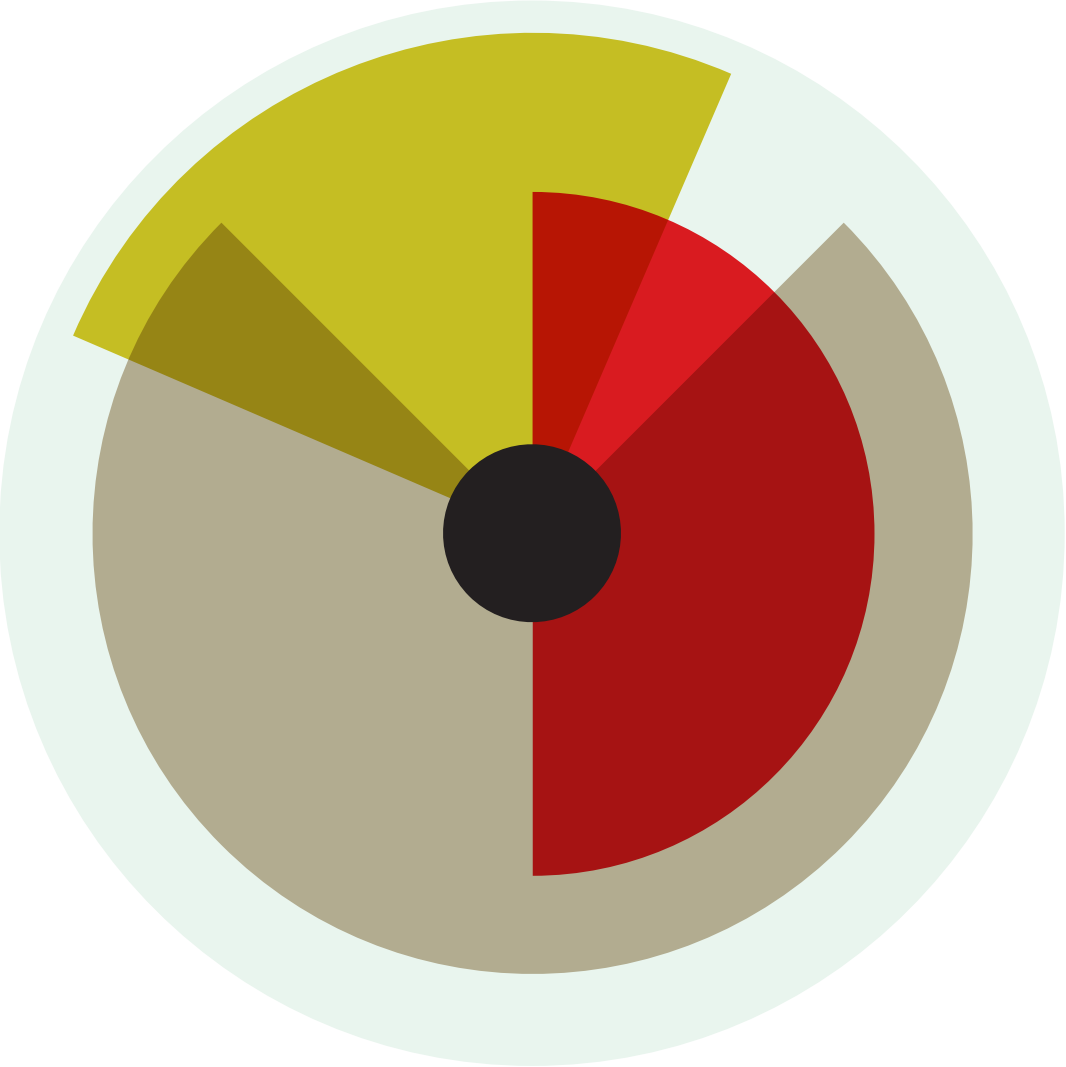
Monitoring Committee

CORPORATE GOVERNANCE CODE

Report
December
2011



Monitoring Committee

CORPORATE GOVERNANCE CODE

Third report on compliance with Dutch Corporate Governance Code

December 2011

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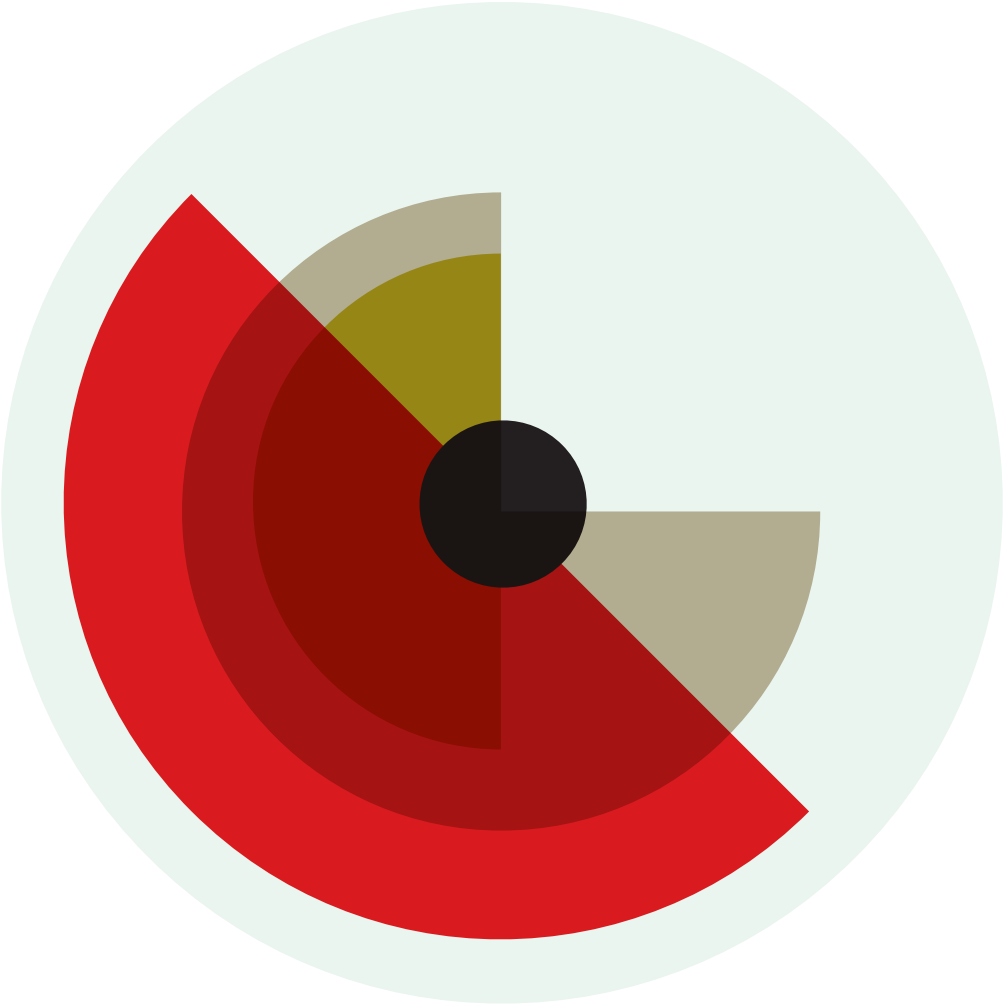
www.commissiecorporategovernance.nl



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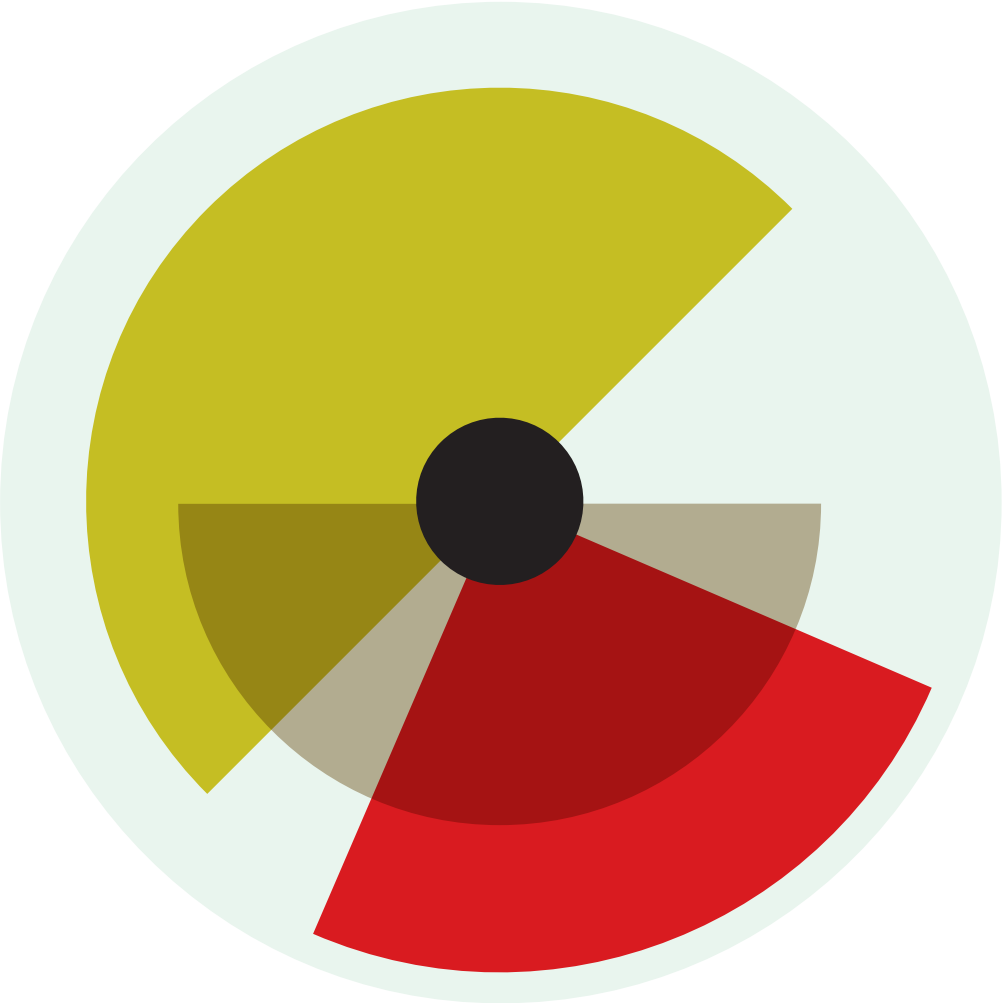


