Corporate Governance Code Monitoring Committee

Second report on compliance with
the Dutch Corporate Governance Code

December 2010

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Foreword

This is the first report on compliance with the new Dutch Corporate Governance Code. The new Code came into force for listed companies on 1 January 2009. The function of the Corporate Governance Code Monitoring Committee is to ensure that the Code is up-to-date and practicable and to monitor compliance with it by Dutch listed companies. To this end the Monitoring Committee undertakes various activities, including an annual survey to ascertain how and to what extent the Code is complied with, the monitoring of the latest developments in the corporate governance field and the identification of gaps or ambiguities in the text of the Code. The introduction, which follows the summary, contains an account of the Committee's activities during the past year.

The Code is based on self-regulation and has broad support. This is evident, for example, from the high rate of compliance in recent years. Keeping the Code up to date and practicable is less of a problem than in the case of legislation as it can be amended more easily and quickly. However, this is possible only as long as the principles of the Code command broad support as generally accepted views on good corporate governance. It is precisely this broad support which is jeopardised if the legislator selects specific best practice provisions from the Code (such as the clawback clause) and converts them into law. This switch from self-regulation to regulation undermines support for the Code among the target group. This is particularly true when the legislation is found to go even further than the provisions of the code in limiting the discretion of the parties involved in the company. Ultimately, this detracts from their willingness to cooperate in complying with (and modifying) the Code. This development is worrying, particularly in view of the principle that underlies the Code, namely that corporate governance is about the *conduct* of parties involved in an undertaking (i.e. management board members, supervisory board members and shareholders). The particular merit of the Code lies in its influence on conduct – influence that can be exerted only if there is sufficient support among those required to comply with the Code. The Monitoring Committee wishes to ensure that corporate governance does not become a box-ticking exercise, in which strict adherence to the letter of the provisions becomes more important than acting in the spirit of the Code.

The question of who has the power to determine corporate strategy has been the subject of a ruling by the Supreme Court in the ASMI case.[1] In this ruling the Supreme Court has once again confirmed the doctrine that it in principle up to the management board to determine the corporate strategy. The management board is therefore not obliged to involve the

[1] Dutch Supreme Court, 9 July 2010 (ASMI), LJN BM0976.

shareholders in advance in the decisions on the strategy to be pursued. The Supreme Court has also ruled that the supervisory board of a company is not obliged to mediate in disputes between the management board and shareholders. The supervisory board must have the freedom to decide from case to case whether direct contact with the shareholders and/or mediation between shareholders and the management board is desirable. The Supreme Court is also emphasised in its ruling that the management board is obliged to respect the right of shareholders to obtain information during the general meeting of shareholders. Although the (academic) debate on certain aspects of the ruling is still in progress, the Monitoring Committee expects the ruling to calm and clarify the vexed subject of the mutual relationships between the various organs of limited listed companies. The Committee would observe in this connection that these relationships could become unclear again as a result of the bill to compel shareholders with a stake of 3% or more to indicate whether they object to the strategy of the company.[2] Approximately 75% of the shares in the largest Dutch companies are held by foreign investors. Once the bill becomes law, shareholders will probably indicate that they do not agree with the corporate strategy in order to keep open all their options for future discussions with the management board. Consequently, a substantial proportion of the major shareholders may indicate solely for legal reasons that they do not support the company's strategy (although this is often not the case in practice). It follows that the legislator's avowed wish to promote dialogue between shareholders and the company will not be achieved by this bill.

This year the Monitoring Committee has studied compliance with the Code in 2009, with particular reference to the shareholders and to the supervisory board and its composition. Various findings stand out.

The survey among the shareholders reveals that for the most part the Code is only of interest to and known by the large institutional investors. Moreover, the Monitoring Committee has noted that proxy advisory services have a major influence on how votes are cast at general meetings of shareholders. In addition, it is often unclear to shareholders whether a vote has actually been cast and whether it has been cast in keeping with the voting proxy. The Committee believes that further study would be desirable.

The survey of diversity in the composition of the supervisory board shows that companies make only limited use of the opportunity to appoint more women when vacancies arise on the supervisory board. Although the percentage of female supervisory board members has risen, it remains low (11%). Moreover, the rise has been largely confined to the AEX

[2] Parliamentary Papers II 2008-2009, 32014.

companies. If the 2009 results for gender diversity set the trend, the 30% benchmark will be achieved in the future only by these AEX companies. Other findings are that the average age of supervisory board members has fallen and that the number of supervisory board members of foreign nationality has declined.

As regards evaluation of the functioning of the supervisory board, the Monitoring Committee sees scope for an improvement in the reporting, for example on how the evaluation has been carried out. Approximately 40% of supervisory board members are not reappointed after their first term of office. Although companies give many different reasons for this, it could be an indication that the evaluation and appraisal of supervisory board members is moving in the right direction. This will be studied by the Committee in the year ahead.

The rate of compliance with the new provisions on remuneration in the Code is good. However, in explaining why they have not applied the best practice provisions on the maximum term of office and maximum severance pay of management board members, companies often state that they wish to honour existing agreements and/or contracts. This is an explanation that should cease to apply in due course. This point too will be closely studied by the Monitoring Committee next year in relation to all appointments made since 1 January 2004, the date on which the Code came into force. The Committee also considers that, in general, the quality of the explanations given for non-application could be improved.

Other topics that the Committee will consider during the remainder of its term of office are diversity, shareholdership from an international perspective and the report of the supervisory board.

In the autumn of 2010 the Monitoring Committee held meetings with management board members, supervisory board members, shareholders and auditors about compliance with the Code and keeping the Code up-to-date and practicable. The discussion during the meeting with auditors on their role in relation to compliance with the Code is noteworthy. The Monitoring Committee is aware that the auditor’s role in monitoring compliance with the Code by listed companies is unclear. Nonetheless, the Committee calls upon auditors to hold the management board of the company to account if the Code is not complied with (i.e. if it is not applied and no explanation is given). The Committee will continue its dialogue with the various stakeholders of companies in the years ahead.

Finally, the Monitoring Committee’s heartfelt thanks are due to everyone who has provided it with information and cooperated in the surveys and interviews conducted on its behalf.

Without their efforts and the recommendations and efforts of the Committee Secretaries, it would not have been possible to make a proper assessment of compliance with the Code and of developments in the field of corporate governance.

Jos Streppel
Chairman of the Corporate Governance Code Monitoring Committee

Summary

The Corporate Governance Code Monitoring Committee (referred to in this document as the Monitoring Committee or the Committee) carried out a survey in 2010 into compliance[3] with the Corporate Governance Code (referred to in this document as the Code). These survey results are described in outline below. The survey focused on two parts of the Code. The first subject is the responsibility of shareholders (principle IV.4 of the Code, section 1 below). The second is the composition of the supervisory board and the evaluation of its functioning (principles III.1 and III.3 of the Code, section 2 below). Finally, compliance in general and a number of specific provisions are considered (section 3 below).

1. Shareholders

The Monitoring Committee chose the 'citizenship of shareholders' (see below) as one of the focus areas. It therefore commissioned a study of how institutional investors fulfil their role in the company. Other shareholders were disregarded in this connection. The survey concerned not only compliance with the provisions of the Code relating to shareholders and institutional investors but also other aspects relating to institutional investors, including their voting behaviour. As far as compliance is concerned, the survey dealt solely with institutional investors that have their registered office in the Netherlands. As regards the other aspects, it also covered foreign institutional investors.[4] The survey of shareholders is partly of an exploratory nature. That is to say, certain conclusions are of a provisional nature and require follow-up study. For this reason the Monitoring Committee has not included all its findings in this monitoring report.

The profile of institutional investors with a registered office in the Netherlands

The shares of Dutch companies are largely in foreign ownership. Approximately three quarters of shares in Dutch companies are held by foreign shareholders. The survey of shareholders focused on Dutch institutional investors in particular. Dutch institutional investors have only limited holdings in Dutch companies. At the end of 2009, approximately two thirds of Dutch institutional investors had invested, directly or indirectly, less than 5% of their total assets in Dutch listed companies. The profile of Dutch institutional investors is characterised by the large number of small institutional investors (mainly pension funds). Of

[3] The meaning given in this report to the terms 'apply' and comply' coincides with their use in the Code. According to the Monitoring Committee a best practice provision is said to be 'applied' if it is strictly observed. The term 'comply' includes not only (i) application of a best practice provision, but also (ii) the giving of a reasoned explanation where a best practice provision is not applied. The Monitoring Committee therefore interprets the term 'comply' more broadly than the meaning given to it in the explanatory memorandum to Article 3 of the Decree of 23 December 2004 adopting further rules governing the content of the annual report (Bulletin of Acts and Decrees 2004, no. 747). In the explanatory memorandum the term 'comply' is used to mean strict observance of a given best practice provision and the term 'apply' to mean strict observance of a given best practice provision or the giving of an explanation in the event of a departure from a best practice provision.

[4] Where reference is made to *Dutch* institutional investors, only the findings relating to the Dutch subpopulation are discussed; for further details see chapter 4.

this group, 78% have outsourced their asset management to a small group of Dutch and foreign asset managers.

'Citizenship' of the shareholder

As noted in the preamble to the Code, unlike the management board and the supervisory board, shareholders are not, in principle, guided exclusively by the interests of the company and its business. For example, shareholders can give priority to their own interests, provided they act in accordance with the principles of reasonableness and fairness. This means that if shareholders exercise their rights, they may still be accountable. In other words, they still have responsibilities. The Monitoring Committee uses the expression 'citizenship of the shareholder' to describe the actual discharge of such responsibilities by shareholders. This includes, for example, the willingness to enter into a dialogue with the company and fellow shareholders when the occasion arises. These responsibilities have been worked out in fuller detail in part IV.4 of the Code.

Compliance with the provisions intended specifically for shareholders

The Dutch Corporate Governance Code has six provisions intended specifically for shareholders:

- Best practice provisions IV.4.1 to IV.4.3 are intended specifically for institutional investors and concern the relationship between institutional investors and ultimate beneficiary owners.
- Best practice provisions IV.4.4 to IV.4.6 are intended for shareholders in general (including institutional investors) and concern the relationship between shareholders and the company.

Where it differentiates according to the amount of the invested capital,[5] the survey finds that the rate of compliance with these provisions is high among eight large Dutch institutional investors (88%). The average rate of compliance by all Dutch institutional investors (i.e. including small and medium-sized institutional investors) is lower (around 60%). The Monitoring Committee considers that compliance with chapter IV.4 of the Code should be 100% and urges small and medium-sized institutional investors to act in conformity with the Code.

Familiarity with the provisions of the Code specifically intended for shareholders

As part of the compliance survey discussed above, all Dutch institutional investors who did *not* cooperate in the survey were asked whether they were familiar with the content of the

[5] The survey distinguishes between small and medium-sized institutional investors (<50 billion in invested capital) on the one hand and large institutional investors (>50 billion in invested capital) on the other.

relevant provisions of chapter IV of the Code and the accompanying statutory provisions specifically intended for institutional investors. 35% of this group stated that they were not familiar with the content of the relevant provisions of the Code, 28% reported that they were familiar with them, and 37% did not answer the question for a variety of reasons.

The role of voting advice and proxy advisory firms

Best practice provision IV.4.5 states that a shareholder should vote as he sees fit. A shareholder who makes use of the voting advice of a third party is expected to form his own judgement on the voting policy of this adviser and the voting advice provided by him. Against this background the Monitoring Committee arranged for the role and influence of proxy advisory firms to be studied.

56% of the institutional investors who participated in the survey reported that they make use of proxy advisory firms. This is true in particular of the larger institutional investors. 100% of the asset managers reported that they use proxy advisory services. Smaller pension funds indicated that they do not use the services of such firms. The different types of advice (off-the-shelf as compared to customised) are received in roughly the same proportion (54% and 46% respectively). 58% of the institutional investors discuss the voting policy with the proxy advisory firms in advance, even where they receive off-the-shelf voting advice.

Two proxy advisory firms in particular are used: the most popular is ISS/RiskMetrics (57%), followed by Glass Lewis & Co (26%).[6] A different proxy advisory firm is used in the other cases (17%). Institutional investors that use a proxy advisory service indicate that they disregard the advice only in a very limited number of cases. The Monitoring Committee would therefore stress that institutional investors have the responsibility to vote as they see fit. This is all the more important because the Dutch market for proxy voting services is dominated by just two players.

Voting chain

Best practice provision IV.3.12 states that a company must offer shareholders the opportunity to issue voting proxies to an independent third party prior to the general meeting of shareholders or extraordinary general meeting of shareholders (together referred to in this document as GMS). This independent third party then casts the vote at the meeting. Generally, the exercise of the voting right involves a chain consisting of several links. The shareholder issues a voting instruction to the custodian. This is the party who helps the

[6] Internationally the market for proxy advice to institutional investors is dominated by five major companies. ISS/RiskMetrics Group ranks second in terms of clients' invested capital (USD 25.5 trillion). With USD 17 trillion, Glass Lewis & Co. is in third place.

shareholder to exercise his rights. The custodian stores, manages and administers securities. Unless the custodian itself is designated as a proxy, it passes on the voting instructions to a party designated for this purpose by the shareholder. This may be a civil-law notary or another third party. This is the last link in the chain and the person who actually casts the vote at the meeting. It is noteworthy that shareholders often do not know whether their vote has actually been cast and, if so, whether it has been cast in accordance with their instructions. In many cases, therefore, neither the company itself nor anyone in the chain checks whether the proxy has been properly executed either qualitatively (has the vote been cast correctly?) or quantitatively (has a vote been cast?). The Monitoring Committee considers this lack of transparency to be undesirable and urges institutional investors to check whether the proxy granted by them has been correctly exercised.

