

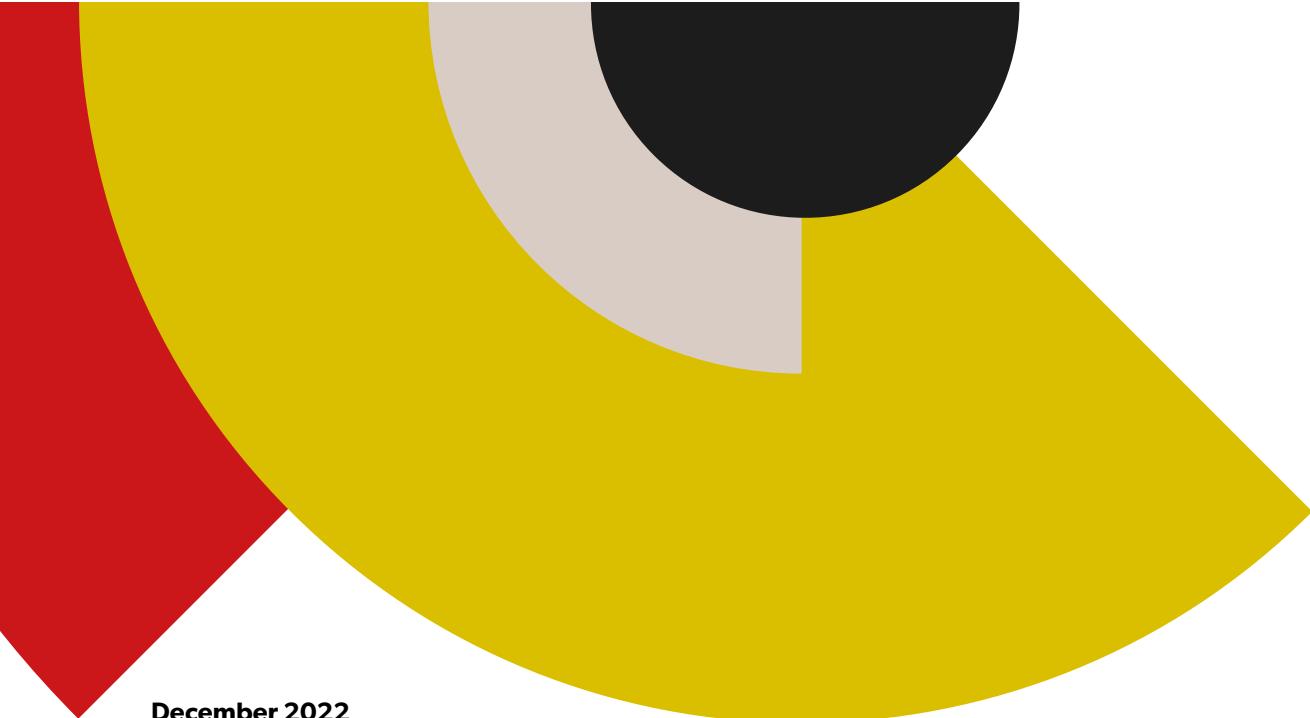


Monitoring Committee

# **CORPORATE GOVERNANCE CODE**

## **FEEDBACK STATEMENT UPDATE CODE**

**ENGLISH TRANSLATION**



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secretariat:

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# INTRODUCTION

The Corporate Governance Code (referred to below as the Code) has been updated. The update was made possible in part thanks to the many valuable responses to the amendments to the Code submitted for consultation and adopted by the Van Manen Committee in 2016.

The present document outlines the parts which prompted the Corporate Governance Code Monitoring Committee (referred to below as the Committee) to amend the principles and best practice provisions submitted for consultation.

The numbering of the principles and best practice provisions in the updated Code has been amended in some places as compared with the text submitted for consultation. Unless stated otherwise, the present document refers to the numbering as applied in the updated Code published on 20 December 2022. In order to improve the readability of the Code, the explanations of the best practice provisions in the updated version of the Code have been placed below the relevant principles or best practice provisions.

## Process for updating the Code

The Code was first adopted in 2003 and was amended in 2008 and 2016. In the years since the last revision of the Code in 2016, a number of important developments have been observed in the field of governance, such as the greater emphasis on sustainability and digitisation and diversity and inclusion. From its first day in office, the Committee therefore started talking to the supportive parties of the Code, management board members and supervisory board members of listed companies and other stakeholders with the aim of keeping the Code current, forward-looking and relevant. Those discussions revealed that the Code needed to be updated in areas such as long-term value creation, diversity and the role of shareholders. In addition, updates were necessary on a number of subjects due to changed legislation and regulations, such as the introduction of the statutory reflection period and the new rules regarding remuneration policy and the remuneration report in Book 2 of the Dutch Civil Code (*Burgerlijk Wetboek, BW*). Moreover, at the request of the Minister of Finance, the Committee has assessed whether, and to what extent, the recommendations in the study report on “Strengthening the Accountability Chain” (“*Versterking Verantwoordingsketen*”) of Leiden University could be included in the updating and further clarification of the Code.