FOREWORD

We were greatly saddened by the death of Morris Tabaksblat this past October. After his impressive managerial career, he devoted himself to propagating the principle of good corporate governance in the Netherlands. It is to his great credit that the vital importance of corporate governance is now recognised by all stakeholders, an achievement that commands universal respect. In fact, the endorsement of the principles of corporate governance by supervisory boards, management boards, shareholders, civil society organisations and the academic world in the Netherlands is largely due to his efforts.

The first corporate governance code, which bears his name and is known as the Tabaksblat Code, was intended for listed companies, but also inspired other organisations to comply with its principles and best practices. His code reflects a body of ideas about standards of conduct – good governance – that enjoys widespread support. The Netherlands, which now plays a pioneering role in this field in Europe, owes a great debt of gratitude to Morris Tabaksblat.

The Code is clearly a success. The surveys carried out this year and in past years show not only that there is a high rate of compliance with the principles and best practices but also that these principles and best practices are alive and well. They influence how responsibility, accountability and conduct are approached both inside and outside companies. We shall continue his work in recognition of his efforts.

When the Tabaksblat Code was introduced, no one could have foreseen that we would now find ourselves in such difficult economic times. Given the current situation it is understandable that society and politicians have recently devoted extra attention to aspects of corporate governance such as severance pay for management board members. In determining the focus of its surveys this year, the Committee has taken these social aspects into account.

Not only is corporate governance in the spotlight in the Netherlands but it is also the subject of debate in Europe. For example, the European Commission published its Green Paper on Corporate Governance at the start of this year. This is a consultation document that discusses a large number of topical subjects such as directors' remuneration with a view to improving corporate governance in Europe. To this end the European Commission is studying whether legislation at European level is necessary. Interestingly, the issues raised by the European Commission reflect many of the items on the Committee's own agenda. It welcomes the fact that the European Commission is working to improve corporate governance in Europe. As the financial markets are closely intertwined, the Netherlands stands to benefit from good European corporate governance. The Monitoring Committee would also point out that all the issues covered in the Green Paper already formed an integral part of either the Code or legislation. Surveys show that the Dutch system of 'apply or explain' and, above all, the monitoring system are rated very highly at European level. Nonetheless, the Committee still sees room for improvement in some areas. To this end it will raise certain matters with a small number of companies.

I should like to take this opportunity to make some observations about subjects that are admittedly not a direct consequence of the surveys commissioned by the Committee, but nonetheless have a real bearing on support for and compliance with the Code.

A side-effect of the heightened public and political interest in corporate governance is a tendency to remove socially sensitive subjects from the Code and regulate them by law in a kind of cherry-picking exercise. For the Committee, this continues to be a matter of concern. If compliance were to remain poor over a long period, introducing legislation would be understandable as an ultimate remedy. However, the Committee notes that in some cases the legislator has not waited to assess compliance and has instead very quickly made proposals to enact a modified and amplified provision. For example, very soon after the new clawback provision was introduced in the Code, a bill to regulate this issue was presented to parlia-

ment. In view of the success of the Code it would have been better in a number of cases to have allowed more time for self-regulation in the form of compliance with its new provisions.

In addition, the manner in which certain provisions of the Code are translated into draft legislation does not always do justice to the underlying principles of the Code. For example, the Code reflects the idea that variable remuneration should serve the long-term interests of the company. However, as a result of an amendment to the clawback bill, even the vested shares of management board members would be 'frozen' in the event of a takeover or possible takeover. This will have the undesirable side-effect that management board members are disinclined to retain their shares for a longer period. The Committee also considers that this provision may well be at odds with the right of ownership (right to peaceful enjoyment of possessions) under the European Convention on Human Rights (ECHR).

In the Committee's opinion, the provisions included by the legislator in the Frijns Bill are also not optimum. This bill is based on a number of recommendations made to the legislator by the previous Monitoring Committee chaired by Jean Frijns. I also touched on this briefly in my foreword to last year's report, in connection with the Supreme Court's ruling in the ASMI case. The bill provides that shareholders who have an interest of 3% or more in a listed company must indicate whether they object to the corporate strategy. As I pointed out last year, the risk is that shareholders will indicate, solely for legal reasons, that they do not support the corporate strategy. In this way they will keep all their options open in any future debate with the management. Unfortunately, this provision has so far remained unchanged in the Frijns Bill. I should like to stress that the present bill – despite its name – is not in keeping with the recommendation of the Frijns Committee, which merely proposed that a shareholder with an interest of a given size in a Dutch listed company should be obliged to disclose his intentions. Disclosure of intentions has now been transformed by the legislator into notice of whether the shareholder objects to the corporate strategy. It is precisely this transformation that can produce the undesirable side-effect mentioned above and may be harmful to Dutch companies. If a large proportion of the shareholders indicate for tactical – and not substantive – reasons that they oppose the corporate strategy, this will hardly be conducive to the proper functioning of the companies concerned. The original aim of the Frijns Committee in making this recommendation, namely to promote constructive dialogue between the company and its shareholders, will not be achieved by the bill in its present form.

Although I do not wish to comment on the results of the surveys, I should like to make a number of general observations. The first pertains to the survey of the quality of the explanations given for non-application. The Code operates on the basis of the 'apply or explain' principle: if a company does not apply a best practice provision of the Code it must give an explanation. Failure to provide an explanation constitutes non-compliance. However, the possibility of providing an explanation does not mean that compliance with the Code is 'without obligation'. Every explanation must be properly substantiated. As is evident from this report, the Committee considers that some types of explanation are not acceptable and amount to non-compliance. Ultimately it is up to the shareholders of a company to decide whether they will accept an explanation of non-application, always assuming that it is explicitly brought to their attention.

My second observation concerns compliance with the best practice provision that a shareholder should vote as he sees fit. Usually, voting rights are exercised through various intermediaries. How this takes place is often not clear to the person ultimately entitled to vote. It may be unclear whether the vote been cast in accordance with his proxy or indeed whether it has even been cast at all. As in last year's report, the Committee notes that this lack of transparency is undesirable. After all, the proper operation of the voting chain is essential if a shareholder is to be able to cast a vote as he sees fit.

In this context it has also emerged that there is sometimes confusion about the responsibility for outsourcing investment decisions to an asset manager. The Committee considers that outsourcing through an investment mandate does not relieve the person entitled to the shares from the responsibility from voting as he sees fit or from the duty of disclosing his voting record. The shareholder continues to have final responsibility even if he follows the recommendations of third parties.

In its report, the Committee pays much attention to the supervisory board report and the evaluation and composition of the supervisory board. Generally speaking, the composition appears to have remained virtually unchanged. This also means that no progress has been made in increasing the proportion of women members.

Thus far my comments have been rather critical. Let me now conclude by mentioning a number of positive points, because they certainly exist.