Proxy voting

Institutional investors cast their vote *in advance* of the GMS in 43% of the cases in which they were entitled to vote in the 2010 GMS season. The institutional investor was itself present or voted itself at 9% of these meetings. In 13% of the cases the vote was cast by a third party proxy who was present at the GMS. This often meant that the result of the vote was determined in advance. The Monitoring Committee notes that the GMS continues to serve as a forum for dialogue with shareholders, but the deliberations generally no longer influence the result of the voting. It follows that the dialogue with the shareholders has often shifted to the period before the GMS is convened.

2. Composition of the supervisory board and evaluation of its functioning

A separate survey was carried out this year into various aspects relating to the supervisory board, including principle III.3 concerning the composition of the supervisory board and best practice provision III.1.7 concerning evaluation of the functioning of the supervisory board.

Composition of the supervisory board

In keeping with best practice provision III.1.7 the supervisory board prepares a profile dealing with the aspects of diversity relevant to the company and stating what objectives the supervisory board applies. As regards the composition of the supervisory board the survey examined, among other things, the diversity criteria of gender and age.

Almost three quarters of the AEX companies in the survey had one or more female supervisory board members. In the case of the local companies this figure was considerably lower: 30 of the 36 supervisory boards had no female members. In 2009, 58 supervisory board members retired and 80 were appointed. The total therefore rose by 22. Of the 80 new supervisory board members, 67 were men and 13 women. The percentage of female supervisory board members therefore rose slightly in comparison with 2008 to 11%. The rate at AEX companies was almost twice as high (20%). As this is a baseline measurement it is not possible to determine whether this reflects a trend. The Monitoring Committee will continue to monitor developments and hopes that the rise will be maintained in the future.

The average age of supervisory members has fallen. In 2009, 69 vacancies resulted from the retirement of supervisory board members born before 1945. Of these 69 vacancies, 42 were filled by someone from the same age category. If the different diversity criteria are combined, it is striking that female supervisory board members are, in general, younger and more highly educated.

This year the survey examined for the first time the extent to which supervisory boards make use of the various ways of increasing the diversity of their composition. This is referred to as the ‘utilised scope for change’. It is noteworthy that diversity increased more in the case of new appointments, i.e. if reappointments are not taken into account. The Monitoring Committee considers it understandable that a supervisory board member who has functioned well should be eligible for reappointment and that this reduces the number of changes that are theoretically possible in the composition of the board.

Evaluation of the functioning of the supervisory board

Best practice provision III.1.7 on the evaluation of the supervisory board is of particular relevance to the functioning of the board. This provision states, among other things, that the supervisory board should discuss at least once a year its own functioning, the functioning of the board’s committees and the individual supervisory board members, and the conclusions to be drawn from this. While 92 of the 99 companies made explicit mention of the evaluation, it is noteworthy that the majority of the companies (64 of the 99) did not state how the evaluation had been carried out. The Monitoring Committee realises that it is no simple matter to strike the right balance between disclosing general information and protecting sensitive information. Nonetheless, the manner in which many companies at present implement this provision is not in conformity with the Code. The Monitoring Committee therefore intends to continue the dialogue with companies and supervisory board members in order to promote the proper implementation of this best practice provision.

3. General compliance findings

In its study covering the year 2009 the Monitoring Committee examined above all (i) provisions whose rate of appliance was less than 90% in the past four years, and (ii) the new provisions of the 2009 Code.

Compliance with the best practice provisions covered in the survey – general

Just as in 2008, most explanations of non-application were given for best practice provisions II.1.1 (maximum term of office of management board members – 55 explanations) and II.2.8 (maximum severance pay for management board members – 51 explanations). The wish to honour existing agreements and/or contracts was given as a reason for non-application in 81 cases, while in 71 cases the explanation was that the non-application was of a temporary nature and/or that the company was in the process of implementing the provision. The Monitoring Committee considers that the explanation that the company has to honour existing agreements and/or contracts will cease to apply in due course. A further survey will be carried out in the year ahead to check compliance with these best practice provisions in the case of appointments made after 1 January 2004. The Monitoring Committee would point out that in future it will treat the explanation that existing agreements and/or contracts are being honoured as non-compliance.

If a best practice provision is not applied and no explanation is given for the non-application, this constitutes non-compliance. The extent of non-compliance is striking in respect of a number of best practice provisions.

One of these best practice provisions is II.2.5, which concerns the allocation of shares to management board members, in particular the minimum period of five years for which the shares must be retained. This retention period was breached by 11 of the 41 companies that had granted shares to management board members.

As regards best practice provision II.2.15 concerning the explanation in the remuneration report about severance pay or other special remuneration, it is noteworthy that the provision is either applied or not complied with. 17 of the 75 companies that paid remuneration of this kind did not comply with this best practice provision.

Although compliance with these provisions is not significantly better or worse than last year, the Monitoring Committee would point out that society is less and less willing to accept non-compliance, particularly in respect of remuneration.

Compliance with the new provisions

The present Code includes a number of new best practice provisions (i.e. provisions that were not in the 2003 Code). The survey also examined compliance with these new provisions. The new provision for which the most explanations of non-application were given was II.2.11 (the clawback clause). In total 26 companies explained why they had not applied this best practice provision. Another best practice provision for which explanations of non-application were given fairly often (14 companies) was II.2.10 (fairness test).

The 2009 financial year saw an increase in the number of companies stating that the non-application was of a temporary nature and/or that the company was in the process of implementing the provision concerned. This explanation of non-application was given in 71 cases in 2009 and 32 cases in 2008. Of the 71 cases in which this explanation of non-application was given, 33 concerned a new best practice provision.

In general, companies either apply the new best practice provisions in the Code or give an explanation for non-application. One negative exception to this overall picture is the non-compliance with best practice provision IV.3.13 concerning the formulation of a policy on bilateral contacts with shareholders. Of the 101 companies, 43 did not comply with this best practice provision; 23 of them were local companies and 14 were AMX companies.

As noted in previous reports, the Monitoring Committee emphasises that compliance with the Code should be 100%. All parties concerned bear responsibility for ensuring that the Code remains an effective instrument as an alternative to regulation. If a company chooses not to apply a best practice provision, it should give clear reasons for this.

Introduction

The Dutch Corporate Governance Code

Well-managed companies are of crucial importance to the health and competitiveness of the economy. The Dutch Corporate Governance Code (referred to below as the Code) contains principles and best practice provisions that are generally regarded as elements of sound corporate governance. The Code entered into force on 1 January 2004. Compliance is in accordance with the 'apply or explain' principle. In other words, the principles and best practice provisions of the Code must be applied unconditionally or an explanation must be given for any departure from them.[7] The management board and supervisory board of a company account to the shareholders for the corporate governance structure that has been adopted and for compliance with the Code.

The function of the Corporate Governance Monitoring Committee

The current Monitoring Committee was established on 2 July 2009. Its function is to help ensure that the Dutch Corporate Governance Code is kept up to date and practicable. The 2003 Dutch Corporate Governance Code (also known as the Tabaksblat Code) was amended and supplemented in 2008 when new best practice provisions were added. This new Code entered into force on 1 January 2009. The Monitoring Committee is reporting this year for the first time on compliance with the new Code.

Work schedule of the Corporate Governance Monitoring Committee

The Monitoring Committee's term of office is four years. When it took office, it formulated a work schedule in order to implement its statutory remit:

- The Monitoring Committee will monitor compliance with the new Code over a broad field.
- The Monitoring Committee will make an extra effort to promote compliance with the Code by:
  - holding companies individually accountable for non-compliance;
  - organising meetings with management board members, supervisory board members and shareholders.

[7] The meaning given in this report to the terms 'apply' and comply' coincides with their use in the Code. According to the Monitoring Committee a best practice provision is said to be 'applied' if it is strictly observed. The term 'comply' includes not only (i) application of a best practice provision, but also (ii) the giving of a reasoned explanation where a best practice provision is not applied. The Monitoring Committee therefore interprets the term 'comply' more broadly than the meaning given to it in the explanatory memorandum to Article 3 of the Decree of 23 December 2004 adopting further rules governing the content of the annual report (Bulletin of Acts and Decrees 2004, no. 747). In the explanatory memorandum the term 'comply' is used to mean strict observance of a given best practice provision and the term 'apply' to mean strict observance of a given best practice provision or the giving of an explanation in the event of a departure from a best practice provision.

- In addition, the Monitoring Committee aims to improve the quality of the explanations given for non-application of the Code. The Committee considers that it is not sufficient for a company simply to refer to its own scheme. The Committee will also investigate explanations that non-application is merely of a temporary nature.
- As regards the supervisory board and its members, the Committee will pay particular attention to:
    - the composition of the board (diversity and independence);
    - evaluation of its functioning.
- As regards the general meeting of shareholders, the Committee will focus on:
    - the ‘citizenship’ of shareholders;
    - communication between company and shareholders;
    - powers and influence in relation to corporate strategy.

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Survey

The Monitoring Committee decided not to survey compliance with all provisions of the Code for the 2009 financial year. Specific topics were selected for examination on the basis of the work schedule. The survey of the 2009 financial year therefore covers:

1. the manner and extent of compliance with the principles and best practice provisions whose rate of application has been consistently less than 90% in the last four years;
2. the manner and extent of compliance with the new principles and best practice provisions;
3. the composition (diversity and independence) of the supervisory board and evaluation of its functioning;
4. the manner and extent of compliance with the principles and best practice provisions by shareholders, the conduct of shareholders and communication between company and shareholders.

The compliance survey was carried out by the University of Groningen (1 and 2), the University of Utrecht (3) and Nyenrode Business University (4). The survey reports are posted on the Monitoring Committee’s website (www.commissiecorporategovernance.nl).

Compliance meetings

In 2010, the Monitoring Committee held four meetings with management board members, supervisory board members, shareholders and auditors with a view to promoting compliance with and awareness of the Code. In these meetings feedback was provided on the results of the compliance survey for 2009. There was also scope for dialogue about the Code. Among the topics raised were the clawback clause and fairness test, the evaluation of the functioning of the supervisory board, the report of the supervisory board, the role of proxy advisory services, the voting chain and the role of the auditor in relation to compliance with the Code.

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The Monitoring Committee intends to organise these compliance meetings next year as well and to hold individual companies to account when the occasion arises. The company will also in any event deal with the subjects of diversity, shareholdership from an international perspective, the report of the supervisory board and the general quality of explanations for non-application.

Structure of this report

This monitoring report is organised as follows. Chapter 1 provides a broad overview of compliance. As noted above, the only provisions dealt with here (and in the following chapters) are (i) provisions in respect of which the rate of application has been less than 90% in the past four years, and (ii) the new provisions of the Code. Chapter 2 examines the principles in these two categories that deal specifically with the management board. The provisions intended for the supervisory board are examined in chapter 3. This chapter also considers the composition of the supervisory board and evaluation of its functioning. Chapter 4 concerns the shareholders and pays specific attention to shareholder conduct, particularly voting behaviour. As compliance with provisions that focus on auditors has not been included in this year’s survey, this topic does not receive any further attention in this monitoring report. The final chapter (chapter 5) describes relevant international developments in the field of corporate governance.

1. General findings

As in past years, the Monitoring Committee commissioned a survey of compliance with the Code. Not all the best practice provisions of the Code were included in the survey of general compliance. In particular, provisions in respect of which the rate of application in the past four years was in excess of 90% were not included in the survey.

Some best practice provisions of the Code refer to the terms of reference of organs of the company. Examples are provisions that express intentions or are conditional. The actual compliance with best practice provisions of this kind can be studied once the relevant event has actually occurred. In cases where the event has not occurred, it is possible to examine the content of articles of association, by-laws and terms of reference to determine whether the business will act in accordance with the Code when the occasion arises. Surveys in previous years showed that companies' articles of association, by-laws and terms of reference are generally in order (application rates of over 90%). This year, the content of articles of association, by-laws terms of reference has therefore not been examined in more detail. However, the amended and new provisions of the Code have all been included in the survey.

This chapter deals with the extent to which explanations for non-application are given and the nature of the explanation. First of all, section 1.1 examines the ten best practice provisions for which explanations of non-application are most frequently given. Section 1.2 discusses generally what explanation of non-application is used most frequently. Sections 1.3 and 1.4 deal with the same subject, but on this occasion in respect of the new best practice provisions.

1.1. Best practice provisions for which explanations of non-application are given most frequently

Table 1 gives an overview of the best practice provisions for which explanations of non-application were given most frequently. Examples are the provisions concerning the maximum term of appointment and maximum severance pay of management board members, webcasts and the clawback clause. Compliance with these best practice provisions will be dealt with in more detail in the relevant chapters.