The Committee presented the proposals for updating the Code on 21 February 2022 in a consultation document (hereinafter: the Proposal). The Proposal was available for consultation from 21 February 2022 to 17 April 2022. A total of 47 different responses to the Proposal were received. Views and suggestions were also put forward during meetings in various forums, in the press and in professional journals.

The Committee also held discussions, both prior to the presentation of the Proposal and subsequently, with the parties supportive of the Code, i.e. CNV, Eumedion, the FNV, Euronext NV, the Association of Stockholders (VEB), the Association of Securities-Issuing Companies (VEUO) and the Confederation of Netherlands Industry and Employers (VNO-NCW).

The Committee is grateful that so many people took the time and trouble to make their opinions known from a variety of perspectives. The responses received were examined with great interest and gave cause to amend parts of the Proposal. These changes are explained in this document. The order of the chapters in the Code has been followed.

The responses received to the Proposal can be consulted on the Committee's website: [www.mccg.nl](http://www.mccg.nl), except where it is indicated that the person concerned objects.

## **Principles for updating the Code**

The Committee was reluctant to introduce any further new elements over and above those in the Proposal, because they had not been submitted for consultation. That said, suggestions for further updates were taken on board and have been analysed so they can be included in the future activities of the next Committee. This concerns, among other things, the in control statement.

When formulating the proposals and processing the responses, the Committee started from the basic premise that the Code should be based as far as possible on principles. It is not the Committee's interpretation, but the reporting and accountability by the companies that is of the utmost importance for the fulfilment of the Code's principles and best practice provisions. Where necessary, the Committee has nevertheless included guidelines in the Code.

Other principles applied by the Committee as far as possible are avoiding overlaps with existing or future legislation and maintaining alignment with the national and international context in which the Code is applied and in which companies and shareholders operate. In response to various responses received, the Committee also critically examined the requirements included in the Proposal in the explanatory notes to best practice provisions rather than in the best practice provisions themselves. In the updated Code, these requirements have been moved to the best practice provisions.

# PREAMBLE

## Works Councils Act

The Committee has included an explicit reference to the Works Councils Act (*Wet op de ondernemingsraden, WOR*) in the preamble. The Committee has made it clear that, if the Works Councils Act is used properly, this law sufficiently safeguards the relationship between the company and its employees (and employee representatives). The Code supplements the Works Councils Act, however, by devoting attention to the relationship between the company and its employees (and employee representatives) in provisions relating to culture and the contacts between the supervisory board and the employee participation body.

## Concept of stakeholder

The stakeholder concept has already been included in the Code. On the basis of the 2016 version of the Code, stakeholders are groups and individuals who, directly or indirectly, influence – or are influenced by – the attainment of the company's objectives, for example employees, shareholders and other lenders, suppliers, customers and other interested parties. In the updated Code, the Committee has expanded the concept of stakeholders by adding that it also includes groups and individuals who may be directly or indirectly affected by the attainment of the company's objectives. The consequences of the company's actions, from both a social and an environmental perspective, may extend far beyond the circle of those directly involved with the company and have a far-reaching impact. The Committee considers that in the current spirit of the times the management board and the supervisory board should also consider which groups or individuals could be affected by the attainment of the company's objectives and should include this in their decision-making. The Committee has also drawn inspiration from the definition of stakeholders in the draft Corporate Sustainability Due Diligence Directive (CSDD(D)). That definition also includes the words "or could be affected by".

## More diverse group of listed companies

The group of listed companies that fall within the scope of the Code is becoming increasingly diverse. After all, there are an increasing number of listed companies having their primary listing abroad and the number of special purpose acquisition companies (SPACs) has also risen in recent years. These companies are expected to comply with the Code. This is addressed in the preamble to the Code.

With regard to SPACs, it should be noted that some of the provisions of the Code only become relevant once the SPAC has made an acquisition, but that there are also various provisions that are relevant before a SPAC has made an acquisition. These could include, for example, principle 2.7 and the underlying best practice provisions concerning the prevention of conflicts of interest.

# CHAPTER 1.

## LONG-TERM VALUE CREATION

### **Sustainable long-term value creation – principle 1.1**

In examining the responses received with regard to the concept of long-term value creation and the attention that must be paid to sustainability in the Code, the Committee has decided to state more clearly in the Code and in the concept of long-term value creation that sustainability is an element of long-term value creation. Management board members and supervisory board members are expected not only to devote attention to the long-term consequences of decisions and their impact on stakeholders, but also to act sustainably from an environmental, social and economic perspective. For this reason, the updated Code refers to *sustainable* long-term value creation. What should be understood by sustainable in this context is coloured by national and international developments and regulations. Although various respondents called on the Committee to define the concept of long-term value creation in greater detail, the Committee has chosen not to do so, after careful consideration. The Committee has, however, outlined the context of sustainable long-term value creation in the explanatory notes. The precise interpretation of this concept will differ from company to company. It is up to the companies to use the scope afforded by the Code to interpret the way in which they create sustainable long-term value and to account for it.