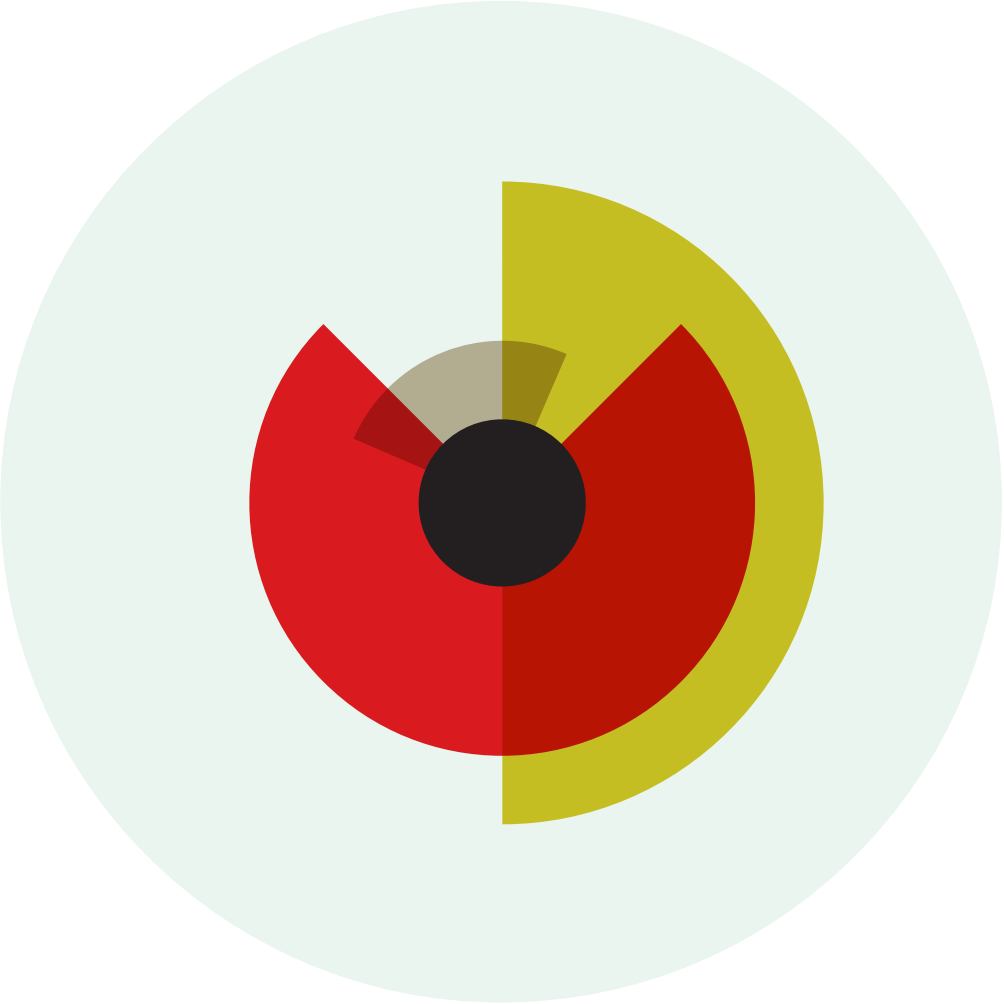
A positive factor which I mentioned briefly at the start of my foreword and which once again underlines the importance of self-regulation is that small and medium-sized enterprises and other non-listed companies increasingly apply the Code. They are under no obligation to comply with the Code but do so voluntarily.

Another positive aspect involves the interviews the Committee held with management board members, supervisory board members and shareholders to discuss and evaluate the survey findings. These interviews help the Committee develop its thinking. Importantly, they also help to generate greater support for the Code and for the Committee's work. In addition, the interviews cover sensitive social and political issues.

The Committee notes that lobbying organisations and professional bodies are also actively involved with corporate governance. The knowledge of these organisations makes a valuable contribution to the debate. For example, the Professional Association of Auditors (NBA) in the Netherlands published a number of recommendations on how the role of auditors could be strengthened in relation to that of the supervisory board. The Committee considers that these recommendations would effectively implement the principles and provisions on auditors in the Code.

Finally, the Committee would like to express its thanks to everyone who has cooperated in the surveys conducted on its behalf. It very much appreciates the attendance and active involvement of the various participants in the interviews. We trust that we can count on the same level of positive cooperation next year. Thanks are also due to our secretaries. Without their efforts in preparing the meetings and processing the results, as well as their assistance with all the surveys, this report would not have materialised.

Jos Streppel
Chairman of the Corporate Governance Code
Monitoring Committee



BROAD OUTLINE

The Dutch Corporate Governance Code (the Code) contains generally accepted principles and best practice provisions of good corporate governance. It is the task of the Corporate Governance Code Monitoring Committee (referred to below as the Monitoring Committee or the Committee) to ascertain each year whether Dutch listed companies comply with the Code.[1] Given the high compliance rates of recent years, the Monitoring Committee commissioned a survey this year into compliance with the best practice provisions for which the rate of application was less than 90% in at least one of the past four years In addition, compliance with the provisions newly included in the Code in 2008 was examined, regardless of the compliance rate achieved in the 2009 financial year. This report outlines the results of the 2011 survey into compliance in the 2010 financial year. More detailed information is included in the survey reports.

In addition to the general monitoring of compliance, the Monitoring Committee requested, in keeping with the work schedule it formulated at the time of its appointment, that a number of specific topics be addressed in the surveys. The first topic is the application of the best practice provisions on management board appointments and severance pay for management board members appointed since the Code entered into force on 1 January 2004 (see below at 2). The second topic concerns the quality of the explanation given for non-application (see below at 3). The third topic concerns the voting and communication behaviour of foreign institutional investors in Dutch listed companies (see below at 4). The fourth topic is the composition of the supervisory board and the evaluation of its functioning and the report of the supervisory board (see below at 5).

1. Main conclusions

- Existing remuneration and other agreements may be honoured only in the case of management board members appointed before 2004.
- No severance pay in the case of voluntary departure (resignation).
- When explaining non-application, simply referring to the company's own scheme without giving further reasons does not constitute an explanation and is treated as non-compliance.
- If temporary non-application lasts longer than one year, the company must explain when it expects to be able to apply the Code.
- The minimum retention period for shares granted to management board members starts from the moment of their conditional grant.
- Shares may be sold by management board members within the five-year retention period if the purpose of the sale is to pay income tax on the acquisition (sell to cover). This practice constitutes an acceptable explanation.
- If the management board acts in accordance with the Code, failure on the part of the shareholders to comply with the response time invoked by the board is acceptable only in exceptional cases.
- No progress has been made in terms of increasing the number of women on supervisory boards.
- The report of the supervisory board should, at minimum, describe the process of evaluation, all activities and specific focus areas and the attendance rate of the board as a whole.

1 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.

2. Survey of appointments since the start of 2004 / explanation that existing contracts are honoured

For a number of years the best practice provisions on the maximum term of appointment[2] and severance pay[3] have been two of the provisions for which an explanation of non-application is given most frequently. One of the most common explanations is the wish to honour existing agreements and/or contracts. It is important to distinguish here between an employment contract and the agreements that are made when a person is appointed under the articles of association as a management board member. The Code does not apply to relationships governed by employment law and the related contract. However, the Code does apply to the position of a management board member under the articles of association and to the agreements made in this connection.

An employment contract for an indefinite term leaves open the possibility of applying the four-year period of appointment referred to in II.1.1. Invoking an existing employment contract is therefore not an acceptable explanation of the non-application of the provisions governing the appointment of management board members under the articles of association. In the case of management board members appointed before the entry into force of the Code, the explanation that existing agreements are being honoured is, in principle, acceptable. Whether this explanation is also used in the case of management board members appointed since the start of 2004 was one of the topics covered by this year's surveys. The statement that an existing contract is being honoured does not constitute compliance in such cases.

The results of this survey are given below. Please note that this survey, unlike the other surveys, is not limited to the 2010 financial year but covers all the financial years since the Code entered into force. In addition, it considers only the new appointments in a given year and any explanation of the non-application of the Code in relation to these appointments.[4]

II.1.1. Maximum term of appointment

The Committee distinguishes between three situations here:
I) the management board member was appointed before 2004; in this situation the explanation that the Code has not been applied because of the wish to honour agreements made at the time of the appointment is permitted. These management board members are not included in this survey, which is restricted to appointments since the start of 2004.
II) the management board member has been appointed since the start of 2004 and was not previously employed by the company; in this situation the Code applies in full and explanation of non-application based on existing contracts constitutes non-compliance.
III) the management board member has been appointed since the start of 2004 and was previously employed by the company; in this situation too the maximum term of appointment of four years applies in full. Although the management board member may possibly have previously had an employment contract for an indefinite term, his appointment as management board member is nevertheless for a term of four years. In such a case explanation of non-application based on existing contracts constitutes non-compliance.

It emerges from the survey that the explanation of non-application was based on a wish to honour existing contracts in a total of 17 new appointments since 2004. These cases therefore constituted non-compliance. The Monitoring Committee is pleased to note that the wish to honour existing contracts was not given as an explanation for non-application of this best practice provision in the case of new appointments in the 2010 financial year.

2 This best practice provision reads as follows: '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.'
3 This best practice provision reads as follows: '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.'
4 In subsequent years this explanation was also used for these management board members. However, these figures are not reflected in this survey.

II.2.8 Maximum severance pay

Here, too, the Monitoring Committee distinguishes between three situations:
I) the management board member was appointed before 2004; in this situation the explanation that the Code has not been applied because of the wish to honour agreements made at the time of the appointment is permitted. As stated above in respect of the maximum term of appointment, these pre-2004 appointments are not covered by the survey.
II) the management board member has been appointed since the start of 2004 and was not previously employed by the company; in this situation the Code applies in full and explanation of non-application based on existing contracts constitutes non-compliance.;
III) the management board member has been appointed since the start of 2004 and was previously employed by the company; in this situation too the maximum severance pay amounting to once the fixed annual salary applies since the employment contract and the appointment under the articles of association are independent of one another. The Committee recognises that in some cases a management board member could obtain a higher severance pay, based on the previous relationship under employment law, than once the fixed annual salary. In order to apply the Code, a company should ensure that in such a situation a management board member, at the time of his appointment, waives the agreements under which he might be entitled to higher severance pay under the terms of his employment contract.

