

Monitoring Committee

# CORPORATE GOVERNANCE CODE

**FINAL DOCUMENT**

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## FOREWORD

Since the very first Corporate Governance Code was published, the world, and with it the way we think about good corporate governance, has changed dramatically. This also applies to what society considers acceptable corporate behaviour. The Code has proved its worth as a tool of self-regulation and provides a timeline of the agreements made by the supporting parties on how the responsibilities of the various bodies of the company should be understood and complied with. Meaningful reporting on such compliance is essential to obtain a true picture of the state of corporate governance in our country.

The current Van der Meer Mohr Committee (hereinafter “the Committee”) took office in 2019 and its first task was to examine compliance with the fully revised 2016 Code. The Committee focused on a different, more qualitative monitoring method. As a result of social developments, it gradually became clear that the supporting parties felt the need for a partial update of the Code. The amended Code was published in December 2022. This final report provides a concise account of the monitoring methodology used by the Committee, the key themes that emerged in the monitoring reports, the reason for updating the Code and the main changes made. We conclude with a brief look ahead and identify the subjects that we will pass on to the next Committee because they have not been included in the current update but nevertheless deserve attention.

Over the past few years the Committee has been indebted to the researchers at SEO, Maarten Buma and Thari van den Berg of NautaDutilh for their legal support and to Margje de Mik, Rachel Kitaman and Robin van der Velde, who together made up the secretariat in the hospitable surroundings of the Ministry of Economic Affairs and Climate Policy. A word of thanks also goes to the supporting parties and everyone else who contributed to the further development of the Code.

This final document also marks the end of the Committee’s term of office in its current composition. Our thanks are also due to all Committee members and the observers from the Ministries of Finance and Justice and Security. A special word of thanks goes to Sietze Hepkema, who acted as *de facto* chairman of the Committee during the first COVID year.

### **Pauline van der Meer Mohr**

Chair Monitoring Committee Corporate Governance Code

## LOOKING BACK AT THE START OF THE COMMITTEE IN 2019

The Committee began its work in January 2019, a year later than planned. The task of the Committee is to promote the current relevance and usefulness of the Code. It performs its task, among other ways, by:

- › taking stock at least once a year of how and to what extent the provisions of the Code are being complied with;
- › keeping up to date with international developments and practices in the field of corporate governance;
- › identifying gaps or ambiguities in the Code.

The Committee's initial focus was on examining compliance with the revised 2016 Code. The Committee's first compliance report relating to the Code was for the 2018 financial year. However, the Committee's discussions with supporting parties, companies and stakeholders soon revealed a need for further clarification of a number of fundamental aspects of the Code. The previous Committee had not addressed the subject of "shareholders" because laws and regulations were under development. Against the combined backdrop of social developments with regard to sustainability, digitisation risks and diversity, the Committee quickly identified the need to update the Code.

## WHAT STEPS HAVE BEEN TAKEN?

### Monitoring

In the first year of the Committee's term, the same research methodology was used for monitoring as in previous years. This research methodology focused on the recording of compliance or non-compliance, with compliance with the Code being "assumed" on the basis of the "comply or explain" principle in the Code. The basis of the "comply or explain" principle is that a listed company is deemed to "comply" if it complies with a provision of the Code or if it sets out in the annual report the reasons why a provision is not being complied with ("explain"). Non-compliance was only recorded if a company had indicated in the annual report that it would not comply with a provision. This research methodology therefore resulted in structurally high compliance percentages of around 99%, with hardly any differences between companies. This raised the question of whether these high compliance figures were sufficiently representative and presented a true picture of compliance. This prompted the Committee to shift its monitoring gradually from strict compliance to the quality of the *content* of the explanatory notes and justifications provided by companies that deviated from the provisions. Since this new monitoring method led to a higher research effort in respect of each company and provision, the Committee chose to focus its annual monitoring on a number of important themes in the Code.