Table 1
Best practice provisions for which explanations of non-application are given most frequently

		2009 Number	2008 Number
II.1.1	Maximum term of appointment of management board members	55	56
II.2.8(a)	Maximum severance pay of management board members	51	64
IV.3.1	Webcasts of analysts' meetings, presentations and press conferences for all shareholders	37	40
II.2.11	Claw back clause	26	-
III.5	Composition and role of three key committees of the supervisory board	25	29
III.6.5	Content of terms of reference of the supervisory board (including rules governing securities transactions of supervisory board and management board members)	20	-
III.3.5	Maximum term of office for supervisory board members: 3 times 4 years	19	17
IV.1.1	Cancellation of binding nature of nomination	16	13
II.2.5(b)	Shares granted without financial consideration to be retained for a minimum of five years	16	15
III.4.3	Duties of the company secretary	15	17
III.5.11	Supervisory board chairman should not also chair the remuneration committee	15	16
III.7.3	Regulations concerning ownership of and transactions in securities by supervisory board members	-	43
II.2.6	Regulations concerning ownership of and transactions in securities by management board members	-	41

1.2. Most common explanation

Table 2 provides information about the most common explanation for non-application of all best practice provisions in the survey. The explanation most frequently given in 2009 was that the administrative and/or financial costs of implementing the provision are too high or that the company is too small to apply the provision. This high figure is due in particular to the local and AScX companies. Types of explanation commonly used in all market segments are (i) the wish to respect existing agreements and/or contracts, and (ii) the non-application is of a temporary nature and/or the company is in the process of implementing the best practice. The wish to respect existing contracts was also frequently used as an explanation in 2008.

The explanation that the non-application is of a temporary nature was used less often in 2008 than in 2009. As we shall see below, this is partly due to the fact that in 2008 the companies were still reporting on the 2003 Code and many companies had not yet implemented the new provisions of the 2008 Code. However, the explanation that non-application of the 'old' provisions of the Code is of a temporary nature increased in 2009. This surprises the Committee. The validity of the argument that non-application is only temporary is of limited duration.

The explanation that a provision is not applied because the company operates a different scheme (and where information is merely given about the company's scheme, without further reasons) still occurs, but its frequency has declined perceptibly since 2008. The Committee does not accept a mere statement by a company that it has its own scheme as a sufficient explanation. This is treated as non-compliance.

Table 2
Nature of explanation given for non-application of all best practice provisions surveyed

Nature of explanation	AEX	AMX	AScX	Local	Total 2009	Total 2008
The company wishes to respect existing agreements and/or contracts	18	19	15	29	81	87
The company states that legislation and regulations and/or case law obstruct compliance	5	8	10	9	32	48
The company points out that the derogation is temporary and/or that it is in the process of implementing the best practice provision	15	17	14	33	71	32
The company points out that it has its own arrangement and states *explicitly* that this is in keeping with the spirit of the Dutch Corporate Governance Code	3	2	2	4	11	14
The company points out that it has a different arrangement (and merely provides information about its own arrangement *without* giving further reasons)	10	13	10	36	69	97
The company considers that the provision requires a procedure that is not usual in the countries and/or sectors in which it operates	2	1	1	1	5	15
The company considers that the administrative and/or financial costs of implementing the best practice provision are unduly high and/or points out that it is too small to comply with the provision	2	3	31	58	94	90
Company considers that the provision concerns something that is a private matter for the members of the management board or supervisory board	0	0	1	8	9	17
Other reasons	35	38	36	74	183	219
Total (2009)	90	101	120	254	565	
Total (2008)	111	105	160	243	619	

1.3. Compliance with the new best practice provisions

Various new best provisions have been added to the 2003 Code. These provisions are applied for the most part, and the number of explanations of non-application is only limited, with the exception of the clawback clause (26 explanations) and the fairness test (14 explanations). Four other new provisions drew occasional explanations of non-application (but in each case the number of explanations was less than five). The best practice provision for which an explanation of non-application is most commonly given is the clawback clause. The reason usually cited is that the company is awaiting legislation on this point. In fact, the introduction of the clawback clause has been delayed by the intention to provide a statutory basis for it.

1.4. Most common explanation for non-application of the new best practice provisions

The survey examined the nature of the explanation given for non-application in the case of the new best practice provisions as well. As already noted above, there was in general an increase in 2009 in the number of companies explaining that the non-application was of a temporary nature and/or that the company was in the process of implementing the best practice provision.

Table 3
Nature of explanation given for non-application of new best practice provisions

Nature of explanation	AEX	AMX	AScX	Local	Total
Respect existing contracts	0	2	1	4	7
Legislation and regulations obstruct compliance	1	0	3	4	8
Temporary derogation	7	8	6	12	33
Own scheme	0	0	0	0	0
Other scheme (without further reasons)	0	0	2	4	6
Arrangement is not usual in the countries and/or sectors in the company operates	0	0	0	0	0
The administrative and/or financial costs are too high and/or the company is too small	0	0	1	5	6
The provision relates to a private matter for the members of the management or supervisory board	0	0	1	6	7
Other reasons	0	0	2	7	9
Total	8	10	16	42	76

2. The management board

Compliance with best practice provisions was discussed in broad outline above. This chapter examines in greater detail to what extent a number of individual best practice provisions[8] are applied or an explanation is given for their non-application. All these provisions deal with the management board and come from chapter 2 of the Code. They are discussed in the same order as they appear in the Code.

2.1. Role and procedure

2.1.1. Maximum term of appointment

II.1.1

A management board member is appointed for a maximum period of four years. A member may be reappointed for a term of not more than four years at a time.

This was the best practice provision for which an exclamation of non-application was given most frequently in 2009. In total 55 companies explained why they had not applied the provision. Table 4 shows the degree of application, explanation of non-application or non-compliance, with a breakdown by market segment.

Table 4

II.1.1 – Maximum term of appointment

	Application	Explanation	Non- compliance	n
AEX	11	10	0	21
AMX	10	11	0	21
AScX	8	12	0	20
Local	16	22	1	39
Total	45	55	1	101

The reason most commonly given by companies for not applying this best practice provision is their wish to respect existing contracts (see Table 5). This explanation was given by 36 companies in 2009, of which 14 were local companies and the rest were divided among the other market segments. This was also the most common explanation for non-application of this best practice provision in the 2008 financial year. Strikingly, on 16 occasions the explanation given for non-application came in the category ‘other’. This was higher than in

[8] It should be noted that the number of companies is not the same for all the best practice provisions included in the survey. This applies, in particular, to the provisions of a conditional nature. These are included in the survey only in so far as the situation concerned has actually occurred. An example is best practice provision II.2.5 concerning the retention of shares: ‘Shares granted to the management board members without financial consideration shall be retained for a period of at least five years or until at least the end of the employment, if this period is shorter.’ Not all companies remunerate their management board members in this way.

2008 when 11 companies gave this explanation for non-application. As regards the explanation that existing agreements and/or contracts have to be respected, the Monitoring Committee takes the view that this argument is no longer tenable in view of the time that has elapsed. Next year the Committee will consider this point in more depth by investigating the compliance with this best practice provision in the case of management board members appointed since 1 January 2004.

Table 5
Explanation in the case of II.1.1: maximum term of appointment of management board members

Explanation given	AEX	AMX	AScX	Local	Total 2009	Total 2008
Company wishes to respect existing contracts	6	7	8	14	36	37
Company complies with existing legislation and regulations and/or is awaiting developments in this field	0	1	0	0	1	3
Company simply provides information about its own scheme	0	0	1	0	1	4
Scope of the provision and/or unduly high administrative and/or financial expenses prevents compliance	0	0	0	1	1	2
Other	3	4	3	7	16	11

2.1.2. Approval of corporate social responsibility issues

II.1.2

The management board shall submit to the supervisory board for approval:

a) the operational and financial objectives of the company;

b) the strategy designed to achieve the objectives;

c) the parameters to be applied in relation to the strategy, for example in respect of the financial ratios; and

d) corporate social responsibility issues that are relevant to the enterprise. The main elements shall be mentioned in the annual report.

A new element has been added to best practice provision II.1.2. From now on the management board must submit corporate social responsibility issues that are relevant to the enterprise for approval to the supervisory board. As the wording of the provision does not require any explicit mention, no conclusions can be drawn about compliance. Table 6 shows how many of the companies in the survey explicitly included information in the annual report about corporate social responsibility issues. Of the 21 AEX companies in the survey, 18 made explicit mention of this element of this best practice provision. Four of these 18 AEX companies provided further information about corporate social responsibility issues. 15 of the

21 AMX and 11 of the 20 AScX companies in the survey mentioned this provision. The companies in these indices provide no further information. The situation is different for local companies. Three of the 39 local companies in the survey provided extensive information about corporate social responsibility issues and 11 of the 39 mentioned them.

Table 6
II.1.2 – The management board submits corporate social responsibility issues relevant to the company for approval to the supervisory board

	AEX	AMX	AScX	Local
Mentioned	18	15	11	11
Extra information	4	0	0	3
Number of companies	18	15	11	11

2.1.3. Description of main risks in the annual report

II.1.4
In the annual report the management board shall provide:
a) a description of main risks related to the strategy of the company;
b) a description of the design and effectiveness of the internal risk management and control systems for the main risks during the financial year; and
c) a description of any major failings in the internal risk management and control systems which have been discovered in the financial year, any significant changes made to these systems and any major improvements planned, and a confirmation that these issues have been discussed with the audit committee and the supervisory board.

Best practice provision II.1.4 is one of the modified provisions in the Code. It states that the management board of the company is required to provide three descriptions in the annual report. Almost all the companies in the survey applied this best practice provision. The provision was not complied with by three companies (one AEX, one AScX and one local company).

Table 7
II.1.4 – Description of main risks in the annual report

	Application	Explanation	Non-compliance	n
AEX				
- Description of strategy-related risks	21	0	0	21
- Description of risk management and control systems	21	0	0	21
- Description of the main failings and (planned) changes; these matters have been discussed with Audit Committee and Supervisory Board	20	0	1	21
AMX				
- Description of strategy-related risks	21	0	0	21
- Description of risk management and control systems	21	0	0	21
- Description of the main failings and (planned) changes; these matters have been discussed with Audit Committee and Supervisory Board	21	0	0	21
AScX				
- Description of strategy-related risks	19	0	1	20
- Description of risk management and control systems	20	0	0	20
- Description of the main failings and (planned) changes; these matters have been discussed with Audit Committee and Supervisory Board	20	0	0	20
Local				
- Description of strategy-related risks	39	0	0	39
- Description of risk management and control systems	38	0	1	39
- Description of the main failings and (planned) changes; these matters have been discussed with Audit Committee and Supervisory Board	39	0	0	39
Total				
- Description of strategy-related risks	100	0	1	101
- Description of risk management and control systems	100	0	1	101
- Description of the main failings and (planned) changes; these matters have been discussed with Audit Committee and Supervisory Board	100	0	1	101

The risks described by the various companies in the survey vary (Table 8). For example, strategic risks were described more by AEX companies (21 times) and local companies (23 times) than by AMX companies (15 times) and AScX companies (13 times). Local companies provided a description of financial risks and operational risks more often (29 times) than other companies. AEX companies were more likely to explain the regulatory risks (9 times). AScX companies lagged behind in describing operational and regulatory risks (11 times and 1 time respectively).

Table 8
II.1.4 - Description of the main risks related to the strategy of the company

	AEX	AMX	AScX	Local
Strategic risk	21	15	13	23
Financial risk	16	15	13	25
Operational risk	16	17	11	29
Market risk	7	11	11	15
Regulatory risk	9	5	1	5
Economic cycle risk	6	3	5	9
Number of companies	21	20	19	37

2.1.4. Statement of reliability of the financial reporting

II.1.5
As regards financial reporting risks the management board states in the annual report that the internal risk management and control systems provide a reasonable assurance that the financial reporting does not contain any errors of material importance and that the risk management and control systems worked properly in the year under review. The management board shall provide clear substantiation of this.

Best practice provision 1.5 has been modified. This provision is applied by all AEX and AMX companies in the survey. Two of the AScX companies did not comply with this provision as they failed to include a statement in the annual report and one failed to provide a substantiation. Of the local companies, four explained why they had not applied certain parts of the provision and six completely failed to comply with parts of the provision.

Table 9
II.1.5 – Statement of reliability of the financial reporting

	Application	Explanation	Non-compliance	n
AEX				
- Reasonable degree of certainty	21	0	0	21
- Statement about functioning in 2009	21	0	0	21
- Manag. board provides substantiation	21	0	0	21
AMX				
- Reasonable degree of certainty	21	0	0	21
- Statement about functioning in 2009	21	0	0	21
- Manag. board provides substantiation	21	0	0	21
AScX				
- Reasonable degree of certainty	20	0	0	20
- Statement about functioning in 2009	18	0	2	20
- Manag. board provides substantiation	19	0	1	20
Local				
- Reasonable degree of certainty	37	1	1	39
- Statement about functioning in 2009	35	2	2	39
- Manag. board provides substantiation	35	1	3	39
Total				
- Reasonable degree of certainty	99	1	1	101
- Statement about functioning in 2009	95	2	4	101
- Manag. board provides substantiation	96	1	4	101

2.1.5. Response time

II.1.9
If the management board invokes a response time within the meaning of best practice provision IV.4.4, such period may not exceed 180 days from the moment the management board is informed by one or more shareholders of their intention to put an item on the agenda to the day of the general meeting at which the item is to be dealt with. The management board shall use the response time for further deliberation and constructive consultation. This shall be monitored by the supervisory board. The response time may be invoked only once for any given general meeting and may not apply to an item in respect of which the response time has been previously invoked or meetings where a shareholder holds at least three quarters of the issued capital as a consequence of a successful public bid.