As regards the agreements made about maximum severance pay in the event of termination of employment, explanations of non-application based on a wish to honour an existing contract were given in a total of 15 cases, which therefore constituted non-compliance. The Committee is pleased to note that the wish to honour existing contracts was not given as an explanation for non-application of best practice provision II.2.8 in the case of any new appointments in 2010. It should be noted, incidentally, that various interviews held by the Committee this year revealed a widely held view among the public that the provisions of the Code should also apply in full to management board members appointed before 2004.

In addition to the contractual agreements made about severance pay, the survey also examined the amount actually distributed as severance pay to departing management board members in 2010 and whether this was in conformity with the Code. It was found that the employment of 34 management board members was terminated in 2010, and 18 of them received severance pay. Four of them were found to have received severance pay that was not in conformity with the Code. In two of these cases a reasoned explanation was given and the company concerned thus complied with the Code. In the other two cases there was non-compliance as no explanation was given for exceeding the severance pay limit.

The Committee distinguishes between three forms of termination of employment in the context of severance pay: (i) voluntary departure (resignation); (ii) departure by mutual consent or after joint consultation (which often means in practice that the management board member is requested to leave and agrees to do so), and (iii) dismissal. The Committee considers that in the last two situations the management board member is entitled to a maximum payment of once the fixed annual salary.

If a management board member leaves voluntarily (i.e. in case (i)), the Committee considers that severance pay is not appropriate.

3. Survey of the quality of explanations given for non-application

The quality of the explanation is of crucial importance to the 'apply or explain' principle. A poor-quality explanation is treated by the Committee as non-compliance. The Committee had formed the impression that companies were engaging in a form of copycat behaviour by borrowing their explanations for non-application from the annual reports of other companies. Only if companies are actually in identical situations could such a standardised form of explanation be acceptable. The Committee would like to stress that an explanation for non-application should, in principle, be specific to the company concerned. The use of the same explanation by two or more companies should, in the view of the Monitoring Committee, therefore be an exception rather than the rule. This is why the Committee arranged for a survey of the quality of the explanations given for non-application of a number of best practice provisions from the Code, with specific emphasis on explanations that the company has its 'own scheme' and/or that the non-application is of a 'temporary nature'.

The survey revealed some noteworthy findings. There has been an increase in the number of cases in which companies explain non-application merely by stating that they apply their own scheme, without indicating why they do not apply the provision. In the opinion of the Committee, this constitutes non-compliance. Reasons must always be given as to why the company's own scheme is necessary and how this relates to the relevant principle of the Code. The Committee will treat this type of explanation as non-compliance in next year's survey of compliance with the Code. Some companies endorse, in principle, the basic rule of the Code, but indicate that they may depart from it in specific situations where this is warranted by the circumstances. This is a superfluous observation since this situation is implicit in the 'apply or explain' system of the Code. In addition, some companies indicate that while they endorse the basic rule, they depart from it in a specific situation that is described. Whether the Code is complied with in these cases depends on the quality of the explanation given. Finally, there are companies which indicate that they assess from case to case whether to apply the Code. Where the Code is not applied in such cases, this constitutes non-compliance.

As regards the explanation that the 'non-application is of a temporary nature', the Committee considers that if the temporary situation lasts longer than one year, an explanation should be given, the company should state when it expects to be able to apply the Code.

The Committee asks companies to give due consideration to the explanation given for non-application. Sometimes a general explanation is sufficient, for example where legislation or regulations prevent application of the Code (the company should then indicate the specific legislative or regulatory provision concerned), but in general the explanation should be specific to the company.

The survey into the quality of the explanation for non-application of best practice provision II.2.5 revealed that two factors play a role here. Under this best practice provision shares granted to management board members as part of their remuneration must be retained for a period of at least five years. The first question that arises is whether the five-year period starts at the moment when the shares are granted conditionally or unconditionally. The Committee considers that the mandatory retention period starts from the moment of conditional grant. Although the question is not relevant in all cases, since many management board members retain such shares voluntarily for longer than five years, the Committee nonetheless considers it important to address this issue. Retaining shares voluntarily sends a more powerful signal than a mandatory retention period. The second question is whether management board members may sell such shares within the five-year period in order to pay a tax assessment imposed in respect of the shares granted, because the liability to pay tax arises at the moment of grant. The Committee considers such sell-to-cover transaction to be an acceptable explanation of non-retention of the shares. This is common practice in order to avoid a situation in which management board members hold financed shares in their own company.

4. Shareholders

In its work schedule adopted when it was appointed, the Monitoring Committee chose the 'citizenship of shareholders'[5] as one of the focus areas for its term of office. Last year the Committee commissioned a wide-ranging survey among all Dutch institutional investors. Based on the basis of the findings of this survey, the Committee chose a number of topics for more in-depth study this year. This is why this year's survey is confined to a select group of large investors rather than covering all institutional investors. Around three quarters of shares in Dutch companies are held by foreign shareholders. This year's survey therefore focused on the 25 largest Dutch institutional investors[6] and 14 large foreign asset managers known by the Committee to be active in the Netherlands.[7] The more in-depth study in the form of interviews was carried out exclusively among the foreign asset managers. The survey produced a number of findings, but when interpreting these findings it should be remembered that participation in the survey and interviews was on a voluntary basis.

The role of proxy advisory services

As regards the obligation to vote as one sees fit,[8] it was examined once again how and to what extent large institutional investors use proxy advisory services. The survey reveals that the influence of proxy advisory services is perhaps not as great as the overall picture suggests. Foreign asset managers indicate that they use proxy advisory services mainly to gather information they can take into account when making their own decision on how to vote. They also state that they do not always subscribe to the voting advice service (and instead confine themselves to the proxy service). If they do subscribe to the voting advice service, this is often done on the basis of a customised voting policy.[9]

Naturally, the selective nature of the sample should be borne in mind when considering the results of the survey. The sample included institutional investors that pursue a more active or activist investment policy and should for this reason be regarded as less inclined to rely 'blindly' on proxy advisory services. The Committee suspects that the more passive investors and smaller investors do less research of their own and tend to rely more on the advice of the proxy advisory services (possibly using information available on the websites of the services). Nor has the nature of the customised voting policies been examined in more depth. To what extent such policies take account of provisions that are specific to the Dutch Code is as yet unclear. Based on the interviews it held, the Committee perceives a trend in which investors are becoming more aware of their own responsibility for deciding how to vote. The Committee intends to carry out a follow-up survey next year into the role of proxy advisory services in order to obtain a more complete picture of how they influence voting at general meetings of shareholders in the Netherlands. Next year the Committee wants to compare the results of this year's survey among (foreign) investors with the findings in relation to Dutch companies.

It should be noted, incidentally, that only a small number of proxy advisory services give advice relating to Dutch companies. The capacity for advising on Dutch companies is limited, but is supplemented by better-equipped organisations or departments of some large Dutch institutional investors, Eumedion and the Association of Stockholders (VEB).

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5 As noted in the 2010 report, the Monitoring Committee understand 'citizenship of shareholders' to mean that shareholders should actually discharge the responsibilities associated with their rights.

6 A distinction is made between insurers, pension funds, investment firms and asset managers. The survey covers the top 25 investors across these categories.

7 The survey of compliance with the best practice provisions intended for institutional investors is confined to the 25 Dutch institutional investors. The survey of compliance with the best practice provisions on the conduct required of shareholders in their dealings with listed companies covers both the 25 Dutch institutional investors and the 14 foreign asset managers.

8 This best practice provision reads as follows: '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 judgement on the voting policy of this adviser and the voting advice provided by him.'

9 In the case of a customised voting policy, the voting advice is based not only on the internal policy guidelines of the proxy advisory service but also on the specific guidelines for casting a vote on behalf of the investor himself.

Response time

Best practice provision IV.4.4. on the response time[10] is the provision for which an explanation of non-application is most frequently given. In its report of December 2010 the Monitoring Committee noted that plain rejection of the 180-day period as a reasonable response time is treated as non-compliance. If a shareholder wishes to put an item on the agenda that relates to a change in corporate strategy, he must give the company's management board the opportunity to invoke a reasonable response time (maximum of 180 days). Under the Code the shareholder must honour this response time. Provision II.1.9[11] of the Code prescribes further requirements as to the conduct of the management board that has invoked the response time. The management board should use this period for further deliberation and constructive consultation, in any event with the shareholder concerned. The Monitoring Committee considers that if the company's management board invokes a response time (of a maximum of 180 days) without using this for constructive consultation (and thus does not act in conformity with the Code), the shareholder is no longer bound to honour this period. He may then apply a different period, although the statutory period of 60 days' notice still applies in any event. If the company's management board does enter into consultation with the shareholder, the latter is obliged to honour the response time invoked by the management board. Any departure from this period would be viewed by the Committee in this situation as inappropriate and unacceptable, barring very special circumstances.