Although the Committee has taken various steps in recent years to develop a research methodology based on the quality of compliance with the Code, there is still room for further development of this research methodology. The Committee therefore wholeheartedly recommends that a subsequent committee take further steps in this area. Consideration could also be given to the role of the Committee in the event of non-compliance or insufficient compliance with the Code by companies, for example, with regard to the Committee's responsibility in the case of observed non-compliances, other than possibly sending letters bringing points to the companies' attention and offering guidance by means of examples.

## Update

When the Committee took office, it was clear that attention should be devoted to the subject of shareholders. Discussions with supporting parties, companies and other stakeholders also revealed that a number of other fundamental subjects of the Code needed further clarification. For example, the Committee received requests for clarification of the concept of long-term value creation and guidelines for calculating pay ratios. Increasing attention was also devoted to the themes of sustainability, digitisation risks and diversity. These developments led to the update of the Code that the Committee has published in December 2022.

In the context of updating the Code, the Committee organised an initial meeting with the supporting parties in January 2020. With some delay due to COVID-19, work meetings followed in December 2020 and January 2021 to further explore the following three themes: “Stakeholders and company in dialogue”, “Diversity” and “Best practices in the field of long-term value creation”. The Committee found these work meetings very valuable. They facilitated an open dialogue, in which the supporting parties of the Code presented their view of developments in the field of corporate governance, each from their own perspective. The Committee recommends that the next committee continue to maintain a regular dialogue between the supporting parties, in order to keep them all involved in the Code.

In response to social developments, the results of the monitoring report for the 2019 financial year and the dialogues with the supporting parties, the Committee presented an initial proposal to update the Code to the supporting parties in June 2021. This proposal was discussed at a meeting with all supporting parties in September 2021. At the end of June 2021, the Committee received the research report entitled “Strengthening the Accountability Chain” by Leiden University. The Ministry of Finance, which had commissioned the report, asked the Committee to include the recommendations from this report in the update of the Code. Given the advanced stage of the update, the Committee was only able to incorporate those recommendations that required little further discussion with the supporting parties. The other recommendations, which require more consultation with the supporting parties (such as the in-control statement), will have to be taken up by the next Committee.

The Committee finally submitted the amended proposal for public consultation in the first quarter of 2022. A total of 47 different responses to the Proposal were received. The Committee is grateful that so many people took the time and trouble to make their views known from a variety of perspectives. The Committee studied the responses with great interest and carefully analysed and assessed them, after which the amended version of the Code was once again discussed individually with all supporting parties. This ultimately resulted in the updated version of the Code that has been published in December 2022.

## CURRENT STATE OF AFFAIRS

Corporate governance is in constant flux and the Code is therefore a living document. The Code evolves in tandem with social developments and new insights and is also intended to inspire and encourage companies to continue developing their corporate governance. Over the years, the Code has widened from best practices aimed at the three bodies of the company to a Code that increasingly addresses social themes, partly due to demand from the world of politics and society. As a result, there is more overlap between the Code and new laws and regulations. There is no clear dividing line between themes that are better suited to self-regulation such as the Code and themes that are better suited to legislation. There needs to be more overall coordination in this regard, which will require regular consultation between a subsequent committee, the supporting parties and legislative bodies.

The Committee also notes that companies find it difficult in practice to implement these social themes, particularly with regard to sustainability, digitisation risks and diversity. For example, there is a gap between the importance of sustainability expressed by companies and its actual implementation in practice. Corporate sustainability policies are being tightened up worldwide, with definitions and requirements remaining fluid, leading to a collective learning process. The juridification of society makes this process even more complex. The Committee is well aware that this process demands a lot from companies and the members of their management and supervisory boards, and recognises that a certain degree of learning anxiety may be an obstacle. To narrow the gap between rhetoric and practice, the Committee encourages companies and management and supervisory board members to be transparent about the challenges and issues they face with regard to sustainability and other transitions.