Best practice provision II.1.9 is also new in the Code. This best practice relates to the response time and must be read in conjunction with best practice provision IV.4.4. Under best practice provision IV.4.4. A shareholder must give the management board the opportunity to stipulate a reasonable period in which to respond (response time) if a shareholder wishes to put an item on the agenda that may result in a change in the company's strategy. Best practice provision II.1.9 indicates, inter alia, that if the management board invokes this response time, the period may not exceed 180 days from the moment the management board is informed of the intention to put an item on the agenda to the day of the general meeting at which the item is to be dealt with. As these best practice provisions deal with ‘conduct’ and do not provide for an explicit mention in the annual report of whether or not this right to specify a response time has been exercised, compliance is to a large extent implicit in this case. If no explanation is given as to why this best practice provision is not applied, it is assumed that it has been applied, even if there is no mention of it in public documents. 20 companies made a reference to best practice provision II.1.9. in public sources (10 AEX, 3 AMX, 4 AScX and 3 local companies).

Under best practice provision II.1.9 the management board has a maximum response time of 180 days and under best practice provision IV.4.4 a shareholder is required to respect this response time. If a shareholder completely fails to respect this 180-day period and applies as a fixed policy a term of, say, 90 days, the Monitoring Committee does not accept this as an explanation for non-application of best practice provision IV.4.4. Instead this is treated as non-compliance with this provision. This does not affect any rights that a shareholder may have by law.

2.2. Remuneration

This section discusses eight best practice provisions concerning the remuneration of management board members.

2.2.1. Scenario analysis

> *II.2.2*
> *The supervisory board shall determine the level and structure of the remuneration of the management board members by reference to the scenario analyses carried out and with due regard for the pay differentials within the enterprise.*

Best practice provision II.2.2 is one of the new provisions of the Code. This best practice provision is applied by many companies. An explanation for non-application of this provision is given by two AEX companies, one AScX company and two local companies in the survey.

Table 10
Best practice provision II.2.2

The supervisory board prepares scenario analyses in order to determine the level and structure of the remuneration of management board members

	Application	Explanation	Non-compliance	n
AEX	19	2	0	21
AMX	21	0	0	21
AScX	19	1	0	20
Local	36	2	1	39
Total	95	5	1	101

2.2.2. Retention of shares

II.2.5

Shares granted to management board members without financial consideration shall be retained for a period of at least five years or until at least the end of the employment, if this period is shorter. The number of shares to be granted shall be dependent on the achievement of challenging targets specified beforehand.

Compliance with this best practice provision has been assessed by reference to the following elements: (i) the retention of shares for at least five years, and (ii) the granting of such shares being dependent on the achievement of predefined targets (see Table 11).

What is striking about this best practice provision in general terms is the high level of non-compliance or explanation of non-application. In total, 20 companies applied this best practice provision, 10 companies explained why they did not apply it and 11 companies failed to comply with it at all. All AEX and AMX companies in the survey applied element (ii).

The non-compliance or explanation of non-application mainly concerns the retention of shares for a minimum period of five years. Six of the AEX companies explained their non-application of this element of the provision and two failed to comply with it. The comparable figures for the AMX companies were two and three respectively.

Table 11
Best practice provision II.2.5
Shares granted to management board members

	Application	Explanation	Non-compliance	n
AEX				
- The shares are held for at least five years	6	6	2	14
- The granting of shares is dependent on meeting predefined targets	14	0	0	14
AMX				
- The shares are held for at least five years	8	2	3	13
- The granting of shares is dependent on meeting predefined targets	13	0	0	13
AScX				
- The shares are held for at least five years	2	2	4	8
- The granting of shares is dependent on meeting predefined targets	6	1	1	8
Local				
- The shares are held for at least five years	4	0	2	6
- The granting of shares is dependent on meeting predefined targets	4	0	2	6
Total				
- The shares are held for at least five years	20	10	11	41
- The granting of shares is dependent on meeting predefined targets	37	1	3	41

2.2.3. Maximum severance pay

II.2.8

The remuneration in the event of dismissal may not exceed one year's salary (the 'fixed' remuneration component). If the maximum of one year's salary would be manifestly unreasonable for a management board member who is dismissed during his first term of office, such board member shall be eligible for severance pay not exceeding twice the annual salary.

Best practice provision II.2.8 on maximum severance pay was applied eight times and there were six explanations of non-application and one case of non-compliance. The most common explanation for non-application was the wish to respect existing contracts. However, this was given as a reason less often than in 2008 (number of cases fell from 39 in 2008 to 29 in 2009). There was also a decline in the number of companies explaining non-application simply by providing information about their own scheme (seven times in 2008 compared with three times in 2009). Another striking development is the increase in the number of companies indicating that they comply with existing legislation and regulations and/or are awaiting developments. Six companies gave this explanation in 2008 and nine in 2009.

Table 12 Explanation for non-application of II.2.8 – Maximum severance pay of management board members						
Explanation given	AEX	AMX	AScX	Local	Total 2009	Total 2008
Company wishes to respect existing contracts	8	8	5	8	29	39
Company complies with existing legislation and regulations and/or is awaiting developments in this field	1	2	2	4	9	6
Company simply provides information about its own scheme	0	2	1	0	3	7
Arrangement is not usual in the sector and/or country in which the company operates	1	0	0	0	1	3
Other	3	4	1	1	9	9

Table 12 indicates to what extent the companies in the survey have regulated the maximum severance pay. The survey also examined to what extent this best practice provision was complied with by the companies that actually provided severance pay in 2009 (see Table 13). This involved 15 companies. Eight of the 15 applied best practice provision II.2.8, six explained why they had not applied it and one AScX company did not comply with it.

Table 13 Best practice provision II.2.8				
	Application	Explanation	Non-compliance	n
AEX	2	0	0	2
AMX	1	3	0	4
AScX	2	1	1	4
Local	3	2	0	5
Total	8	6	1	15

2.2.4. Fairness test

II.2.10

If a variable remuneration component conditionally awarded in a previous financial year would, in the opinion of the supervisory board, produce an unfair result due to extraordinary circumstances during the period in which the predetermined performance criteria have been or should have been achieved, the supervisory board has the power to adjust the value downwards or upwards.

Best practice provision II.2.10 (the ‘fairness test’) is a new addition to the Code. Under this best practice provision the supervisory board has the power to adjust the value of a variable remuneration component conditionally awarded in a previous financial year if this award would produce an unfair result due to extraordinary circumstances. The supervisory boards of 86 of the 100 companies have this power; 14 companies (half of them local companies) explained why they did not apply this best practice provision, and none of the companies failed to comply with this provision. Of all the new best practice provisions in the Code this is the second most explained provision.

Table 14
II.2.10 – Fairness test

	Application	Explanation	Non-compliance	n
AEX	19	2	0	21
AMX	19	2	0	21
AScX	17	3	0	20
Local	31	7	0	38
Total	86	14	0	100

Table 15 shows that the majority of the companies referred implicitly to the fairness test (they indicated that they complied with the Code, but did not provide any specific information about the fairness test; they did not state that the supervisory board did not have this power). Local companies are over-represented here. The AEX is the only market segment in which explicit reference to the fairness test is more common than implicit reference. Explicit references usually consist of a statement that the supervisory board has the possibility of carrying out a fairness test. The most common explanation of why a company did not apply the best practice provision on the fairness test was that, although the company endorsed the new code in this respect, it would not apply it until 2010 or 2011.

Table 15
Reference to fairness test

	AEX	AMX	AScX	Local	Total
Explicit reference	10	8	7	4	29
Implicit reference	9	10	10	26	55
Explanation of non-application	2	5	3	4	14
Non-application without explanation	0	0	0	1	1
Total	21	23	20	35	99

The government took the initiative of providing a statutory basis for the fairness test.[9] The proposed Article 135, paragraph 6, of Book 2 of the Civil Code reads as follows:

'[the supervisory board] is competent to adjust the amount of a bonus to an appropriate level if payment of the bonus would be unacceptable according to the criteria of reasonableness and fairness. For the purposes of this article a bonus is understood to mean the variable part

[9] Parliamentary Papers II, 2009-2010, 32 512, no. 2.

of the remuneration, the granting of which is wholly or partly dependent on the achievement of certain targets or the occurrence of certain circumstances.'

The Monitoring Committee considers that the decision to enact this provision is premature. It takes this view because (i) little experience has yet been gained of the fairness test in the Code, and (ii) there is no evidence as yet of a lack of willingness on the part of companies to apply the fairness test. As previously indicated, the Monitoring Committee considers that the selective enactment of principles from the Code is at odds with the system of self-regulation on which the Code is based.

2.2.5. Clawback clause

II.2.11
The supervisory board may recover from the management board members any variable remuneration awarded on the basis of incorrect financial or other data (clawback clause).

Best practice provision II.2.11 relating to the clawback clause is new. The rate of application of this best practice provision is lower than that of the fairness test. In 73 of the 100 companies the supervisory board has the power to recover any variable remuneration awarded to a management board member on the basis of incorrect financial or other data (Table 16). 26 companies explained why they did not apply this best practice provision (nine local companies, six AMX companies, six AScX companies and five AEX companies). One company did not comply with this best practice provision.

Table 16
II.2.11 – Clawback clause

	Application	Explanation	Non-compliance	n
AEX				
- The supervisory board has the power	16	5	0	21
AMX				
- The supervisory board has the power	15	6	0	21
AScX				
- The supervisory board has the power	14	6	0	20
Local				
- The supervisory board has the power	28	9	1	38
Total				
- The supervisory board has the power	73	26	1	100

Table 17 shows that 25 companies explicitly referred to the existence of the clawback clause in the remuneration policy for management board members. One striking aspect is that over half of the companies in the survey (mainly the local companies) did not include an explicit reference and that 23 companies explained why they did not apply this provision. There were no differences between the market segments in the proportion of companies explaining non-application.

Table 17
Reference to clawback provision

	AEX	AMX	AScX	Local	Total
Explicit reference	12	7	4	2	25
Implicit reference	4	9	11	27	51
Explanation of non-application	5	7	5	6	23
Total	21	23	20	35	99

The clawback clause ranks fourth in the list of best practice provisions included in the survey for which an explanation of non-application was given most frequently in 2009 (23 explanations). Of all the *new* provisions in the 2008 Code, this is the best practice provision for which an explanation of non-application was most often given. Table 18 shows that the explanation given most frequently was that the company was in the process of implementing the provision.

Table 18
Explanation for non-application of II.2.11 - Clawback clause

Explanation given	AEX	AMX	AMS	Local	Total 2009	Total 2008
Company wishes to respect existing contracts	0	1	0	2	3	-
Company complies with existing legislation and regulations and/or is awaiting developments in this field	1	0	1	1	3	-
Company states that it is in the process of implementing the provision	4	5	3	4	16	
Company simply provides information about its own scheme	0	0	0	1	1	-
Other	0	0	1	2	3	-

Here too – just as in the case of the fairness test – the government has seen fit to arrange for the enactment of the clawback clause.[10] The text of the statutory provision is as follows:

'The company is competent to recover all of part of the bonus insofar as the payment has been made on the basis of incorrect information about the achievement of the targets underlying the bonus or about the circumstances on which the bonus was made conditional.

[10] Parliamentary Papers, 2009-2010, 32 512.

The claim for recovery may also be instituted by the supervisory board on behalf of the company (…)'

2.2.6. Remuneration report

> *II.2.12*
> *The remuneration report of the supervisory board shall contain an account of the manner in which the remuneration policy has been implemented in the past financial year, as well as an overview of the remuneration policy planned by the supervisory board for the next financial year and subsequent years. The report shall explain how the chosen remuneration policy contributes to the achievement of the long-term objectives of the company and its affiliated enterprise in keeping with the risk profile. The report shall be posted on the company's website.*

The rate of compliance with best practice provision II.2.12 is varied (Table 19). Under this best practice provision the remuneration report of the supervisory board must contain the following elements: (i) an account of the manner in which the remuneration policy was implemented in the past financial year, (ii) an overview of the remuneration policy plans by the supervisory board for the next financial year and subsequent years, and (iii) how the remuneration policy contributes to the achievement of the long-term objectives of the company and its affiliated enterprise, in keeping with the risk profile. Local companies scored lower rates of compliance with these elements. Nine local companies did not comply with part (i), fifteen with part (ii) and twenty-three with part (iii). Part (iii) was applied by only 12 of the 39 local companies in the survey. Across all market segments 38 of the 101 companies in the survey failed to comply with part (iii), while 59 companies applied this part of the provision and four companies explained why they had not done so. Higher percentages of companies applied parts (i) and (ii) of the provision (88 and 78 of the 101 respectively).

Table 19
II.2.12 – Remuneration report

	Application	Explanation	Non-compliance	N
AEX				
- The report contains a description of the remuneration policy of the past financial year	21	0	0	21
- The report contains a description of the remuneration policy for the next financial year	20	1	0	21
- The report explains how the remuneration policy helps to achieve the long-term objectives of the company	19	0	2	21
AMX				
- The report contains a description of the remuneration policy of the past financial year	21	0	0	21
- The report contains a description of the remuneration policy for the next financial year	19	1	1	21
- The report explains how the remuneration policy helps to achieve the long-term objectives of the company	16	0	5	21
AScX				
- The report contains a description of the remuneration policy of the past financial year	19	1	0	20
- The report contains a description of the remuneration policy for the next financial year	18	1	1	20
- The report explains how the remuneration policy helps to achieve the long-term objectives of the company	12	0	8	20
Local				
- The report contains a description of the remuneration policy of the past financial year	27	3	9	39
- The report contains a description of the remuneration policy for the next financial year	21	3	15	39
- The report explains how the remuneration policy helps to achieve the long-term objectives of the company	12	4	23	39
Total				
- The report contains a description of the remuneration policy of the past financial year	88	4	9	101
- The report contains a description of the remuneration policy for the next financial year	78	6	17	101
- The report explains how the remuneration policy helps to achieve the long-term objectives of the company	59	4	38	101

As regards alignment of the remuneration with the long-term objectives of the company, the survey examined what objectives are explicitly mentioned by the company in the annual report (Table 20). It is noteworthy that shareholder value was the objective most frequently mentioned in the context of remuneration policy.