5. Composition and evaluation of the functioning of the supervisory board and report of the supervisory board

As regards the supervisory board, the topics specifically examined in this year's survey once again included principle III.3[12] concerning the composition of the board and best practice provision III.1.7[13] concerning the evaluation of the functioning of supervisory board. In addition, the survey covered the report of the supervisory board.

10 This best practice provision reads as follows: '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.'

11 This best practice provision reads as follows: '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, in any event with the relevant shareholder(s), and shall explore the alternatives. (...).'

12 This principle reads as follows: 'Each supervisory board member shall be capable of assessing the broad outline of the overall policy. Each supervisory board member shall have the specific expertise required for the fulfilment of the duties assigned to the role designated to him within the framework of the supervisory board profile. 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.'

13 This best practice provision reads as follows: '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 desired profile, composition and competence of the supervisory board shall also be discussed. Moreover, the supervisory board shall discuss at least once a year without the management board being present both the functioning of the management board as an organ of the company and the performance of 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.'

Composition of the supervisory board

The survey finding that the number of women on supervisory boards has not increased is both striking and disappointing. When analysing the distinction between male and female supervisory board members, we notice that in the case of both women and men the number of members leaving the supervisory board in 2010 was exactly equal to the number joining the board. Seven female and 67 male supervisory board members resigned, and the same numbers were appointed. In general, the AEX companies have more female supervisory board members than companies in other segments.

It emerged from the interviews held by the Committee with supervisory board members that although intensive efforts are made to find female candidates for appointment to the supervisory board, the supply is too small to meet demand. The Committee therefore wonders whether the search for candidates is not confined to an unduly limited circle of people. The Committee will pay extra attention in next year's survey to cases in which companies indicate that they have not appointed female supervisory board members because of the absence of suitable candidates.

Evaluation of the functioning of the supervisory board

Best practice provision III.1.7 is of particular importance to the functioning of the supervisory board. It is noteworthy that in general companies report that an evaluation has been carried out but do not specify how. From its talks with management board and supervisory board members the Committee concludes that it would be desirable to include a description of the evaluation process, and possibly the outcome in broad outline, in the report of the supervisory board. An example would be the observation that the board is searching for specific expertise. Naturally, there is no need to include references to individual supervisory board members.

Report of the supervisory board

As the Monitoring Committee has the impression that supervisory board reports are often superficial and rather uninformative, this was a special topic in this year's survey. The survey revealed that supervisory board reports generally fulfil the formal requirements of the Code. However, their contents are of little informative value. As corporate governance has evolved, the duties and responsibilities of the supervisory board have become more onerous. In the opinion of the Committee, this heavier role should also be reflected in the board's accountability to stakeholders.

The Committee therefore considers that the report of the supervisory board should provide information about all activities of the supervisory board and the specific focus areas. Good supervision and advice is not always compatible with complete openness. It is not usually in the interests of the company when doubts about whether the management board and the supervisory board agree on strategy and policy become public knowledge. The Committee therefore appreciates that the report of the supervisory board does not disclose information about internal discussions that precede a decision explained in the report of the management board.

As regards reporting of frequent non-attendance, the Committee would in any event like the supervisory board report to specify the attendance rate of the board as a whole. This is information that every board can be expected to supply. Where appropriate, this could be supplemented by an observation that frequent absentees were called to account by the chairman.

INTRODUCTION

The Dutch Corporate Governance Code

The Dutch Corporate Governance Code (the Code) contains principles and best practice provisions that are generally regarded as elements of good 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. 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. In 2008, the Code was amended and supplemented with new best practice provisions.

Remit and work schedule of the Corporate Governance Monitoring Committee

The current Monitoring Committee was established on 2 July 2009 for a term of four years. Its remit is to help ensure that the Dutch Corporate Governance Code is kept up to date and practicable. The Monitoring Committee is reporting this year for the second time on compliance with the 2008 Code. When it took office, the Committee formulated a work schedule in order to implement its statutory remit: This work schedule is as follows:

- The Monitoring Committee will monitor compliance with the 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.
- 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);
  - the 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.

2011 review

Survey

For the 2010 financial year, the Monitoring Committee decided to survey compliance with those best practice provisions for which the rate of application was less than 90% in at least one of the past four years and with new provisions that were included in the Code in 2008. In addition, specific topics were selected for examination on the basis of the work schedule. The specific topics included in the survey of the 2010 financial year were:

1. compliance with the best practice provisions on management board appointments and severance pay in the case of appointments after the entry into force of the Code, i.e. after 1 January 2004;
2. explanations that a provision is not applied because the company has its 'own scheme' or that the non-application is 'only temporary';
3. the quality of the explanations given for non-application;
4. the composition of the supervisory board and the evaluation of its functioning;
5. the report of the supervisory board; and
6. the (voting) behaviour of foreign institutional investors and communication by foreign institutional investors with the company.

The survey of general compliance with the Code and the surveys of the issues referred to at 1, 2 and 3 above were carried out on behalf of the Monitoring Committee by the University of Groningen. The Institute for Business Law carried out the surveys referred to at 4 and 5. Finally, the survey referred to at 6 was performed by Nyenrode Business University. The survey reports, which were compiled under the responsibility of the universities concerned, are posted on the Monitoring Committee's website (www.commissiecorporategovernance.nl).

Compliance meetings

The Monitoring Committee held compliance meetings with management board members, supervisory board members and shareholders in 2011 as well. During these meetings the Committee presented the preliminary results of the surveys to the participants; the presentations were followed by an exchange of views. The Committee drew special attention to a number of issues. Among the topics raised were the appointment and severance pay of management board members, the quality of the explanation given, the evaluation of the functioning of the supervisory board, the report of the supervisory board, the response time and the role of proxy advisory services. In addition, the Committee held talks with the ministers most closely involved and with organisations concerned with corporate governance, including the Federation of Dutch Trade Unions (FNV) and the National Federation of Christian Trade Unions in the Netherlands (CNV), Confederation of Netherlands Industry and Employers (VNO-NCW), the Association of Securities-Issuing Companies (VEUO), the Dutch Central Bank (DNB), the Netherlands Authority for the Financial Markets (AFM), Eumedion, the Association of Stockholders (VEB) and the Dutch Professional Association of Auditors (NBA). The corporate governance principles were also discussed in board programmes and courses organised by universities, the Internal Auditor Organisations (IAA) and the consultative meetings of company secretaries of listed companies. In the context of the Corporate Governance Green Paper, the Committee also participated in consultation with the European Commission and the European Parliament.

Meeting with the Parliamentary Standing Committee for Finance

In 2011, the Monitoring Committee held an exploratory meeting with the Parliamentary Standing Committee for Finance. The Monitoring Committee regarded this meeting as very useful. The members of the Parliamentary Standing Committee too stated that they appreciated the meeting and would like to hold regular meetings with the Monitoring Committee. Naturally, the Monitoring Committee will gladly accede to this request.

2012 preview

In view of the surveys carried out this year and its work schedule, the Monitoring Committee intends to focus the 2012 survey on:

- asset management mandates and how they incorporate corporate governance aspects;
- the role of proxy advisory services viewed from the perspective of listed companies;
- diversity in the composition of supervisory boards and the experience and background of supervisory board members;
- the report of the supervisory board;
- the position of the chairman of the supervisory board; and
- the quality of the explanations given for non-application.

In 2012, the Committee will once again hold compliance meetings with the various parties concerned. Companies that have a poor compliance record will be individually called to account for this.

Structure of this report

This monitoring report is organised as follows. Chapter 1 provides a broad overview of compliance. First, a number of developments compared to compliance in the 2009 financial year are highlighted. Next some best practice provisions are discussed; where relevant, attention is also paid to the quality of the explanation. The provisions relating to the supervisory board are examined in chapter 2. This chapter also considers the composition of the supervisory board and the evaluation of its functioning, as well as the report of the supervisory board. Chapter 3 concerns the shareholders and pays specific attention to the conduct, particularly the voting behaviour, of foreign shareholders. The final chapter (chapter 4) describes relevant international developments in the field of corporate governance.

1. COMPLIANCE

Developments relative to 2009 and some best practices

As stated above, the Monitoring Committee commissioned a survey this year into compliance with the best practice provisions for which the rate of application was less than 90% in at least one of the past four years and provisions newly included in the Code in 2008 or amended, as well as into some specific topics chosen by the Committee. The general picture is that the rate of application by the AEX companies was close to 100%. The Committee considers this to be a positive development. The rates of application and compliance by the AEX, AMX and AscX companies were generally higher than by the local companies, with the AEX companies having a higher application rate than AMX companies and the latter a higher rate of application than AscX companies. Section 1.1 of this chapter deals with the main change in compliance relative to the 2009 financial year. Section 1.2 examines compliance with a number of best practices.

Besides carrying out the general compliance survey, the researchers also studied the quality of the explanation given for non-application, in particular explanations that a provision is not applied because the company has its 'own scheme' or that the non-application is 'only temporary'. The main findings of this survey into the quality of explanations have already been set out in the broad outline section. These findings are not repeated in a general sense in this chapter. Section 1.2 does specifically examine the quality of the explanation given for a number of best practice provisions.