The juridification of society also means there is more tension surrounding the principle-based nature of the Code. In the Committee's experience, the development of juridification also makes interaction between the company's supporting parties and stakeholders less straightforward than before. The Committee requests a subsequent committee to devote attention to this development. After all, in order to maintain broad support for the Code, it is very important that the dialogue on corporate governance is constantly conducted with all parties involved.

## A GLIMPSE OF THE FUTURE

As a result of all social developments in the field of corporate governance, it is already clear that this updated Code will also need to be revised in the foreseeable future. The Committee recommends that the following committee at least include the following subjects:

### › **One-tier board**

- › The one-tier board does not receive sufficient attention in the Code. The current Chapter 5 takes insufficient account of the differences between companies with a two-tier board and companies with a one-tier board. Compliance by one-tier companies would benefit from best practice provisions issued specifically for these companies.

### › **Scope of the Code**

- › The Code is currently aimed at listed companies established and listed in the Netherlands as well as companies established in the Netherlands but listed abroad. Consideration should be given to the tensions experienced by the latter group of companies between the Code and Dutch company law on the one hand and the foreign stock exchange rules applicable to them on the other.

### › **Response time**

- › In response to the public consultation on the proposed update, the Committee received critical reactions to the maintenance of the response time in the Code in addition 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 at present. It is recommended that a subsequent committee evaluate in the years ahead how the accumulation of the response time and the statutory reflection period works out in practice and whether it is desirable to make any adjustments. This evaluation could coincide with the evaluation of the legal reflection period that will take place in a few years.

### › **Reporting on pay ratios**

- › The Committee recommends that the next committee review the best practice provision pertaining to the reporting of pay ratios in the company, to ensure that the gap between what is considered socially responsible and what supporting parties are willing to agree in terms of regulation does not become too wide. This provision, introduced in 2016, was intended to encourage companies to reflect on and become aware of the pay ratios, particularly between directors and employees. Among other things, individual directors were expected to give their views on vertical pay ratios. In practice, however, this does not appear to be happening a great deal, so this provision should be reconsidered.

### › **Independence requirements in best practice provision 2.1.8**

- › In the public consultation on the proposed update of the Code, it was indicated that provision 2.1.8 was not sufficiently clear in practice. The Committee has included a number of non-complex and non-controversial changes in the 2022 update. Since amendments to best practice provision 2.1.8 were not included in the public consultation, the more complex and controversial points have not been incorporated.

- › **Recommendations from the ‘Strengthening the Accountability Chain’ (‘Versterking Verantwoordingsketen’) report that have not been incorporated (including in particular the in-control statement)**
  - › The Committee has not incorporated a number of recommendations from the ‘Strengthening the Accountability Chain’ report and recommends that a subsequent committee discuss these in more detail with the supporting parties, including in particular the in-control statement. The recommendations concerned are as follows:
    - introduction of the *Verklaring Omtrent Risicobeheersing (VOR)* (also known as the in-control statement)
    - safeguarding the internal audit function if the internal audit function and the risk management function and/or compliance function are not separate;
    - assessment by and reporting to the audit committee on the activities and effectiveness of the internal audit;
    - devoting attention to conduct and culture in the management report and the report of the supervisory board;
    - statement by the management board on the correctness and completeness of information provided for the external auditor;
    - explanatory notes on the auditor prior to and during the general meeting of shareholders;
    - opportunity for shareholders and members of the general meeting of shareholders to ask questions about the auditor.

## IN CONCLUSION

The Code is very much alive, but it exists in a context that is constantly changing. Developments in the field of corporate governance will remain high on the agenda in the period ahead. A subsequent committee will therefore need to facilitate a future-proof Corporate Governance Code that offers value to all stakeholders involved. The Code is not merely a legal document, but also serves to inspire and encourage members of the management and supervisory boards. It is important to keep the Code flexible in order to respond to new developments in society and to maintain the self-regulatory nature of the Code that is enshrined in law. The current backing from the supporting parties on the one hand and the Ministries of Economic Affairs, Justice and Security, and Finance on the other hand is consistent with this.