Table 20
II.2.12 – The long-term remuneration is aligned with the following objectives:

	AEX	AMX	AScX	Local
Market share	6	2	0	2
Strategy development	3	2	1	0
Key Performance Objectives	3	1	0	2
Risk mitigation	5	2	1	1
Shareholder value	15	13	10	11
Number of companies	19	15	12	13

2.2.7. Overview of remuneration policy

II.2.13

The overview referred to in best practice provision II.2.12 shall in any event contain the following information:

a) an overview of the costs incurred by the company in the financial year in relation to management board remuneration; (…);

b) a statement that the scenario analyses referred to in best practice provision II.2.1 have been carried out;

c) for each management board member the maximum and minimum numbers of shares conditionally granted in the financial year (…);

d) a Table showing the following information for incumbent management board members (…):

i) the value and number of shares (…); ii) the present status of shares (…) awarded: whether they are conditional or unconditional and the year in which vesting period and/or lock-up period ends; iii) the value and number of shares (…) awarded under i) at the time when the management board member obtains ownership of them (end of vesting period), and iv) the value and number of shares (…) awarded under i) at the time when the management board member obtains unrestricted control over them (end of lock-up period);

e) if applicable: the composition of the peer group (…);

f) a description of the performance criteria (…);

g) a summary and account of the methods that will be applied in order to determine whether the performance criteria have been fulfilled;

h) an ex-ante and ex-post account of the relationship between the chosen performance criteria and the strategic objectives applied, and of the relationship between remuneration and performance;

i) current pension schemes and the related financing costs; and

j) agreed arrangements for the early retirement of management board members.

Best practice provision II.2.13 provides an overview of the remuneration policy to be implemented in the coming years. The extent of compliance differs from element to element.

The performance of the local companies is striking. Local companies failed to comply with this best practice provision a total of 217 times. In 35 cases, explanations for non-application were given and the provision was applied 127 times.

2.2.8. Disclosure of main elements of management board member's contract

> *II.2.14*
> *The main elements of the contract of a management board member with the company shall be made public after it has been concluded, and in any event no later than the date of the notice calling the general meeting where the appointment of the management board member will be proposed. These elements shall in any event include the amount of the fixed salary, the structure and amount of the variable remuneration component, any agreed redundancy scheme and/or severance pay, any conditions of a change-of-control clause in the contract with a management board member and any other remuneration components promised to the management board member, pension arrangements and performance criteria to be applied.*

This best practice provision is applied by most companies, with the exception of the part stating that the main elements of a management board member's contract should be disclosed no later than the date of the notice calling the GMS where the appointment is to be proposed. Fairly often companies fail to comply with this part of the provision. In the case of 12 of the 43 appointments, the company failed to explain why this part was not applied (Table 21).

Table 21 II.2.14 – Disclosure of main elements of management board member's contract				
	Application	Explanation	Non-compliance	n
Total				
The main elements of a management board member's contract are disclosed after the conclusion of the contract and in any event no later than the date of the notice calling the GMS at which his appointment is to be proposed	28	3	12	43
The amount of the fixed component of the remuneration has been disclosed	28	3	0	31
The structure and amount of the variable component of the remuneration have been disclosed	28	3	0	31
The redundancy scheme and/or severance pay has/have been disclosed	27	3	1	31
Any conditions of a change-of-control clause and other remuneration held out as a prospect to the management board member have been disclosed	27	3	1	31
The pension plan has been disclosed	26	5	0	31
The performance criteria for variable remuneration have been disclosed	14	4	1	19

2.2.9. Severance pay

II.2.15

If a management board member or former management board member is paid severance pay or other special remuneration during a given financial year, an account and an explanation of this remuneration shall be included in the remuneration report.

In the case of best practice provision II.2.15 it is noteworthy that it is either applied or not complied with (see Table 22). 17 of the 76 companies failed to comply. The survey also examined what reasons were most frequently given for special remuneration. A striking finding in the case of the AEX companies is the number of management board members appointed as an adviser and receiving special compensation in this capacity (seven). The Monitoring Committee considers that where appointment as an adviser is used as a way of circumventing the severance pay arrangement, this constitutes non-compliance.

Table 22 II.2.15 – Severance pay and other special remuneration				
	Application	Explanation	Non-compliance	n
AEX	14	0	6	20
AMX	15	0	2	17
AScX	9	0	1	10
Local	19	1	8	28
Total	57	1	17	75

3. The supervisory board

This chapter examines to what extent some of the best practice provisions from chapter 3 of the Code relating to the supervisory board are applied or explained. As in chapter 2 of this report, the best practice provisions are dealt with in the same order as they appear in the code.

3.1. Evaluation obligation of the supervisory board

III.1.7
The supervisory board shall discuss at least once a year on its own, i.e. without the management board being present, its own functioning, the functioning of its committees and its individual members, and the conclusions that must be drawn on the basis thereof. (…) The report of the supervisory board shall state how the evaluation of the functioning of the supervisory board, the separate committees and the individual supervisory board members has been carried out.

As Table 23 shows, 92 of the 99 companies in the survey made explicit mention of the evaluation. This number is divided more or less equally across the market segments. Four local companies do not provide specific information about the evaluation by the supervisory board.

Table 23
III.1.7 - Mention of evaluation

	AEX	AMX	AScX	Local	Total
Explicit mention	21	22	20	29	92
No evaluation (no reason given)	0	0	0	1	1
Explanation for absence of mention	0	1	0	1	2
No information	0	0	0	4	4
Total	21	23	20	35	99

Under best practice provision III.1.7 the report of the supervisory board must also state *how* the evaluation of the supervisory board has been carried out. Table 24 shows whether or not the companies in the survey provided information about how the evaluation was performed. Although 92 of the 99 companies in the survey made explicit mention of the evaluation, it is noteworthy that 64 of the 99 companies did not mention *how* the evaluation was carried out. However, the other 35 companies did provide this information. It was mainly the local companies that failed to provide information about the manner of evaluation (34 of the 64). In the case of the AScX and AMX companies too, the number of companies that failed to mention how the evaluation was carried out exceeded the number that did provide this information. The picture is different in the case of the AEX companies. Here the majority of companies did say something about the manner of evaluation (17 of the 21).

Table 24III.1.7 – Manner of evaluation

	AEX	AMX	AScX	Local	Total
Mentioned	17	10	7	1	35
Not mentioned	4	13	13	34	64
Total	21	23	20	35	99

The survey also examined how the evaluation was carried out. In the case of 20 companies (including ten AEX companies) a written survey was held among the supervisory board members in which they were often required to express an opinion on their own functioning and the functioning of their fellow members and of the various committees. A variant that was also mentioned involved discussion of the results of a series of bilateral meetings held by the chairman of the supervisory board with the individual members. Individual appraisal interviews were conducted by 12 companies (including nine AEX companies).

3.2. Independence

Best practice provision III.2.1

All supervisory board members, with the exception of not more than one person, shall be independent within the meaning of best practice provision III.2.2.

Under best practice provision III.2.1 only one member of a supervisory board may not be independent within the meaning of the Code. The criteria that a supervisory board member must satisfy in order to be deemed independent are set out in best practice III.2.2. In 2009 there were 19 supervisory board members (divided among 18 companies) who were not independent within the meaning of the Code. The company in which two supervisory board members could not be qualified as independent within the meaning of the Code gave an explanation of why it had not applied the provision. The Monitoring Committee would therefore note that the rate of compliance with this best practice is 100%.

Table 25
III.2.1 - Independence

	AEX	AMX	AScX	Local	Total
Number of supervisory board members in the employ of the company in the past five years	7	3	1	8	19

3.3. Composition of supervisory boards in 2009

> *III.3 Principle*
> *(…) The composition of the supervisory board shall be such that it is able to carry out its duties properly. The supervisory board shall aim for a diverse composition in terms of such factors as gender and age. A supervisory board member shall be reappointed only after careful consideration. The profile referred to above shall also be applied in the case of a reappointment.*

This section will examine the composition of supervisory boards with particular reference to the aspects of gender, age, nationality, expertise, independence and the correlation between the various diversity criteria in terms of expertise.

3.3.1. Gender

Table 26 shows that 64 of the 99 supervisory boards in the survey did not have any female members. This was true in particular of the local companies, since 30 of the 35 companies had no female supervisory board members. 22 companies had just one woman on their supervisory board. 11 AEX companies had two or more women on the supervisory board. None of the AScX and local companies had more than one woman on the supervisory board.

Table 26
Gender

	AEX	AMX	AScX	Local	Total
Number of men	137	116	77	129	457
Number of women	28	11	6	5	50
Number with no women members	6	14	14	30	64
Number with one woman member	4	7	6	5	22
Number with two or more women members	11	2	0	0	13

Table 27 shows the total number of men and women members who left the supervisory board or were reappointed or newly appointed to the board in 2009. The number of both men and women on supervisory boards increased by ten in comparison with 2008 (the difference between the number whose membership ended and the number of newly appointed members). More women were newly appointed to the supervisory boards of AEX and AMX companies than to the boards of the AScX and local companies.

Table 27
Gender

	Termination of membership	Reappointed	Newly appointed
Men	57	72	67
Women	3	7	13
Unknown	0	0	0
Number of observations	60	79	80

3.3.2. Age

Table 28 shows the average age of the supervisory board members of the companies in the survey. The average age is 60. The average age is the lowest (59) in the local companies and highest (62) in the AEX companies. 59 supervisory board members are aged between 69 and 74 and only 25 are younger than 48.

Table 28
Age

	AEX	AMX	AScX	Local	Total
Average age	62	61	60	59	60
Standard deviation in age	5.8	6.2	6.0	6.3	6.1
Number born in or before 1935	1	1	0	0	2
Number born in 1936-1940	22	15	8	12	57
Number born in 1941-1945	45	32	14	28	119
Number born in 1946-1950	60	36	29	42	167
Number born in 1951-1955	22	17	18	24	81
Number born in 1956-1960	12	20	9	15	56
Number born in 1961-1965	2	3	4	8	17
Number born in 1966-1970	1	1	1	2	5
Number born in or after 1971	0	0	0	3	3

The average age of the supervisory board members was lower than in 2008. This is evident from Table 29, which shows how many people in the different age categories left the board or were reappointed or newly appointed to the board in 2009. The positions of 69 supervisory board members born before 1945 became vacant in 2009.[11] Of these 69 positions, 42 were filled by someone from the same age category (in 32 cases through reappointment). On average, the members leaving the board were between five and eleven years older than the newly appointed members. This difference was rather smaller, however, in the case of the local companies.

[11] This is the number of supervisory board members who left the board plus the number of reappointed members.

Table 29
Age

	Termination of membership	Reappointed	Newly appointed
Average age	64	62	58
< 1936	0	0	0
1936-1940	14	8	2
1941-1945	23	24	8
1946-1950	7	36	28
1951-1955	8	6	23
1956-1960	5	3	12
1961-1965	1	2	4
1966-1970	0	0	2
> 1970	1	0	1
Unknown	1	0	0
Number of observations	60	79	80

3.3.3. Nationality

A particular feature of this criterion is that a supervisory board member may have more than one nationality. 376 supervisory board members have in any event Dutch nationality (and possibly a second nationality as well) and 131 supervisory board members do not have Dutch nationality (Table 30). On average, American nationality is the most common non-Dutch nationality; in the case of the AScX and local companies, Belgian nationality is the most common foreign nationality.

Table 30
Nationality

	AEX	AMX	AScX	Local	Total
Number of Dutch nationals	101	92	71	112	376
Number of non-Dutch nationals	64	33	12	22	131
USA	22	10	1	3	36
UK	16	6	2	5	29
Belgium	2	6	4	8	20
Germany	9	6	1	0	16
France	6	1	0	0	7
Sweden	2	2	1	0	5
Israel	1	1	0	1	3
Other countries	11	4	4	5	24

The number of supervisory board members with Dutch nationality rose by 16 in 2009 (Table 31). The number of non-Dutch nationals rose by 7. The breakdown by nationality shows that there has been a slight decline in the number of supervisory board members with foreign nationalities other than American, British, German and Belgian. Within the top four nationalities the greatest increase has been in the number of members with American nationality (an increase of five).

Table 31
Nationality

	Termination of membership	Reappointed	Newly appointed
Dutch nationality	44	57	60
Non-Dutch nationality	13	22	20
Unknown	3	0	0
USA	0	5	5
UK	4	10	5
Germany	0	1	3
Belgium	3	1	3
Other	6	9	4
Number of observations*	60	79	80

* The total number of observations exceeds the total number of positions on supervisory boards owing to dual nationalities.

3.3.4. Expertise

The degree of diversity in terms of expertise does not differ greatly between the various market segments. The maximum number of fields of expertise that could be specified for each supervisory board member was two. As Table 32 shows, the great majority of supervisory board members have gained their expertise in trade and industry. The next most common fields of expertise were finance & accountancy and banking & insurance. The other fields of expertise were distributed reasonably evenly, with technology and investment leading the way.