The Committee has also made clear the great importance of sustainable long-term value creation by stipulating in principle 1.1 that the management board is responsible for sustainable long-term value creation. In the explanatory notes, the Committee has explained in more detail that this responsibility, as is generally the case in the performance of management board members' duties, does not entail an obligation of result. There is no prescription of what the outcome of the balancing of relevant interests and external consequences should be in specific cases. Moreover, the responsibility that management board members may be expected to exercise in the performance of their duties should not be equated with liability.

In principle 1.1, the Committee has replaced the phrase "takes account of the effects of the actions of the company and its affiliated enterprise in the production and value chain" with "the management board takes account of the effects of the actions of the company and its affiliated enterprise on people and the environment". The Committee believes that this better reflects the proposal for the Corporate Sustainability Reporting Directive (CSRD) and the proposal for the CSDDD.

### **Digitisation and cybersecurity – principle 1.1 and best practice provision 1.1.1**

The Committee has clarified in the explanatory notes to Principle 1.1 that awareness and anticipation of developments in new technologies and changes to business models encompasses associated risks, including cybersecurity, supplier and chain dependencies, data protection and ethically responsible use of new technologies (e.g. "Responsible AI"). The Committee has thus taken up the suggestion from various respondents that more explicit attention should be paid to digitisation and cybersecurity in the Code. An addition has also been made to best practice provision 1.1.1, section viii, stating that when shaping the strategy for sustainable long-term value creation, attention must be paid to the impact of new technologies and changing business models on the company.

## Strategy for sustainable long-term value creation – best practice provision 1.1.1

The use of the term “ESG strategy” may give the impression that companies should develop a separate ESG strategy, rather than integrating it into the strategy aimed at sustainable long-term value creation. To prevent this, the Committee has removed the reference to the ESG strategy from best practice provision 1.1.1. The explanatory note makes it clear that sustainability is an important aspect of the development of a vision on sustainable long-term value creation and an appropriate strategy. It has also been made clear that the development of the vision, strategy and concrete objectives should take into account the actual or potential impact of the company on people and the environment and the actual or potential impact of sustainability issues on the company.

In the updated version of the Code, the Committee has also chosen to replace the term “ESG” with “sustainability”. By replacing the term ESG with sustainability, the Committee has also included the economic aspects of doing business in addition to the environmental, social and governance factors. This is more in line with the development towards integrated reporting.

The Committee considers that the way in which companies deal with the payment of taxes should be part of a vision and strategy aimed at sustainable long-term value creation. Companies are expected to contribute to a distribution of tax revenues from cross-border activities in a way that is acceptable to all countries. With the amendment to best practice provision 1.1.1, the Committee seeks to state more clearly that companies should make this contribution by paying a fair share of taxes in the countries in which they actually conduct their business activities and generate profits.

Finally, the explanatory note to best practice provision 1.1.1 stated that companies could opt to define a purpose. The Committee considers that, partly in view of the global transformation with regard to sustainability, it is becoming increasingly important for companies to specify not only the purpose as defined in the articles of association but also the objectives that the company pursues for the benefit of society. The Committee therefore wishes to encourage companies to work on their purpose. In various responses, however, respondents said that merely stating in the explanatory notes that companies could opt to define a purpose would add little to the Code.

## Reporting by the management board – best practice provision 1.1.4

Listed companies can be expected to have the theme of sustainability high on their agenda and to provide clear insight into how they fulfil the sustainability aspects of running the business. EU legislation will also increasingly impose such requirements on companies in the years ahead. In order to prepare management boards of listed companies for more detailed and meaningful reporting on their efforts in the field of sustainability and the results achieved, best practice provision 1.1.4 states that the management board must also report on sustainable long-term value creation objectives and what effects the products, services and activities of the company have had on people and the environment. In response to the input from various respondents stating that it is currently too early to set out sustainability results in monetary terms, the Committee has removed this element from the best practice provision. This does not alter the fact that in practice there is a move under way towards quantification and monetisation. The Committee therefore recommends that companies begin this work where possible.

Given that by making the additions to best practice provision 1.1.4 the Committee aims to encourage companies to prepare for future legislation and regulations in the field of sustainability reporting and given that the CSRD will lead to new requirements in the foreseeable future, the Committee has stated in best practice provision 1.1.4 that the second sentence of that provision 1.1.4 will not apply to companies reporting in accordance with the requirements arising from the CSRD.

## Dialogue with stakeholders – best practice provision 1.1.5

Best practice provision 1.1.5 states that both the relevant stakeholders and the company are expected to be prepared to enter into a dialogue regarding at least the aspects of the strategy relating to sustainability. It is assumed that not every stakeholder of the company can be regarded as equally relevant to every sustainability aspect of the strategy and that it is up to the management board of the company to determine who the relevant stakeholders are. This best practice provision does not intend to create a right of dialogue with the company for the stakeholders. It is up to the management board to determine whether such dialogue is in the interests of the company and its affiliated enterprise.