1.1. Developments relative to 2009

A number of developments relative to 2009 were identified:

- the application rate rose for about half of the provisions studied, remained roughly constant for over a quarter and fell for just under a quarter;
- there was a slight increase per company in the average number of best practice provisions for which an explanation of non-application was given (from 5.2 in 2009 to 5.4 in 2010);
- fewer explanations were given for the non-application of the best practice provisions on management board pay;
- the list of ten best practices for which explanations of non-application were given most frequently was the same in 2010 as in 2009, save for a few changes in position;[14]
- the explanation for non-application based on the wish to respect existing contracts was used less frequently in 2010;
- the category of explanation known as 'other company-specific arguments' occurred more often in 2010 than in 2009;
- in 2010 non-application was explained more frequently by the provision of information about the company's own scheme, without explanation of why this scheme was necessary or how it was in keeping with the spirit of the Code.

14 The five best practice provisions for which explanations of non-application are given most frequently:
II.1.1 Maximum term of appointment of management board members
II.2.8 Maximum severance pay of management board members
IV.3.1 Webcasts of analysts' meetings, presentations and press conferences for all shareholders
III.5 Composition and role of the three key committees of the supervisory board
III.3.5 Maximum term of office for supervisory board members: 3 times 4 years

1.2. Compliance with a number of best practice provisions

The best practice provisions that will be dealt with here are II.1.1 on the maximum term of appointment, II.2.5 on the retention period for shares granted by way of remuneration, II.2.8 on the maximum severance pay, II.2.12 on the contents of the remuneration report and II.2.13 on the overview of remuneration. In each case the text of the best practice provision is quoted; next a table shows the compliance figures for the relevant provision. With the exception of best practice provisions II.2.12 and II.2.13,[15] these compliance figures are subdivided into the various market segments. It should be noted that the compliance surveys are based on several sources, whereas the survey of the explanation and its quality is drawn up solely by reference to the corporate governance section in the annual report. The number of times that an explanation is given may therefore differ in the two surveys.

1.2.1. Provision II.1.1: maximum term of appointment

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.

Table 1

	Application	Δ 2009	Explanation	Δ 2009	Non-Compliance	Δ 2009	n
AEX	12	5%	8	-5%	0	0%	20
AMX	8	-5%	16	5%	0	0%	24
AMS	7	0%	14	3%	0	-3%	21
Local	19	0%	17	1%	0	-1%	36
Total	46	0%	55	1%	0	-1%	101

Table 1 shows that the rate of compliance with this best practice provision is 100%. The extent to which this best practice provision is applied has not changed since 2009. However, there has been a shift in the type of explanation given for non-application, namely from the 'other' category to 'simply providing information about its own scheme'.

The survey into the quality of the explanation for non-application of this best practice provision covered 51 companies that gave such an explanation.[16] 48 of the 51 companies had an unlimited term of appointment for management board members. Two of these 48 companies merely observed that they had an unlimited term of appointment, without providing further reasons. These companies therefore do not comply with this best practice provision. The explanation for non-application varied among the other 46 companies. Twelve companies rejected a limitation of the term of appointment in general terms. Some stated, for example, that management board members are often appointed from within the company itself and that any change in the terms and conditions of employment (namely the introduction of a maximum term of four years) was not considered expedient. 37 companies indicated that the management board members had been appointed before 2004 and that a limitation of the term of appointment had not been introduced for that reason. This latter type of explanation is, in principle, acceptable but there is now a widespread view in society that companies should endeavour to act entirely in accordance with the Code.

15 For practical reasons it was decided to include here only total compliance figures. The breakdown for each market segment is included in the underlying survey.

16 Some companies cite more than one reason when explaining non-application.

1.2.2. Provision II.2.5: retention period for shares granted to management board members

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.

Table 2

	Application	Δ 2009	Explanation	Δ 2009	Non-Compliance	Δ 2009	n
AEX							
retain for at least 5 years	9	17%	4	-16%	2	-1%	15
dependent on targets	15	0%	0	0%	0	0%	15
AMX							
retain for at least 5 years	11	30%	2	0%	0	-30%	13
dependent on targets	13	0%	0	0%	0	0%	13
AscX							
retain for at least 5 years	3	-11%	3	23%	2	-11%	8
dependent on targets	8	20%	0	0%	0	-20%	8
Local							
retain for at least 5 years	2	-20%	1	20%	2	0%	5
dependent on targets	5	0%	0	-10%	0	10%	5
Total							
retain for at least 5 years	25	10%	10	-1%	6	-9%	41
dependent on targets	41	8%	0	0%	0	-8%	41

Table 2 shows the rate of compliance in relation to shares actually granted. The rate of application of this best practice provision rose by 10% relative to 2009. Non-compliance dropped by 9%. This is a positive development. The increase in the rate of application is, however, due only to the AEX and AMX companies. By contrast, the rate of application by AscX and local companies fell. Among these companies there was a shift from application to explanation for non-application. The rate of non-compliance dropped by 11% in the case of the AscX companies and remained the same in the case of the local companies. Also noteworthy is the 30% decline in the rate of non-compliance by the AMX companies.

The survey of the quality of the explanation examined what policy companies generally pursue in relation to this best practice provision. In 2010 thirteen companies explained why they had not applied this best practice provision. Compared with 2009, there was a perceptible increase in the number of companies not simply providing information about their own scheme but also explicitly stating why they considered the scheme to be in accordance with the spirit of the Code. The Committee views this as a positive development.

In the case of seven companies the retention period was limited to two or three years. One of these companies provided no explanation for this and consequently did not comply with the Code. The other six companies stated that they had acted in accordance with the spirit of the Code. These companies conditionally grant the shares to the management board members for a period of three years. If the management board member concerned meets certain performance criteria by the end of this three-year period, the shares vest permanently. At present these companies still apply a retention period of two or three years.

In this context the question arises whether the five-year period starts at the moment when the shares are granted conditionally or unconditionally. The Committee considers that the mandatory retention period starts from the moment of conditional grant. This is not contrary to the idea behind this provision of the Code, namely that by holding shares for a longer period a management board member becomes more closely engaged with the company. The Committee is aware that many management board members voluntarily retain such shares for more than five years and that the question as to when the mandatory retention period starts is then of less relevance. The Committee also believes that retaining shares voluntarily sends a more powerful signal than a mandatory retention period.

Four companies reported that they did not have a mandatory retention period at all. The reasons varied. For example, one company considered that this retention period had no particular merit since the shares were conditionally granted by the supervisory board each year and management board members therefore already had a strong incentive to look after the long-term interests of the company. Another company pointed out that its policy required management board members to build up and retain a personal shareholding in the company and that this was in keeping with the spirit of the Code.

Four other companies reported that they made an exception to the mandatory retention period in certain circumstances. Management board members at these companies may sell the shares within the five-year period if and insofar as this is required to pay a tax assessment imposed in respect of the shares granted, because the liability to pay tax arises at the moment of grant. Such sell-to-cover transactions are common practice in order to avoid a situation in which management board members hold financed shares in their own company. The Committee considers this an acceptable explanation of non-retention.

1.2.3. Provision II.2.8: maximum severance pay

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.

Table 3

Explanation given	AEX	AMX	AscX	Lokaal	Total 2010	Total 2009
Existing contracts are honoured	5	6	6	2	19	29
Company complies with existing legislation and regulations and/or is awaiting developments in this field	0	2	0	2	4	9
Company simply provides information about its own scheme	1	4	2	2	9	3
Scheme is not usual in the sector and/or country in which the company operates	1	1	0	0	2	1
Other	5	5	1	6	17	9
Total explanations for non-application in 2010	12	18	9	12	51	51

The broad outline section of this report already examined various aspects of compliance with this best practice provision, namely the extent to which companies, in explaining their non-application of this provision since 2004, cited the wish to honour existing contracts and the severance pay actually granted for 2010. Here a number of other aspects concerning compliance with this best practice provision are dealt with briefly.

Table 3 shows that, compared with 2009, there is a perceptible shift in the explanation given for non-application of this provision; fewer companies now attribute non-application to a wish to honour existing contracts or to the fact that legislation and regulations prevent application, and more companies now give explanations that fall into the category 'other' and simply provide information about their own scheme.

51 companies explained why they did not apply this provision and one of them stated that its own scheme was stricter.[17] In 21 of the 51 cases the explanation given for non-application was that the employment contract concluded with the management board member dated from before 2004.[18] As noted in the broad outline section, however, this is not an acceptable explanation for non-application since the employment contract and the appointment as a management board member are separate from one another. In such situations the Code could have been applied by waiving at the time of appointment any remuneration to which the management board member might be entitled on the basis of his employment contract if this remuneration were to exceed one year's salary. It follows that these 21 companies did not comply with the provision.

19 companies did not generally apply this provision. Of these 19 companies only nine indicated what action they did take, albeit without providing an explanation of why they failed to apply the provision. As already noted, the Committee considers that this constitutes non-compliance with the Code. Four of the 19 companies stated that the severance pay was in keeping with Dutch employment law. A further 19 companies stated that although they endorsed, in principle, the basic rule of best practice provision II.2.8, they departed from it in specific cases and/or specific circumstances.[19] Five of the 19 companies did not apply it in specific cases. Reasons were not always given. 16 companies did not apply it in special circumstances. Examples of these circumstances are a change of control, application manifestly unreasonable, long service, the ability to attract the right person and departure during the period of notice.

