2017

- Exhibit 30** Het Financieele Dagblad 24 April 2017
- Exhibit 31** Press release AkzoNobel, 24 April 2017
- Exhibit 32** Presentation PPG, 6 May 2017
- Exhibit 33** Financial Times, 25 April 2017
- Exhibit 34** Letter from AkzoNobel to PPG of 8 May 2017
- Exhibit 35** Press release PPG, 10 May 2017
- Exhibit 36** Articles re. Elliott
- Exhibit 37** Brochure Elliott
- Exhibit 38** RTLZ, 5 May 2017
- Exhibit 39** Press release Elliott, 23 March 2017