## Sustainability reporting and responsibilities of the supervisory board and audit committee – principle 1.5 and best practice provisions 1.5.1 and 1.5.3

A number of respondents argued that the role of the supervisory board and the audit committee with regard to sustainability should also be codified in the Code. For this reason, the Committee has stated in principle 1.5 that the supervisory board should also focus on the integrity and quality of sustainability reporting. Best practice provisions 1.5.1 and 1.5.3 include the responsibility of the audit committee with regard to sustainability reporting. Best practice provision 1.5.1 allows for the fact that an external party other than the external auditor may be involved in the audit of the sustainability reporting.

The 2016 Code distinguishes between financial reporting and sustainability reporting. In line with developments in Europe, the Committee has opted for the term “sustainability reporting”, rather than “non-financial reporting”. The reporting requirements are constantly developing, however, and there is a slow shift towards integrated reporting, in which a distinction is no longer made between financial reporting and sustainability reporting. The Committee encourages companies to monitor developments with regard to integrated reporting and, where possible, to continue working on them.

## In control statement – best practice provisions 1.4.2 and 1.4.3

The Committee still considers that the inclusion of an in control statement as referred to in the report entitled “Strengthening the Accountability Chain” is a controversial subject that requires ample time and attention. This was not part of the consultation and would be too far-reaching a change to the content compared to the Proposal. It therefore falls outside the scope of the update. The responses received on this subject have nevertheless been taken on board and will be passed on to the next Committee.

Notwithstanding the above, on the basis of the responses received, the Committee has once again critically examined the text of best practice provisions 1.4.2 and 1.4.3 and has clarified them in conjunction with the best practice provisions relating to risk management. For example, on the basis of what was already included in the accountability document for the revision of the Code in 2016, sections i and iv of best practice provision 1.4.3 make it clear that these statements relate to both the reporting risks and the strategic, operational and compliance risks.

## Risk control – best practice provisions 1.2.1, 1.2.2 and 1.2.3

By moving the strategic, operational, compliance and reporting risks from best practice provision 1.2.3 to best practice provision 1.2.1, the Committee wished to make it clear that the management board should in any event include these risks in the overall risk management process. In the explanatory notes to best practice provision 1.2.1, the Committee has provided further clarification of what should be understood by strategic, operational, compliance and reporting risks. Explicit attention has also been paid to the risks associated with the global transformation in sustainability and digitisation. Best practice provision 1.2.3 makes it clear that in the management report the management board should describe not only the operation of the internal risk management and control systems, but also its design.

## **Report on risk management and statement by the management board – best practice provisions 1.4.2 and 1.4.3**

The Committee concludes from the responses received to the consultation document that there is a lack of clarity concerning the scope of the accountability required in the management report under best practice provision 1.4.2 regarding the risk assessment and the internal risk management and control systems. As has already been explained above, the entire risk management process should in any event cover strategic, operational, compliance and reporting risks. The same applies to the accountability for this in the management report. This accountability is therefore not limited to reporting risks.

As stated above, the Committee has not made any further changes to the in control statement in the Code. The Committee has nevertheless made it clear in best practice provision 1.4.3 that both section i and section iv of the statement by the management board concern the strategic, operational, compliance and reporting risks. Sections ii and iii of this best practice provision are indeed limited to the financial reporting risks. In the explanatory note the Committee observes that this theme is currently evolving and that integrated reporting (in which no distinction is any longer made between financial reporting and sustainability reporting) is on the rise.

It has also been pointed out to the Committee that in practice there is a lack of clarity concerning what should be included in the statement of the management board if there are no risks to the continuity of the company. By adding the words “to the extent” in section iv of best practice provision 1.4.3, the Committee wishes to make it clear that material risks and uncertainties with regard to the continuity of the company only need to be reported if there are actual risks to the continuity of the company.

## **Assessment of the internal audit function and internal audit plan – best practice provisions 1.3.2 and 1.3.3**

The Committee has changed “in consultation” in best practice provisions 1.3.2 and 1.3.3 in the Code to “after consultation”. The assessment of the way in which the internal audit function performs its task is a competence of the management board, not a joint competence of the management board and the audit committee. The management board must of course take the audit committee’s opinion into account. This is ensured by stating that the board should assess the internal audit function “after consultation” with the audit committee. The internal audit function should draw up the audit plan itself after consultation with the management board, the audit committee and the external auditor. The audit plan should then be submitted to the management board and to the supervisory board for approval.

## **Reports of findings – best practice provision 1.3.5**

The Committee received varying responses regarding the hierarchical accountability of the internal audit function to a member of the management board, preferably the CEO. Various parties indicated that “preferably” should be omitted because the internal audit function should always report to the CEO. However, other respondents said it might be appropriate for companies to report to a management board member other than the CEO and that for that reason “preferably the CEO” should be removed from this best practice provision entirely. The Committee considers that in most cases it is desirable that the internal audit function reports to the CEO. However, there may be situations in which it is better for the internal audit function to report to another management board member. The Committee has therefore not made any changes. In accordance with the principle stated above, the Committee has nevertheless decided to move this requirement from the explanatory note to the text of the best practice provision.