Table 32
Field of expertise[12]

	AEX	AMX	AScX	Local	Total
Trade and industry	88	68	36	70	262
Corporate finance & accountancy	26	17	16	23	82
Banking and insurance	29	18	12	12	71
Technology	21	7	6	7	41
Investment	7	7	11	11	36
Law	9	6	6	7	28
ICT	4	2	4	11	21
HRM	7	4	2	2	15
Politics and diplomacy	8	5	1	0	14
CSR and sustainability	4	4	0	3	11
General economics	0	0	2	1	3
Other	21	26	12	25	84
Unknown	0	1	0	0	1

Table 33 shows how the division among the fields of expertise has changed since 2008. In most of the fields there has, in general, been an increase in the number of supervisory board members having the specific expertise. The only field where this did not apply was

[12] This count also includes supervisory board members having two different fields of expertise.

technology: there were three fewer supervisory board members with this expertise. Two fields in which there was one less supervisory board member with the relevant expertise in 2009 were HRM and general economics.

Table 33
Field of expertise

	Termination of membership	Reappointed	Newly appointed
Trade & industry	25	46	41
Finance & accountancy	10	17	18
Banking & insurance	9	13	3
Technology	4	7	7
Investment	1	3	8
Law	3	6	3
ICT	1	3	7
HRM	1	3	0
Politics and diplomacy	3	2	3
CSR and sustainability	1	0	4
General economics	2	0	1
Other	11	7	11
Unknown	6	0	0
Number of observations*	60	79	80

3.3.5. Correlation between the diversity criteria

The previous sections dealt with various diversity criteria for the composition of supervisory boards. This section describes the correlation between the different criteria of gender, age, nationality and expertise. A summary is given in Table 34.

Women members of supervisory boards generally tend to have less expertise than men in the fields of finance and accountancy (5% compared with 13%) and banking and insurance (6% compared with 11%). However, women have more experience than men in the field of politics and diplomacy (8% compared with scarcely more than 1%).

As regards the age criterion, the only perceptible difference is that older members tend to have greater expertise in the fields of finance and accountancy whereas younger members tend to have more expertise in the field of investment. A clear difference between Dutch and non-Dutch supervisory board members is that non-Dutch members have a higher degree of technical expertise. As women and non-Dutch nationals clearly have different fields of expertise, they make the composition of supervisory boards more diverse. The foreign members contribute in the field of the sciences and the women members more in non-science fields.

Table 34
How gender, age and nationality differences correlate with expertise

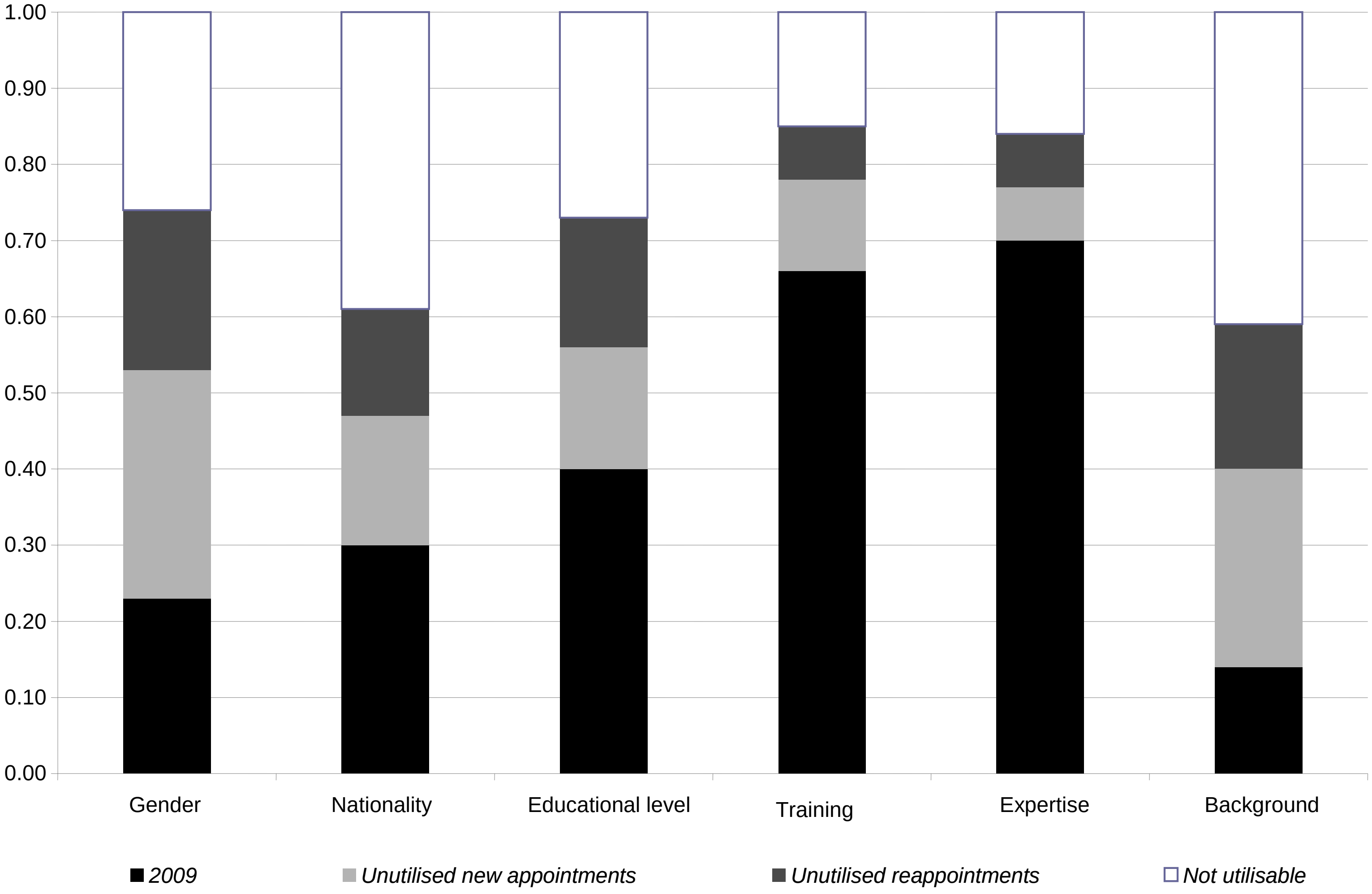
	Gender		Age		Nationality	
	Man	Woman	≤ 1955	> 1955	NL	Non-NL
Trade & industry	235	27	224	38	203	59
Finance & accountancy	79	3	69	13	62	20
Banking & insurance	67	4	64	7	56	15
Technology	41	0	38	3	24	17
Investment	36	0	23	13	29	7
Law	25	3	22	6	24	4
ICT	20	1	19	2	15	6
HRM	14	1	13	2	14	1
Politics and diplomacy	9	5	13	1	9	5
CSR and sustainability	10	1	9	2	8	3
General economics	3	0	3	0	3	0
Other	67	17	72	12	60	24
Unknown	1	0	1	0	1	0
Number of observations	457	50	426	81	376	131

3.3.6. Scope for change

To ascertain how diversity is evolving, the survey examined the maximum theoretical scope for change in respect of each diversity criterion, given the number of positions eligible to be filled. This theoretical scope for change was calculated both for the sum of reappointments and new appointments and for new appointments alone. This was then compared with the actual degree of diversity achieved. The variance between the maximum theoretical scope for change and the scope for change actually realised is the unutilised scope for change. This indicates the extent to which companies failed to make use of the opportunity to diversify the composition of their supervisory boards. Local companies and AScX companies left more scope for change unutilised than AEX and AMX companies, with the exception of the background of supervisory board directors. Here the AScX companies have significantly less unutilised scope for change than the other market segments.

Figure 1 (on the following page) provides an overview of diversity in 2009, once again for all 99 companies. The lowest sections of the bars indicate the degree of diversity in 2009. For example, diversity in terms of expertise is greater than diversity in terms of gender. The second section of the bar from under indicates what potential for change has been left unutilised by failure to use the opportunity presented by new appointments to achieve diversity. In cases where diversity was already at a high level in 2009, there is naturally less scope for change and the unutilised scope for change is smaller. The third sections from under show the scope for change left unutilised through the reappointment of supervisory board members who do not contribute to diversity. Finally, the white sections of the bars at the top indicate that the maximum of the indicators could not be achieved because some supervisory board members had not yet reached the end of their term of office in 2009.

Figure 1
Overview of utilisation of scope for change



3.3.7. Reason for termination of membership

In 2009, 60 supervisory board memberships ended. The survey examined the most common reasons for these terminations. These are shown in Table 35. The reasons most frequently mentioned were that the member was no longer available or that the maximum term of office had elapsed (both mentioned 10 times).

Table 35 Reason for termination of membership	
Reason	Number
No longer available	10
End of maximum term of office	10
No reason given	10
No time for job	7
Death	4
Appointment to another position[13]	4
Health	3
Need to avoid conflict of interest[14]	3
Age limit under the articles of association	3
Private reasons	2
Other job necessitates resignation	2
Other reasons	2
Total number of observations	60

Table 36 deals with the reasons why supervisory board membership ends. In 47% of the cases a fairly general reason is given. This reason is not really clear in 36% of the cases. Where the reason is clear, however, it tends to be job-related rather than of a personal nature or related to the term of office. In 75% of the cases the membership ends during the general meeting of shareholders. It is striking that in almost half the cases (43%) the termination takes place at the end of the first term of office. Termination after the second or third term of office occurs in about a quarter of the cases.

[13] An example of what is meant by 'another position' is the position of temporary member of the management board. This is in keeping with best practice III.6.7, which provides that a supervisory board member who temporarily takes on the management of the company where the management board members are absent or unable to fulfil their duties is obliged to resign from the supervisory board.

[14] Without explicit reference to best practice III.1.4, these are cases in which a supervisory board member retires early on account of a structural incompatibility of interests.

Table 36
Reason for termination of membership - specified

Panel A – Exactness of reason		
Precise reason	22	37%
General reason	28	47%
No reason	10	16%
Panel B - Type of reason		
Personal reason	9	15%
Job-related reason	16	27%
Reason related to term of office	13	22%
Unclear reason, other reason or no reason	22	36%
Panel C - Timing		
During the general meeting of shareholders	45	75%
In the course of the year	13	22%
During an extraordinary meeting of shareholders	2	3%
Panel D – Term		
First term of office	26	43%
Second term of office	15	25%
Third term of office	17	28%
Fourth term of office or more	2	3%

4. The general meeting of shareholders

Corporate governance issues involve three main players. The first two – the management board and the supervisory board – have been dealt with in the previous chapters. This chapter deals with the third main player: the shareholder.

The survey has examined compliance with some of the best practice provisions from chapter IV of the Code, which deals with the shareholders. These are best practice provisions IV.3.1, IV.3.13 (to be complied with by the company) and IV.4.1 to IV.4.6 (to be complied with by the shareholders). As regards the provisions IV.4.1 to IV.4.6, the Monitoring Committee has decided to focus on institutional investors. Other shareholders therefore fall outside the scope of the survey. All *Dutch* institutional investors (604 in total) were approached in connection with best practice provisions IV.4.1 to IV.4.6; 58 of them took part in the survey.

Besides examining compliance with the best practice provisions, the survey also covers various other aspects of the behaviour of institutional investors. Often these are related to best practice provisions from chapter IV of the Code and will therefore be dealt with, wherever possible, in conjunction with the best practice provisions concerned. For this part of the survey, twelve major foreign institutional investors were approached and invited to take part. In the end, 58 Dutch and five foreign institutional investors participated in this part of the survey, including two of the three largest foreign asset managers. Of the five foreign institutional investors that took part, four represent an invested capital of over EUR 50 billion.

4.1. Provision of information to and logistics of the general meeting

This chapter deals exclusively with provisions targeted at shareholders, with the exception of the best practice provisions discussed in this section: provisions IV.3.1 and IV.3.13, which are targeted at companies (and not at shareholders).

4.1.1. Use of webcasts etc. to enable shareholders to watch presentations

> *IV.3.1*
> *Meetings with analysts, presentations to analysts, presentations to investors and institutional investors and press conferences shall be announced in advance on the company's website and by means of press releases. Provision shall be made for all shareholders to follow these meetings and presentations in real time, for example by means of webcasting or telephone. After the meetings, the presentations shall be posted on the company's website.*

Best practice provision IV.3.1 is one of the best practices for which an explanation of non-application was given most often. Table 37 shows the most common reasons given for non-application of this best practice provision. The explanation that the administrative burden and/or financial costs of complying with the provision were too high was used on 17 occasions in 2009. This compares with 20 in 2008. Since 2008 there has been a rise in the number of companies simply providing information about their own scheme when explaining their reasons for non-application (7 in 2008 and 10 in 2009). The majority of companies giving this explanation were local companies (7).

Table 37
Explanation for non-application of best practice provision IV.3.1

Explanation given	AEX	AMX	AScX	Local	Total 2009	Total 2008
Company states that it is still in the process of implementing the provision	0	0	0	2	2	1
Company simply provides information about its own scheme	0	2	1	7	10	7
Scope of the provision and/or unduly high administrative burden and/or financial expenses prevents compliance	0	0	5	12	17	20
Other	2	2	2	2	8	12

Table 38 shows that local companies are most likely to explain why they do not apply best practice provision IV.3.1 (19 times). In addition, eight of the 39 local companies in the survey failed to comply with the provision. In total, 56 companies applied best practice provision IV.3.1, 33 companies explained why they did not apply it and 12 companies failed to comply with it.