1.2.4. Provision II.2.12: remuneration report of supervisory board

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. (...)

17 This company did not make use of the possibility provided for in the Code of to grant severance pay up to twice the annual salary in the event of dismissal during the first term of office.

18 In section [...] the figures on non-application of best practice provision II.2.8 relate only to new appointments in any year. As indicated in footnote 5 this explanation of non-application in respect of the management board members concerned was also used in subsequent years. Those are the figures shown here.

19 The total number of companies using a given explanation for non-application exceeds 19. This is because a company may give more than one explanation.

Table 4

	Application	Δ 2009	Explanation	Δ 2009	Non-compliance	Δ 2009	n
The report contains a description of the remuneration policy of the past financial year	92	6%	1	-1%	5	-5%	98
The report contains a description of the remuneration policy for the next financial year	76	1%	2	-2%	19	1%	97
The report explains how the remuneration policy helps to achieve the long-term objectives of the company	36	-21%	0	-3%	62	24%	98

One striking conclusion to be drawn from Table 4 is that little mention is made of how the remuneration policy contributes to the long-term objectives of the company. 62 of the 98 companies made no mention of this and therefore failed to comply with the provision. The Monitoring Committee calls on companies to cover this point each year, even if remuneration policy has not been specifically put on the agenda.

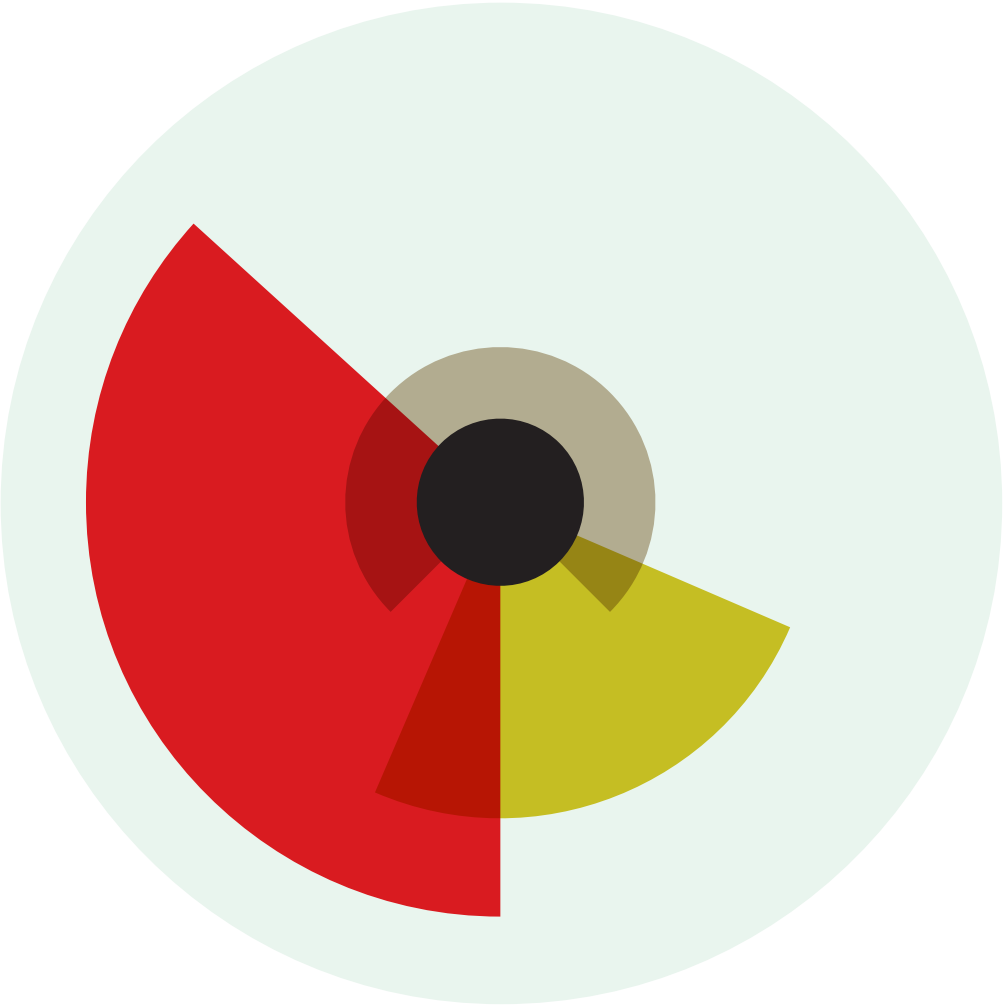
Companies indicated in connection with general remuneration principle II.2 that in determining the total remuneration they took into account how this influenced pay differentials within the company. To obtain a better understanding of how pay differentials play a role in determining management board remuneration, the Committee recommends that this be covered in the report of the supervisory board.

1.2.5. Provision II.2.13: remuneration overview

Table 5

	Application	Δ 2009	Explanation	Δ 2009	Non-compliance	Δ 2009	n
Provision of schematic overview	85	4%	1	-1%	13	-3%	99
Breakdown of the different items given in the overview	45	-10%	3	-1%	52	11%	100
Mention is made that scenario analyses have been made	53	10%	3	-5%	42	-5%	98
The bandwidth for the shares/options to be granted is shown for each management board member	52	13%	1	-2%	24	-11%	77
The overview includes a table containing data on shares/options granted to each management board member	19	1%	0	0%	53	-1%	72
The situation in the peer group of companies is described	50	1%	2	-3%	44	3%	96
The performance criteria are described	75	2%	4	-4%	16	3%	95
The methods for performance measurement are described	62	18%	2	-10%	30	-7%	94
Relationship between performance criteria and objectives and between remuneration and performance (both ex ante and ex post) is described	53	20%	3	-8%	39	-12%	95
Pension plans are described	74	5%	0	-3%	25	-2%	99
Early retirement schemes are described	76	3%	0	-2%	22	-1%	98

Although the rate of application of this best practice provision was higher than in 2009, it remained relatively low and the rate of non-compliance relatively high, particularly among the smaller companies. 23 companies did not comply with more than half of the elements of this provision. These were three AMX companies, seven AscX companies and 13 local companies. Nor was all the requisite information provided for some elements by the other companies. Moreover, the form in which the data were provided varied. Sometimes a description was given and sometimes a table. It should be noted here, incidentally, that the Committee – just as in its survey of the 2009 financial year – commissioned a strict test: in the event of non-compliance with one of the elements, the Committee treated this as non-compliance with the entire best practice.



2. THE SUPERVISORY BOARD

This chapter deals with the supervisory board (chapter 3 of the Code). This year the Committee commissioned a survey of three subjects:

- how the supervisory board carried out the self-evaluation provided for in best practice provision III.1.7;
- the report of the supervisory board, with particular reference to the informative value of the report and the level abstraction;
- the background to compliance with the provisions on the composition (diversity) of the supervisory board in principle III.3.

The three subjects are dealt with successively in sections 21., 2.2. and 2.3. below.

2.1. The evaluation

Best practice provision 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.

The evaluation provision is explained in the Code in the following terms:

Notes to III.1.7
This provision relates to the annual review by the supervisory board members of their own functioning and that of the management board. The aim of the review is to reflect critically on the functioning of the members of the supervisory board and management board. A periodic review can enhance the quality of the functioning of the supervisory board and the management board and help to ensure that the right choices are made when preparing appointments or reappointments of supervisory and management board members, for example in connection with the appropriate composition of the boards or the appropriate diversity in their composition. How the review is carried out is a matter for the company and may therefore differ from one company to another. The review can take place collectively, on an individual basis between the chairman and the members separately, or through the input of an external adviser. Each supervisory board member should be able to express his views confidentially during the review.

2.1.1. The statement

Table 6 shows to what extent the report of the supervisory board discusses the evaluation of the functioning of the supervisory board as a whole, the separate committees, the individual supervisory board members and the chairman. As in 2009, almost all the surveyed companies (96) stated that the supervisory board had evaluated its own functioning. The proportion of companies complying with the obligation to include a statement about the supervisory board's evaluation of its own functioning rose slightly from 93% in 2009 to 95% in 2010.

Table 6

	AEX	AMX	AScX	Local	Total
Number of companies	20	24	21	36	101
Statement about the evaluation of the functioning of the supervisory board as a whole	20	23	20	33	96
Statement about the evaluation of the functioning of the separate committees	15	17	10	6	48
Not applicable (no committees established)	-	2	3	21	26
Statement about the evaluation of the functioning of individual supervisory board members	17	19	13	15	64
Separate statement about the evaluation of the functioning of the chairman	4	3	0	2	9

One AscX company and three local companies provided no explanation as to why the report of the supervisory board did not contain a statement about the evaluation. These companies thus failed to comply with this best practice provision. The number of companies reporting the evaluation of the separate supervisory board committees rose was higher than in 2009 (up from 57% in 2009 to 64% in 2010). As in 2009, the majority of companies (64) stated that an evaluation had been made of individual supervisory board members. This compliance rate fell from 74% in 2009 to 64% in 2010.