Several respondents also indicated that the audit committee often only wants to receive the key points and that it should be left to the audit committee itself to set the level of detail it wishes to receive from the

internal audit function. By removing “the essence of the findings” from best practice provision 1.3.5, the Committee has already left the parties room in this best practice provision to determine how to report to the audit committee. After all, the Code does not prescribe how the report should look and whether the report to the management board and the audit committee should be the same. In view of the uncertainty that had arisen in practice concerning this amendment to best practice provision 1.3.5, the Committee has included an explanatory note clarifying the above.

## CHAPTER 2.

# EFFECTIVE MANAGEMENT AND SUPERVISION

### Sex or gender identity

The Committee believes it is important at this time to refer not only to sex but also to gender identity. However, it would be too far-reaching to refer only to gender identity, because it is also possible that a person will not wish to state their gender identity. The Committee has therefore decided to base the Code on sex or, if the person so desires, gender identity. This provides the possibility to indicate gender identity, but the company does not have to actively enquire into it. Unless stated otherwise, the company can refer to the sex of the person.

### Composition and size – principle 2.1

The term "a balance between", in conjunction with the sentence "the size of both bodies is tailored to it", could give the impression that the size of the bodies could be substantially increased to achieve such a balance. This could give companies scope to comply with the appropriate diversity requirements without making changes to the existing structure of the bodies. The Committee did not intend the provision in that way and has therefore replaced the term "a balance between" and removed the sentence "the size of both bodies is tailored to it". The Committee has also removed the phrase concerning the independence of the supervisory board, as this is dealt with in best practice provisions 2.1.7 and 2.1.8.

The sentence "where there is a large degree of diversity, however, additional attention will have to be paid to cohesion within a body" seemed to imply that a body with more diverse composition could lead to less cohesion within that body. That is similarly not the Committee's intention and for that reason this sentence has been removed from the explanatory note to the principle. In addition, the English term "groupthink" has been replaced by "groepsdenken".

### Expertise & development – best practice provisions 2.1.4 and 2.4.6

Like various respondents, the Committee recognises the importance of demonstrable knowledge on the part of the management board and the supervisory board in the field of digitisation and cybersecurity. Such knowledge is also indispensable in the field of sustainability. Sustainability and digitisation are not separate or supporting processes, but go to the heart of the company's strategy and business operations. Because these transformations are so far-reaching, every management board member and supervisory board member can be expected to be closely involved. There may nevertheless be a division of tasks within a body and members of a body may have differing degrees of knowledge of these subjects. It is important to pay attention to this in the composition of the management board and the supervisory board, as well as in the periodic training and education provided under best practice provision 2.4.6. Companies are free to choose whether or not to appoint a specific digitisation and sustainability officer and/or a specific management board member with knowledge in this area.

### D&I policy and reporting on the D&I policy – best practice provisions 2.1.5 and 2.1.6

As insight into inflow, progression and retention is relevant not only to the talent of the organisation but to all employees, the Committee has replaced the term "diverse talent" with "employees".

The Committee agrees with various respondents that, in view of the relationship between the management board and the executive committee, it makes more sense to have the D&I policy for the executive committee set by the management board. Before determining the D&I policy for the executive committee, the second tier and the rest of the workforce, the management board requires the approval of the supervisory board.

Various parties have questioned the diversity matrix and self-identification included in the Proposal. It has been argued, for example, that self-identification may potentially lead to box-ticking, that it is questionable whether the highly personal information included in the diversity matrix can be publicly disclosed under privacy legislation, that the matrix may indirectly put pressure on the persons concerned and that knowledge of gender diversity can be hazardous when doing business internationally. The Committee agrees with the concerns of these parties and has therefore decided to remove the diversity matrix and self-identification from the explanatory notes.

The Committee is aware that the accountability obligation in best practice provision 2.1.6 goes further than the accountability obligation under Article 2:166 of the Dutch Civil Code and the Decree on the content of the management report. In best practice provision 2.1.6, the subjects on which the company is required to report and the order in which the report is presented are as far as possible in line with the Decree on the content of the management report. Companies that report in accordance with the Decree on the content of the management report are expected to include in their accountability the additional information required under best practice provision 2.1.6.

Various respondents indicated that in addition to diversity and inclusion, the Code should also devote attention to equity in best practice provision 2.1.5. According to the respondents, equity means that “people who are different” have equal access to opportunities. However, the Committee considers that this is already part of inclusion, which is also included in the notes to best practice provisions 2.1.5 and 2.1.6. Since the concept of equity has not sufficiently crystallised at the moment and the tenor of the concept is already part of inclusion, the Committee has chosen not to make equity a separate part of best practice provisions 2.1.5 and 2.1.6.

In the definition of diversity, the Committee has removed the distinction between visible characteristics and less visible characteristics. In the explanatory note, the Committee has finally also stated that social safety within the company, including tackling transgressive behaviour, is also part of inclusion.

## **Independence of members of the supervisory board – best practice provision 2.1.8**

It has been pointed out to the Committee that the independence requirements as included in best practice provision 2.1.8 lead to a lack of clarity in practice. Since this is an important provision for practical implementation, the Committee has critically examined which ambiguities can be eliminated at this stage of the Code’s update. After all, no amendment to best practice provision 2.1.8 was anticipated in the Proposal. This assessment has resulted in amendments to section i, section ii and section iii of best practice provision 2.1.8.