Table 38 Best practice provision IV.3.1	Application	Explanation	Non-compliance	n
AEX				
- Announced in advance and watchable as a webcast etc.	19	2	0	21
- Available from public sources	20	1	0	21
AMX				
- Announced in advance and watchable as a webcast etc.	16	4	1	21
- Available from public sources	21	0	0	21
ASCX				
- Announced in advance and watchable as a webcast etc.	9	8	3	20
- Available from public sources	20	0	0	20
Local				
- Announced in advance and watchable as a webcast etc.	12	19	8	39
- Available from public sources	25	3	11	39
Totaal				
- Announced in advance and watchable as a webcast etc.	56	33	12	101
- Available from public sources	86	4	11	101

4.1.2. Policy on bilateral contacts

IV.3.13

The company shall formulate an outline policy on bilateral contacts with the shareholders and publish this policy on its website.

It is noteworthy that 14 of the 21 AMX companies do not comply with best practice provision IV.3.13 (Table 39). This number is even higher in the case of local companies (23 of the 39).

Table 39 Best practice provision IV.3.13	Application	Explanation	Non-compliance	n
AEX	19	0	2	21
AMX	6	1	14	21
ASCX	12	4	4	20
Local	11	5	23	39
Total	48	10	43	101

4.2. Responsibility of shareholders

The Code contains six provisions targeted directly at shareholders:

- best practice provisions IV.4.1 to IV.4.3 are intended specifically for institutional investors and concern the relationship between institutional investors and the ultimate beneficiary owners;
- best practice provisions IV.4.4 to IV.4.6 are intended for shareholders generally (including institutional investors) and concern the relationship between shareholders and the company.

In the discussion of these provisions below, findings about the conduct of institutional investors will also be presented, where relevant.

4.2.1. Annual publication of proposed policy on voting rights

Best practice IV.4.1
Institutional investors (pension funds, insurers, investment institutions and asset managers) shall publish annually, in any event on their website, their policy on the exercise of the voting rights for shares they hold in listed companies.

Of all Dutch institutional investors which took part in the survey, 59% indicated that they applied this best practice provision. The degree of application varied according to the size of the invested capital and hence the size of the institutional investor concerned. 89% of the institutional investors with an invested capital of between EUR 1 and 50 billion reported that they applied this best practice provision. The figure in the case of investors with an invested capital of EUR 50 billion or more was 88%. Only 13% of the institutional investors which did not apply the provision explained why they did not do so. Non-compliance with this best practice provision was particularly common among small institutional investors with invested capital of up to EUR 1 billion.

4.2.2. Annual report on implementation of the policy on voting rights

Best practice IV.4.2
Institutional investors shall report annually, on their website and/or in their annual report, on how they have implemented their policy on the exercise of the voting rights in the year under review.

In total, 60% of Dutch institutional investors which took part in the survey stated that they applied this best practice provision. A breakdown of the findings by reference to the amount of invested capital shows once again that the large institutional investors are more likely than their smaller counterparts to apply this best practice provision. 84% of institutional investors with invested capital of between EUR 1 and 50 billion indicated that they applied this provision, compared with 88% of investors with invested capital in excess of EUR 50 billion. Non-compliance with this best practice provision was particularly common among small institutional investors (i.e. investors with invested capital of less than EUR 1 billion).

4.2.3. Quarterly report on the exercise of voting rights

Best practice IV.4.3
Institutional investors shall report at least once a quarter, on their website, on whether and, if so, how they have voted as shareholders at the general meeting.

57% of all Dutch institutional investors which participated in the survey stated that they reported on their website whether they had voted as shareholders at a GMS. 48% of all institutional investors also stated that they reported how they had voted as shareholders at a GMS. 85% of the institutional investors who posted these reports on their website stated that they did so quarterly. Once again, it was mainly the large institutional investors who applied this provision. Almost none of the institutional investors who did not apply the provision explained why they did not do so.

Exercise of voting rights
Institutional investors (including foreign investors) indicated that they had cast their vote in advance at 43% of the meetings at which they were entitled to vote in the 2010 shareholder meeting season. Among the asset managers this figure was 93%. The large institutional investors in particular cast their vote in advance of the meetings. Institutional investors themselves attended and voted at 9% of the meetings. In 13% of the cases a vote was cast by a third party proxy present at the GMS.

4.2.4. Response time

Best practice IV.4.4
A shareholder shall exercise the right of putting an item on the agenda only after he has consulted the management board about this. If one or more shareholders intend to request that an item be put on the agenda that may result in a change in the company's strategy, for example through the dismissal of one or more management or supervisory board members, the management board shall be given the opportunity to stipulate a reasonable period in which to respond (the response time). This shall also apply to an intention as referred to above for judicial leave to call a general meeting pursuant to Article 2:110 of the Netherlands Civil Code. The shareholder shall respect the response time stipulated by the management board within the meaning of best practice provision II.1.9.

The institutional investors were asked to indicate what they considered to be a reasonable period for the management board to respond in cases where a shareholder requests that an item be put on the agenda that may result in a change in the company's strategy. It is clear from the responses of the institutional investors who took part in the survey that:

- 88% of them considered that a period of 90 days or less was long enough;
- 69% of them considered that a period of less than 60 days was reasonable;
- 41% of them considered that a period of less than 30 days was reasonable.

4.2.5. Voting as one sees fit

Best practice IV.4.5
A shareholder shall vote as he sees fit. A shareholder who makes use of the voting advice of a third party is expected to form his own judgment on the voting policy of this adviser and the voting advice provided by him.

62% of all Dutch institutional investors applied this provision. Only 9% of the institutional investors who did not form their own judgement in voting explained why they had not applied this best practice provision. Non-compliance with this provision was most common among the small and medium-sized pension funds.

Hiring of proxy advisory services
Of both Dutch and foreign institutional investors who took part in the survey, 56% reported that they made use of proxy advisory services. This was particularly true of the larger institutional investors. All the asset managers used proxy advisory services. Smaller pension funds indicated that they did not make use of the services of such firms. Two proxy advisory

firms in particular are used: the most popular is ISS/RiskMetrics (57%), followed by Glass Lewis & Co (26%). A different proxy advisory firm is used in the other cases (17%).

Type of advice

Different types of advice are available: off-the-shelf and customised. Off-the-shelf (i.e. standard) advice is taken in 54% of cases and customised advice in 46% of cases. The larger asset managers in particular reported that they used customised voting advice. Large investment institutions and major pension funds evidently tend to use off-the-shelf advice.

Check on advice

58% of the Dutch and foreign institutional investors which participated in the survey reported that they discussed the voting policy with the proxy advisory firms in advance, even where they received off-the-shelf voting advice. They also stated that they checked the advice retrospectively.

Influence of voting advice

Institutional investors were also asked to what extent parties influenced how votes were cast. Proxy advisory firms were said to have the most influence. (The respondents could also choose from lobbying organisations and other institutional investors.) Institutional investors that used proxy advisory services indicated that they disregarded the advice only in a very limited number of cases.[15]

Voting chain

Best practice provision IV.3.12 states that a company must offer shareholders the opportunity to issue voting proxies to an independent third party prior to the GMS. This independent third party then casts the vote at the meeting. Generally, the exercise of the voting right involves a chain consisting of several links. The shareholder issues a voting instruction to the custodian. This is the party who helps the shareholder to exercise his rights. The custodian stores, manages and administers securities. Unless the custodian itself is designated as a proxy, it passes on the voting instructions to a party designated for this purpose by the shareholder. This may be a civil-law notary or another third party. This is the last link in the chain and the person who actually casts the vote at the meeting. It is noteworthy that shareholders often do not know whether their vote has actually been cast and, if so, whether it has been cast in accordance with their instructions. Over 50% of the respondents indicated that they had limited information[16] as to whether the voting instruction

[15] On a scale from 0 to 10 the average score was 1.7.
[16] On a scale from 0 to 100 the average score was 25.

had been executed; 17% reported that they knew this exactly. In answer to the question about the extent to which the chain between the shareholder and the person ultimately casting the vote should be checked, 44% stated that they did not consider this to be necessary at all; 30% (mainly the large institutional investors) stated that this should certainly be done and 20% were uncertain. In many cases, therefore, neither the company itself nor anyone in the chain checks whether the proxy has been properly executed either qualitatively (has the vote been cast correctly?) or quantitatively (has a vote been cast?).

4.2.6. Giving reasons for agenda item

Best practice IV.4.6
If a shareholder has arranged for an item to be put on the agenda, he shall explain this at the meeting and, if necessary, answer questions about it.

Of all Dutch institutional investors which participated in the survey, 93% indicated that they had not arranged for items to be put on the agenda. For this reason, no further examination was carried out.

4.2.7. Overview of compliance with best practice provisions IV.4.1 – IV.4.6

When the findings set out above are combined in a single table, this gives the following picture:

Best practice provision	Compliance by Dutch institutional investors with an investment capital in excess of EUR 50 billion (N=8)			Compliance by Dutch institutional investors, irrespective of the size of their invested capital (N=58)		
	Applies	Explains	Does not comply	Applies	Explains	Does not comply
IV.4.1 annual report on proposed policy on voting rights	88%	0%	12%	59%	5%	36%
IV.4.2 annual report on implementation of policy on voting rights	88%	0%	12%	60%	6%	34%
IV.4.3 Quarterly report on exercise of voting rights	88%	0%	12%	48%	7%	45%
IV.4.4 response time	88%	0%	12%	76%	10%	14%
IV.4.5 voting as one sees fit	100%	0%	0%	62%	4%	32%
IV.4.6 giving reasons for agenda item[17]	n/a	n/a	n/a	n/a	n/a	n/a

If the findings are broken down according to the amount of invested capital[18], the rates of application of these provisions by the eight large Dutch institutional investors are high. Compliance by all Dutch institutional investors (i.e. including medium-sized and smaller institutional investors) is lower on average: closer to 60%. Only in a limited number of cases

[17] Provision IV.4.6 reads as follows: 'If a shareholder has arranged for an item to be put on the agenda, he shall explain this at the meeting and, if necessary, answer questions about it.' 93% of all Dutch institutional investors did not arrange for an item to be put on the agenda.

[18] A distinction is made between small and medium-sized institutional investors (i.e. investors with less than EUR 50 billion in invested capital) on the one hand and large institutional investors (with more than EUR 50 billion in invested capital) on the other).

do these institutional investors explain why they have not applied the provision. There is therefore a relatively high degree of non-compliance.

4.3. Shareholder engagement

Section IV.4 deals with two aspects of conduct that are not directly connected with a specific provision in part IV.4 of the Code.

4.3.1. Perception of shareholder engagement

Dutch institutional investors were asked whether they regarded themselves as engaged shareholders. On a scale of 0 to 100, 52% percent of the investors which took part in the survey awarded themselves a score of 70% or higher; 36% gave themselves a score of 30% or lower. The latter category consisted mainly of pension funds. In relative terms, asset managers were most likely to see themselves as engaged shareholders.

4.3.2. Investments in shareholder engagement

43% of the institutional investors did not invest in shareholder engagement. This was particularly true of the small and medium-sized pension funds. Large institutional investors invest to a limited extent in separate departments for corporate governance and shareholder engagement. 61% of institutional investors reported spending less than EUR 100,000 and a quarter spending more than EUR 200,000 on shareholder engagement.

4.4. Familiarity with the Code

In the context of the compliance survey discussed above, a non-response analysis was also carried out among the total population of Dutch institutional investors. All institutional investors which did not take part in the survey (i.e. approximately 90% of the total population) were asked whether they were familiar with the content of the relevant provisions of chapter IV of the Code and the accompanying statutory provisions specifically intended for institutional investors. 35% stated that they were not familiar with the content of these provisions and 28% that they were familiar with the content, while 37% did not answer the question for a variety of reasons.

5. International developments

The Committee has examined whether there have been international corporate governance developments of interest up to November 2010. A non-exhaustive summary is given below.

5.1. European Commission

During the past year, the European Commission took various corporate governance initiatives. One example is the issuance of the 'Corporate governance in financial institutions and remuneration policies' and 'European audit market' Green Papers. There is a draft resolution on the remuneration of directors in the financial sector. Standards have also been developed on cross-border voting and the directive on alternative investment funds has been adopted.

Corporate governance in financial institutions and remuneration policies Green Paper
The Green Paper on corporate governance has been prepared with the idea that shareholders are often absent and inactive and so play a lesser role in the checks and balances at listed companies.

In June 2010, the European Commission published a Green Paper on Corporate governance in financial institutions and remuneration policies and opened it for consultation to Member States. The Commission asked whether and, if so, on what points the existing corporate governance rules relating to financial enterprises are not working property and whether and, if so, to what extent corporate governance rules are not adequately being implemented. The Green Paper also addresses the remuneration of directors of listed companies. The Commission's proposals include a requirement for institutional investors to adhere to the Code and disclose their voting practices so that the company has the ability to identify shareholders. It also calls for a limit on the number of boards on which a director may sit, a ban on combining of the functions of CEO and Chairman, mandatory 'risk committees' and more women on supervisory boards. The Commission has now received the responses to the consultation and will use them to decide whether and what legislative steps should be taken in the spring of 2011.

European audit market Green Paper
The European Commission published the 'Audit Policy: Lessons from the Crisis' Green Paper on 13 October 2010. The Commission is consulting on the role of the statutory audit of financial statements. The question is whether the audit function should be enhanced so that

new financial risks can be limited in future. The Commission proposes more independent operation and improvements in communication from external auditors to the outside world. The Commission also lists measures to improve the audit function, such as client rotation and the appointment and remuneration of external auditors by a third party, preferably a regulator. After the consultation period, the Commission will decide on the basis of the responses whether measures should be taken.