In section i, the Proposal still referred to “associated companies as referred to in Section 5:48 of the Financial Supervision Act”. However, Section 5:48 of the Financial Supervision Act does not refer to an associated company, only an associated issuing institution. Sections ii and iii refer in the Proposal to “associated company”. The Committee has amended the incorrect reference in section i to refer to “an associated issuing institution as referred to in Section 5:48 of the Financial Supervision Act”. Sections ii and iii now refer to “associated entity” instead of “associated company”. In the explanatory note to best practice provision 2.1.8 the Committee has stated what should be understood by an associated entity.

In section iii, the Committee has added “has been” to the last sentence. According to the Committee, it should be deduced from the first sentence of this section “in the year prior to the appointment” that section iii only concerns the period of one year prior to the appointment. However, because the words “has been” were not included in the final sentence of this section, it seemed possible to deduce that this section also covered the simultaneous fulfilment of two functions. This ambiguity has been eliminated with the addition of the words “has been”.

The other sections of best practice provision 2.1.8 should also be critically examined and may have to be amended. Since those sections may be subject to a more far-reaching substantive change, the Committee has decided to take note of the proposals in this regard for the next Committee and not to include them in the current update of the Code.

## **Evaluation by the supervisory board and evaluation accountability – best practice provisions 2.2.6 and 2.2.8**

In the Proposal, the Committee had included in the explanatory notes to best practice provision 2.2.6 the requirement that the evaluation should take place periodically under the supervision of an external expert. This requirement has been moved from the explanatory notes to the best practice provision itself. The Committee received various suggestions to further clarify this requirement, such as replacing the term periodically with a specific number of years during which the evaluation should take place under the supervision of an external expert. On the premise that the formulation of the Code should be principle-based as far as possible, the Committee has opted not to add any further stipulations to this requirement. It is up to companies themselves to determine how this best practice provision can be properly fulfilled.

In the Proposal the Committee had stated in the explanatory notes to best practice provision 2.2.6 that in line with provision 2.2.8 the report of the supervisory board should contain a summary of the evaluation process and the actions resulting from it. The Committee agrees with the responses received that “the actions resulting from it” requires too much detail and has replaced this with “the main findings and conclusions”. In addition, this requirement has been moved from the explanatory notes for best practice provision 2.2.6 to best practice provision 2.2.8, so that all requirements relating to the report of the supervisory board are contained in one best practice provision.

## **Composition of the committees – best practice provision 2.3.4**

The Committee also received responses indicating that an addition could be made to best practice provision 2.3.4 stating that all chairmen of supervisory board committees must be independent. Although the Committee understands this wish, it has chosen not to amend best practice provision 2.3.4, as it would involve a far-reaching change that was not part of the consultation. The Committee is also aware that this would be an amendment to the Code that is not consistent with current practice. The Committee recommends that its successors look further into this in a subsequent updating of the Code.

## **Management board's responsibility for culture and reporting on culture – best practice provisions 2.5.1 and 2.5.4**

Various responses indicated that more attention should be paid to promoting social safety within companies and that the culture of a company should also promote the discussion and tackling of identified misconduct and irregularities. The Committee shares these views and has therefore added in best practice provision 2.5.1 a requirement that the board must also pay attention to the social safety within the company and the ability to discuss and report actual or suspected misconduct and irregularities.

If it is desirable to make changes to the culture within the company, the management board of a company may also be expected to account for the actions taken by the company to improve the culture of the company. The Committee has included this addition in section ii of best practice provision 2.5.4.

## **Employee participation – best practice provision 2.5.3**

In best practice provision 2.5.3, which concerns the discussion of conduct and culture between the management board, the supervisory board and the employee participation body, the Committee has added consultation on the values adopted by the management board and on the D&I policy of the company. The Committee considers that these two themes should also be part of the discussion on conduct and culture between the management board, the supervisory board and the employee participation body.

Various respondents argued in favour of including the role of employee participation in more places in the Code. The Committee has been reluctant to amend the Code on this point, because these subjects were not included in the Proposal. Except for the additions to best practice provision 2.5.3, the Committee has refrained from further defining the role of employee participation in the Code. As indicated earlier, the frameworks for the role of employee participation are already largely determined in legislation, particularly in the Works Councils Act and a number of articles of the Civil Code. The Committee has therefore adhered to the basic principle that overlaps with legislation in the Code should be avoided as far as possible. Further definition of the role of employee participation would exceed the scope of the current update.

## **Procedure for reporting actual or suspected misconduct or irregularities – best practice provision 2.6.1**

The explanatory notes to principle 2.6 includes a reference to the House for Whistleblowers Act ("Wet huis voor klokkenluiders"). This Act is due to be replaced by the Whistleblower Protection Act in the foreseeable future. The entry into force of the Whistleblower Protection Act is expected to impose further requirements on the policy to be formulated by the company with regard to whistleblowers. In the explanatory notes to principle 2.6, the Committee has added an expectation that arrangements for reporting actual or suspected misconduct and irregularities will state that such reports are seen as a contribution to improving the functioning of the enterprise affiliated with the company, that the report will be seriously investigated, that measures will be taken where necessary and that the person making the report will not be disadvantaged.