Draft resolution on remuneration of directors in the financial sector

The draft resolution on remuneration of directors of listed companies and remuneration policies in the financial services sector was adopted on 7 July 2010. The draft resolution calls on Member States to set a limit on severance pay of no more than twice the annual fixed pay component. Furthermore, there should be no severance pay in cases of failure or voluntary departure. Member States should require a balance between fixed and variable pay. In addition, to strengthen the link between performance and pay, variable pay should also be linked to predetermined performance criteria. The long-term sustainability of companies must be promoted. This demands a balance between long and short-term performance criteria, for example, by requiring that some shares must be held until the end of employment. It has also been proposed that companies should be able to reclaim variable reward paid on the basis of data which proved to be manifestly misstated (‘claw back’).

Cross-border voting

A European standard for cross-border voting, the ‘market standard for general meetings’, has been agreed. A working group of listed companies, investors and banks has developed a set of standards on calling shareholder meetings, communication on the size of the equity interest being voted on and the announcement of participation in decision-making at the shareholders’ meeting. Preparation of the standards is being supported by the European Commission and fits within the context of the European directive on shareholder rights.

Directive on Alternative Investment Fund Managers

The Directive on Alternative Investment Fund Managers (AIFM) requires Member States to regulate alternative investments, such as hedge funds and private equity, more strictly. The AIFM directive requires alternative investment funds to disclose investment strategies and bookkeeping information to investors and regulators. Fund managers will be subject to a minimum capital requirement. Another significant change is the introduction of a market licence (passport), creating the possibility for funds to trade throughout the European Union without having to deal with individual national laws. All Member States must have transposed the directive into national legislation by 2013.

5.2. International Corporate Governance Network and International Integrated Reporting Committee

International Corporate Governance Network

The International Corporate Governance Network (ICGN) is a global network of institutional investors which aims to raise standards of corporate governance worldwide. On 22 February 2010, the ICGN published the Global Corporate Risk Oversight Principles consultation document. The idea is that shareholders must have sufficient capacity and resources to inform themselves of and monitor the quality of the strategy and risk oversight of the companies they invest in. It follows from the draft principles that shareholders must pay attention to corporate risk oversight in discussions with the board. The companies must provide clear information on this.

International Integrated Reporting Committee

A new initiative has been taken to create a global framework for integrated reporting: the Global Reporting Initiative & Accounting for Sustainability Project. The International Integrated Reporting Committee (IIRC) has been set up for this. Its remit is to create a globally accepted framework for integrated reporting that contributes to a better understanding by analysts and other stakeholders of a company's overall performance. The initiative involves all significant parties, including IASB, IOSCO, the four large accountancy firms, the umbrella organisation of Chief Financial Officers of listed companies and the ICGN. The IIRC's aim is to publish a draft standard by the end of the year. A definitive standard will be presented to the G20 during 2011.

5.2 United Kingdom

There have been changes in the field of corporate governance in the United Kingdom. The Corporate Governance Code has been revised, a Stewardship Code has been introduced and legislation has been proposed on amending the Takeover Code.

Corporate Governance Code

The revised version of the British Corporate Governance Code came into force on 29 June 2010. It states that directors of British listed companies should be subject to annual re-election. According to the Financial Reporting Council (FRC), annual re-election will not only contribute to greater accountability of directors, but also promote the expertise, independence and time commitment of executive and non-executive directors. The revised

Corporate Governance Code also states that the functioning of the board should be evaluated by an external party once every three years. This would emphasise the board's responsibility for setting the risk appetite. Listed companies are also required to set out their strategy clearly in the annual report.

Stewardship Code

In addition to the Corporate Governance Code, a specific British code for institutional investors was published in the United Kingdom in July 2010. British institutional investors must disclose, for example, on their website, whether they subscribe to the Stewardship Code. The Stewardship Code will be monitored by the FRC from 2011. There will be no active supervision of the extent of compliance with the Code. The regulator expects that investors will hold the institutions accountable.

The FRC has called on foreign institutional investors and their proxy advisory firms to comply with the Code for British listed companies. Foreign investors are, however, free under the 'comply or explain' option to comply with other international standards on shareholder responsibility.

Further to the Code, British institutional investors have set up an Institutional Investor Council (IIC), to ensure that British investors speak more with a single voice on policy issues and that they act together towards listed companies. The IIC was set up mainly to promote the Stewardship Code.

Takeover Code

The UK government is proposing to alter the bid rules or more specifically the Takeover Code. To this end, the British Takeover Panel published a consultation document on corporate governance and the trend towards short-termism on 1 June 2010. The consultation was launched following the recent acquisition of the British soft-drinks and confectionary manufacturer Cadbury by the US company Kraft Foods. The document relates to takeovers, shareholders' responsibilities and, for example, the remuneration policy for directors. It means that the takeover process will no longer be determined by speculative investors with short-term interests. The consultation asks about the possible causes of the short-term focus of shareholders and how shareholders can become more involved in the activities of listed companies. The aim is to shorten the period of uncertainty for the company and its stakeholders.

Following the consultation period, the Takeover Panel published a report on 21 October 2010. This report states that in cases in which there is public speculation about a takeover, a potential bidder must state within four weeks of these rumours whether or not it will be making an official bid for the shares. If the potential bidder does not wish to make a bid, it may not make a new bid within six months of such announcement. The Takeover Panel wants to forbid ‘break-up fees’, in other words the bidder may not demand that the target company pays a penalty of up to 1% of the takeover price at the time that the board of the target company eventually decides to withdraw an earlier recommendation to its shareholders to accept a bid. All fees to advisers should be transparent and bidders must provide more information on their plans for the target company and employment at that company. Given the adverse responses to the consultation, the Takeover Panel decided against suspending the voting rights on shares purchased during the bid process and the proposal to impose a minimum threshold of 60% or two-thirds for a public bid to become unconditional.

5.3 United States

Major legislation strengthening the rights of shareholders has been passed in the United States. Attention has also been given to voting by investors and possible inside information and price manipulation.

Restoring American Financial Stability Act

During the year, legislation to strengthen shareholders’ rights, the Restoring American Financial Stability Act and later amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, was passed by the Senate and the House and it took effect on 21 July 2010. The Act grants shareholders in American listed companies the right to hold an advisory vote on remuneration policy once every three years. Once every the six years the general meeting of shareholders must decide how frequently it wants to vote on remuneration. The US regulator, the Securities and Exchange Commission (SEC), has been given statutory authority to draw up a rule allowing shareholders in US listed companies to nominate their own candidates for the board. The legislation also contains provisions on setting up an independent remuneration committee and incorporating claw-back provisions in the remuneration policy. Furthermore, companies must explain the underlying idea if the positions of CEO and Chairman are held by the same person. American stockbrokers may no longer vote on directors’ remuneration without voting instructions.

A particular point in the new right is that shareholders in US listed companies may nominate directors. The SEC wants to increase shareholders' influence over membership of the boards of US listed companies. Shareholders may, however, no more than propose more than a quarter of the number of directors and must represent at least 3% of the total voting rights (excluding borrowed shares). Until recently, it was expected that shareholders would be able to nominate directors in shareholders' meetings held in 2011, but the SEC has delayed introduction of their nomination rights because of a legal challenge to the SEC in the District of Columbia Court by the Business Roundtable and the American Chamber of Commerce, who are demanding that the SEC withdraws its plans to allow shareholder participation in the appointment of directors. They argue that the SEC failed to undertake a thorough cost-benefit analysis of the decision. The court will rule in the spring of 2011.

Voting by investors

There is a draft decision by the SEC, based on a provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act, requiring investors to provide information on the way they vote on directors' remuneration. This obligation applies to investors who have at least USD 100 million invested in US listed companies.

Inside information and price manipulation

US legislation allows directors of UIS listed companies to hold one-on-one dialogues with shareholders and shareholder organisations. The SEC recommends that companies institute procedures to avoid breaching the Fair Disclosure Regulation, for example, by listing the subjects to be discussed in advance and holding the meeting in the presence of the head of legal affairs. The SEC points out that it is advisable to have the shareholders sign a non-disclosure agreement if confidential information is discussed.

5.4 Germany

There were some notable developments in Germany on the membership of supervisory boards and speeches at general meetings of shareholders.

Supervisory boards

The German corporate governance committee (Klaus-Peter Müller Committee) revised the German Corporate Governance Code in respect of the membership of supervisory boards with the intention not only of having more women members, but also making these boards more international. Companies are asked to report each year on their plans to achieve the desired constitution of supervisory boards. The supervisory board will set specific targets which must be published in the corporate governance report along with progress on them. The German committee has also tightened the scope of the maximum number of supervisory directorships that may be held. This remains at three, but now includes supervisory directorships of both listed companies and other large companies. The revised Code took effect on 26 May 2010.

General meetings of shareholders

The German Federal Court of Justice ruled in *Karl-Walter Freitag* vs *Biotest* that the chairman of a general meeting of shareholders may limit shareholders' oral statements to 15 minutes for each agenda item and to 10 minutes for later speakers. The chairman may furthermore allot a total of 45 minutes for shareholders' speeches. The chairman is also free to switch off the microphone once the speaking time has been exceeded and may rule that a meeting will close, for example, at 10.30 p.m.

5.5 Italy

The Italian government has set out a position on loyalty dividends and also announced that it wants to alter the rules on bids.

Loyalty dividend

Legislation to implement the Shareholders' Rights Directive has been passed by the Italian parliament and taken effect. The legislation makes it possible to pay a loyalty dividend. Italian listed companies may pay a loyalty dividend if permitted by their articles of association. Shareholders are eligible for a 10% dividend if they have held their shares for at least a year and their shareholding in the company is no more than 0.5%. The law also states that shareholders who represent at least 2.5% of the issued capital are entitled to propose items for the agenda of general meetings. A uniform record date has also been implemented and is set at seven days before the day of the meeting. Those who are shareholders on that day may vote regardless of whether they have transferred the shares by the day of the meeting. The law also opens the possibility of asking securities intermediaries to disclose the identity of shareholders as proof that those persons hold shares. The identity of a shareholder will remain secret if he wishes to remain anonymous.

Bid rules

As in the United Kingdom, the Italian government is proposing to change its bid rules. The Italian stock market regulator, Commissione Nazionale per le Società e la Borsa (Consob), opened consultations on 6 October 2010. It is proposed to allow beneficial long-positions and cash-settled equity swaps to count in establishing whether a party has reached the threshold for making a public bid. Further details have also been given of the concept of ‘acting in concert’ so that shareholders who collaborate on corporate governance matters or exercising specific rights of minority shareholders will no longer be faced by the mandatory bid rule if together they breach the threshold. The consultation closed on 15 November 2010 and, depending on the responses, consideration will be given to what further steps will be taken.

5.6 Other countries

Ireland

The Irish stock exchange expressed the wish in a consultation document published on 1 July for the country to have its own corporate governance code. Up to now the British Corporate Governance Code has applied to Irish listed companies. The Irish Stock Exchange (ISE) wants to end the automatic application of the British code, as it wants to express its own opinions on the desirability of applying changes in the British Code to Irish companies. In addition, foreign investors have the impression that the corporate governance structure in Ireland falls short of the global standard. The proposal is to add local principles, such as stricter requirements for the ‘comply or explain‘ principle, to a copy of the British Code. Furthermore, Irish companies should report in more detail on the size and structure of the board, expertise of individual directors, work of committees and results of the evaluation of the functioning of the board. The responses to the consultation showed, however, that there was no support for this proposal which was, therefore, withdrawn.

Norway

The revised version of the Norwegian Corporate Governance Code makes corporate social responsibility one of to the directors’ responsibilities. This is included in the section covering ‘risk management and internal control’.

South Africa

A code of conduct for institutional investors is being developed in South Africa. Institutional investors will have to demonstrate that they treat their shareholders’ rights responsibly. The draft code has been drawn up by a special committee on which different stakeholders are represented. it means that investors should have a policy on holding discussions with the company if problems occur. They also have to publish the criteria they use to determine their voting and develop policies on preventing and dealing with conflicting interests.

Composition of the Corporate Governance Code Monitoring Committee

Chairman

Jos Streppel
Former Chief Financial Officer of Aegon NV
Vice-chairman the Supervisory Board of KPN NV
Vice-chairman of the Supervisory Board of Van Lanschot NV

Members
Ieke van den Burg
Former member of the Socialist Group in the European Parliament
Former member of the Executive Board of the Federation of Dutch Trade Unions (FNV)
Member of the Supervisory Board of ASML Holding NV
Member of the Supervisory Board of APG Groep NV

Jurjen Lemstra
Partner at Lemstra Van der Korst
Lecturer in company law at Radboud University, Nijmegen

Jaap van Manen
Professor of Corporate Governance at the University of Groningen
Partner at PricewaterhouseCoopers Accountants NV

Henriette Prast
Professor of Personal Financial Planning at Tilburg University
Member of the Scientific Council for Government Policy
Member of the Banking Code Monitoring Committee
Member of the Supervisory Board of the Netherlands Authority for the Financial Markets

Hélène Vletter-van Dort
Professor of Banking and Securities Law at Erasmus University Rotterdam
Professor of Securities Law at the University of Groningen
Member of the Supervisory Board of De Nederlandsche Bank

Peter Wakkie
Vice-Chairman of the Supervisory Board of Wolters Kluwer NV
Member of the Supervisory Board of Tomtom NV
Member of the Supervisory Board of BCD Holdings N.V.

Member of the Supervisory Board of ABN AMRO Group N.V.

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