With regard to the forthcoming Whistleblower Protection Act, the Committee has assessed whether the entry into force of the Whistleblower Protection Act will mean that the scope of principle 2.6 and the associated best practice provisions in the Code is still wider than the legal provisions. Since the Code is also aimed at reporting irregularities, the scope of the Code will still be wider than the legal provisions upon the entry into force of the Whistleblower Protection Act and the Committee believes there is added value in retaining these provisions in the Code.

### **Notification by the external auditor – best practice provision 2.6.3**

In accordance with the new best practice provision 2.6.4, the Committee has stated in best practice provision 2.6.3 that the external auditor should also inform the management board without delay, in addition to the chairman of the audit committee, if he identifies or suspects misconduct or irregularity in performing his engagement.

## CHAPTER 3.

# REMUNERATION

### Remuneration policy – best practice provision 3.1.2

Various respondents requested the Committee to explain more clearly the overlap between the legal provisions and best practice provision 3.1.2 in the explanatory notes to best practice provision 3.1.2. The Committee answered this call by stating in the explanatory notes to best practice provision 3.1.2 what additional information is required on the basis of the Code from companies that already report on the basis of the legal provisions.

### Remuneration report – best practice provision 3.4.1

The Committee received various responses on the inclusion of the pay ratio calculation method in the explanatory notes to best practice provision 3.4.1. The Committee had already included this method of calculating the pay ratios in the monitoring report for the 2019 financial year and the method is intended to ensure that consideration is given to pay ratios in the boardroom and to ensure that pay ratios are comparable. In order to ensure that the explanatory notes to best practice provision 3.4.1 are as clear and complete as possible, this calculation method is also included in the explanatory notes. Various responses indicated that this calculation method is not entirely in line with the calculation of pay ratios based on the draft guidelines on the standardised presentation of the remuneration report under Directive 2007/36/EC. The Committee agrees with the respondents that it is desirable to ensure that the pay ratio calculation method referred to in the Code is aligned as closely as possible with the calculation method included in the draft guidelines. This led the Committee to remove from the calculation method the obligation to take into account on a *pro rata* basis the use of external staff hired for at least three months. The group for which the pay ratios should be calculated will, however, remain the same as in the Proposal. In line with the provisions of Article 2:135b(3)(e), the Committee has stated in section iv of best practice provision 3.4.1 that the changes in the pay ratios must be included for the five previous financial years instead of at least one financial year. The Committee has also chosen to replace the reference to IFRS in the calculation method with the applied reporting requirements so that the company can use the reporting requirements applied by the company.

The Committee has also stated in the explanatory notes to best practice provision 3.4.1 that companies that prepare a remuneration report in accordance with Article 2:135b of the Dutch Civil Code are expected also to report on the sections included in this best practice provision. It has been made clear that these elements can be included in the remuneration report drawn up on the basis of the legal provisions. The explanatory notes also make it clear that companies are not expected to disclose the content of the scenario analyses in the remuneration report.

## CHAPTER 4. GENERAL MEETING

### **“Comply or explain” in provisions aimed at shareholders**

Various respondents asked how companies should view best practice provisions aimed at shareholders and how these provisions relate to the responsibility of the management board and the supervisory board for compliance with the Code. Companies cannot enforce compliance with such best practice provisions by shareholders. In order to make it clear that the “comply or explain” principle can be disregarded to the extent that the management board and the supervisory board cannot influence compliance with the best practice provisions by shareholders, the Committee has explicitly included this in the explanatory notes to principle 4.1.

### **Stipulation of the response time – best practice provision 4.1.7**

The Committee received widely varying responses with regard to the retention of the response time. Some respondents argue that the response time should be removed from the Code for the following reasons:

- the instrument is no longer necessary as self-regulation because a legal provision has been introduced;
- the response time and the statutory reflection period can be stipulated for the same subjects;
- the essential consequences of both instruments are identical;
- the response time impedes the principle of shareholder engagement and the general meeting must be able to play a full role in the company’s checks and balances;
- an accumulation of protective structures is unnecessary and undesirable.

The Committee does not agree with all these reasons. There are currently marked differences between the subjects for which the response time and the statutory reflection period can be stipulated. Depending on a company’s articles of association, a shareholder could, for example, propose to issue new shares, reduce its capital or effect a distribution in kind. Such proposals may also affect the company’s strategy and can be temporarily excluded from the agenda of the general meeting by means of the response time, in contrast to the statutory reflection period. The Committee remains of the opinion that there are sufficient differences between the statutory reflection period and the response time to keep the response time in the Code. This is also acknowledged by various respondents. The Committee has however advised the next committee to continue to monitor the usefulness and use of the response time and to make adjustments where necessary.

### **Contacts and dialogue with shareholders – best practice provision 4.2.2**

The Committee has divided the content of best practice provision 4.2.2 into several paragraphs and stated more clearly what is expected of companies and what is expected of shareholders. Companies are expected to facilitate the dialogue and shareholders are expected to be prepared to engage in a constructive dialogue. However, it is and remains up to the management board of the company to determine whether such dialogue is in the interests of the company and its affiliated enterprise.

By adding derivatives to the disclosure of the share position by a shareholder who enters into a dialogue with the company outside the context of the general meeting, the Committee has made it clear that such a shareholder is expected to disclose his actual and potential economic and legal position. More complex financial instruments, other than long and short equity positions, will also have to be taken into account.

## **Report on the implementation of institutional investors' engagement policy – best practice provision 4.3.6**

As indicated above, requirements for companies and the explanation of terms will be moved from the explanatory notes to the text of the best practice provision itself. For this reason, the explanation of the term "important vote" has been moved from the explanatory notes to best practice provision 4.3.6.

The Committee agrees with the respondents who indicated that the engagement of institutional investors is broader than the voting behaviour of institutional investors and the use of proxy advisors. It also includes conducting a meaningful dialogue with the company. From the perspective of transparency, institutional investors are therefore expected to disclose every quarter the key points of the dialogues they have conducted with listed companies.

## **Share lending – best practice provision 4.3.8**

Various respondents called upon the Committee to reconsider this best practice provision because it could potentially have significant negative consequences for the liquidity of the Dutch stock market. The proposed best practice provision would leave market participants uncertain about the length of time for which they can borrow the shares, because a shareholder may have to recall his lent shares prior to a general meeting. The Committee has given detailed consideration to the possible effects of this best practice provision on the liquidity of the Dutch stock market. The Committee agrees with various respondents that this best practice provision could lead to more complex lending agreements and that it could be expected to make it more difficult to short shares around the time of the annual general meeting. It is nevertheless possible for market participants to enter into contractual agreements on this matter. In addition, the Committee attaches great importance to voting by shareholders on important resolutions on the agenda of the general meeting. The Committee has decided not to amend this provision, due to possible negative impacts on market liquidity and complex loan documentation.

In accordance with the Stewardship Code, the Proposal included as one of the examples of a significant matter a resolution on the agenda of a general meeting where the outcome of the vote is expected to be uncertain or controversial. Challenges regarding the practicality of this have been pointed out to the Committee. It is often only after receiving advice from the proxy advisory services and an alert from Eumedion that it becomes clear whether the outcome of the vote on a particular resolution is uncertain or controversial. As a rule, these reports arrive 20 to 25 days before the general meeting and are therefore too late to recall lent shares due to the record date, which is 28 days before the date of the general meeting. The Committee agrees and has therefore decided to no longer consider such matters to be significant cases. Another example of a significant case, also in accordance with the Stewardship Code, was a resolution of economic importance. The Committee has also removed this as an example of a significant case. A "resolution of economic importance" is a broad concept which in principle could include any decision that has a financial impact. The Committee did not intend the concept of the significant case to have such broad scope. In accordance with the principle stated above, the Committee has finally decided to move the explanation of a significant case from the explanatory notes to the text of the best practice provision.

## **Recognising the importance of company strategy – principle 4.4**

The Committee has moved best practice provision 1.1.5 in the Proposal to a new principle 4.4 in the Code, so that all provisions relating to shareholders are included in one chapter.

## COMPLIANCE WITH THE CODE

### Operation of the “comply or explain” principle

Various respondents to the Proposal proposed introducing a “comply and explain” principle for both principles and best practice provisions. This was not part of the consultation and would be too far-reaching a change to the content compared to the Proposal. It therefore falls outside the scope of the update. The Committee has chosen to maintain the principle of “comply or explain”.

### Quality of the explanation

A key principle for the operation of the Code is that the decisive factor is not the extent to which it is complied with to the letter, but rather the extent to which all stakeholders are guided by the spirit of the Code. In this light, the Committee sets store by the quality of explanations in general and not only in the event of departures from the Code. A box-ticking approach and the use of standard (“boilerplate”) texts in annual reports are inconsistent with this. The Committee calls on companies to embrace the Code’s intentions and not only to describe processes and actions, but also to offer insight into the dilemmas and challenges that companies face, the associated considerations, the resulting outcomes and impacts on the company. In addition, the Committee is in favour of a less process-driven and more content-based approach to reporting in the management report on core themes such as sustainable long-term value creation, risk management and culture.

# COMPOSITION OF THE CORPORATE GOVERNANCE CODE MONITORING COMMITTEE

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Non-executive director, Viatris

Chairman, Supervisory Board, ASM Internationaal

Chairman, Supervisory Board, Nederlands Dans Theater  
(Until March 2022)

Member, AFM Capital Market Committee

Member, selection committee of the Supreme Court  
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Member, evaluation committee, Conservatrix (until April 2022)

Member, supervisory committee PBL Netherlands

Environmental Assessment Agency

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Member, Supervisory Board, Nationaal Register

Member, Netspar Foundation Board

Member, Management Board, NL Sporter

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