2.1.2. The method of evaluation

Table 7 shows that the number of supervisory board reports stating how the evaluation was carried out is considerably less than the number confirming the performance of the evaluation. Of the 96 companies reporting an evaluation 40 stated how it had been carried out. The other 56 companies provided no further information about the method of evaluation. In such cases the report tends to state that the supervisory board 'discussed its own functioning' or that 'the functioning of the board was raised during a meeting' and similar remarks.

Table 7

	AEX	AMX	AScX	Local	Total
Number of companies	20	24	21	36	101
Statement about method of evaluation of the supervisory board as a whole	18	12	6	4	40
Statement about method of evaluation of the separate committees	14	9	4	2	29
Not applicable (no committees established)	-	2	3	21	26
Statement about method of evaluation of the individual supervisory board members	15	9	5	4	33
Separate statement about the method of evaluation of the chairman	4	2	0	1	7

However, the number of statements about the method of evaluation was higher than in 2009 (rising from 35% to 40%). For the purposes of the survey, comments such as 'the supervisory board discussed its func-

tioning during a meeting' were not treated as statements about the method of evaluation. The Committee considers that such explanations imply application of the Code only in a formal sense. counted. Seven of the nine companies that made separate mention of the evaluation of the chairman also stated how this had been done.

The survey also examined how evaluations took place. Table 8 shows whether use was made of a written survey or interviews (self-evaluation) or an external facilitator. The number of external evaluations was slightly higher than in 2009. An external facilitator was used once in 2009 and three times in 2010. More supervisory boards made use of a written questionnaire than in 2009 (up from 20 to 32). Ten companies (of which seven were AEX companies) reported using a combination of a written questionnaire and bilateral interviews. Panel B indicates how many supervisory boards carried out the evaluation without the management board being present, as prescribed by the Code. The majority does this. One company indicated that the supervisory board performed the evaluation in the presence of the CEO. This is contrary to the Code.

Table 8

	AEX	AMX	AScX	Local	Total
Number of companies	20	24	21	36	101
Panel A					
Method of evaluation known	18	12	6	4	40
Written survey	16	6	6	4	32
Bilateral interviews	9	4	0	2	15
External evaluation	0	3	0	0	3
Panel B					
Without the management board being present	13	18	15	24	70
Unclear	4	6	5	9	24
Not applicable	2	-	1	3	6

Just as in 2009, the 2010 survey found that reporting on the evaluation by the supervisory board was most detailed in the case of the AEX and AMX companies. The smaller companies often simply state that 'the functioning was discussed during a plenary meeting'. This may be an indication that the evaluation was carried out in a more informal manner.

Companies generally included a statement to the effect that an evaluation had been carried out. The survey found that in almost 20% of all cases in which an evaluation was made more information was given than required by the Code. This is a positive development. However, the Committee was disappointed to find that the proportion of companies stating how the evaluation was made was much smaller. Compliance must be greatly improved in this respect. It would be desirable for the report of the supervisory board to contain in any event a description of the evaluation process and, possibly, the outcome in broad outline as well. In talks conducted by the Committee with supervisory board members and management board members it emerged that the chairman of the supervisory board plays an important role during the evaluation process. The Committee proposes to consider this point in more detail next year.

2.2. The report

As corporate governance has evolved, the duties and responsibilities of the supervisory board have become more onerous. In the opinion of the Committee, this heavier role should also be reflected in the board's accountability to stakeholders. The report of the supervisory board is the ideal place for the board

to render account for the work it has performed and for its own functioning. The survey examined to what extent the provisions from the Code that contain requirements relating to the report were complied with. In addition to formal compliance, the survey also examined the informative value of the reports. 101 companies were involved in the survey. Three companies did not come within the scope of the survey in a number of respects because they had a one-tier board and no separate report was prepared by the non-executive directors.[20] The Code contains various provisions relating to the report.[21] The findings in relation to a number of these provisions are given below. This concerns best practice provisions III.1.5 and III.1.8.

2.2.1. Provision III.1.5: frequent absence

(...) The report of the supervisory board shall state which supervisory board members have been frequently absent from the meetings of the supervisory board.

Table 9

	AEX	AMX	AScX	Local	Total
Number of companies	20	24	21	36	101
Panel A					
Frequent absence	20	20	16	21	77
Panel B					
Qualitative analysis					
o (statement)	6	15	7	7	35
+ (extra information)	10	3	6	6	25
++ (individual supervisory board members)	4	2	3	8	17

It is evident from Table 9 that 24 companies made no mention of whether supervisory board members were present or absent during meetings. Almost a quarter of the companies received a (+) rating. Such companies may, for example, have mentioned an attendance rate. 17 companies reported the presence of individual supervisory board members. The Code does not state explicitly when mention should be made of absence. However, the Committee would in any event like the supervisory board report to state the attendance rate of the supervisory board as a whole.

2.2.2. Provision III.1.8: statement about discussion of strategy and risk

The supervisory board shall discuss at least once a year the corporate strategy and the main risks of the business, the result of the assessment by the management board of the design and effectiveness of the internal risk management and control systems, as well as any significant changes thereto. Reference to these discussions shall be made in the report of the supervisory board.

20 Two of these three companies did, however, prepare reports of subcommittees. All three included a chairman's statement.

21 The following provisions concern the report of the supervisory board: principle II.2 and best practice provisions III.1.2., III.1.3, III.1.5, III.1.7, III.1.8, III.2.3, III.5.2, III.3.1 and IV.3.3.

Table 10

	AEX	AMX	AScX	Local	Total
Number of companies	20	24	21	36	101
Panel A					
Reference to the discussion in the report of the supervisory board	13	11	13	11	48
Reference to the discussion elsewhere	1	0	0	1	2
No reference to separate discussion of strategy and risk	6	13	8	22	49
Panel B					
Qualitative analysis					
- (no reference)	0	0	0	2	2
0 (reference)	8	14	11	27	60
+ (content)	10	6	7	6	29
++ (content, opinion/view)	2	4	3	1	10

Table 10 shows whether and, if so, how reference is made to the discussion of strategy and risks. A difference is apparent here in the manner in which reference is made to this. The survey also examined how much information the references contained. Out of the total of 101 companies, two companies failed to make any reference to a discussion or did not cover the subject of strategy and risks at all. In addition to the 60 companies that did refer to this subject, 39 provided more detailed information and explanation. The Committee regards this as a positive development. An example of the additional information about the discussion of strategy that a report may contain is given below:
'In discussions with the Management Board, the Supervisory Board explored ways in which the company can position itself for future growth through product innovation, moving into new geographical areas and through diversification. In November 2010, an updated three-year strategic plan was presented to the Supervisory Board, setting out the strategic objectives and targets of the various organisation units.(...)'

It is evident that although in general the reports of supervisory boards formally comply with the Code, they tend to be rather uninformative. The Committee considers that the report should provide more information about all activities of the supervisory board and the specific focus areas.

2.3. The composition of the supervisory board

This year the Committee once again arranged for the survey to examine the composition of supervisory boards. This section deals successively with the following subjects: to what extent diversity is dealt with in supervisory board profiles, the number of men and women joining and leaving supervisory boards, the ratio of men to women on supervisory boards and any trends in relation to the previous year. An overview is also given of the unutilised scope for change in relation to several diversity criteria.

2.3.1. Provision III.3.1: the profile

The supervisory board shall prepare a profile of its size and composition, taking account of the nature of the business, its activities and the desired expertise and background of the supervisory board members. The profile shall deal with the aspects of diversity in the composition of the supervisory board that are relevant to the company and shall state what specific objective is pursued by the board in relation to diversity. In so far as the existing situation differs from the intended situation, the supervisory board shall account for this in the report of the supervisory board and shall indicate how and within what period it expects to achieve this aim. The profile shall be made generally available and shall be posted on the company's website.

Table 11

	AEX	AMX	AscX	Local	Total
Number of companies	20	24	21	36	101
Profile present	20	24	20	33	97
Objective specified in profile	7	5	4	1	17
No objective specified, but diversity dealt with	12	14	12	20	58
Aspects of diversity in the profile					
Age	11	13	9	20	53
Gender	7	13	10	20	50
Nationality	8	12	12	21	53
Background	9	13	7	21	50
Active/retired	7	14	10	19	50

It is evident from Table 11 that a profile was drawn up in 97 cases (i.e. the great majority of the supervisory boards), while 58 supervisory board profiles included the issue of diversity.

Of the 97 supervisory board profiles, 17 included a specific objective in relation to diversity. Over 83% of the companies did not mention a specific objective and therefore failed to comply with the Code. The Committee therefore emphatically requests the supervisory boards to include a specific objective in their profile next year. It has already been indicated in the broad outline of the report that the Committee will pay extra attention in next year's survey to cases in which companies indicate that they have not appointed any female supervisory board members on the grounds that the supply is too small to meet demand. Next year's survey will also examine to what extent measures are taken to achieve the concrete objectives in the profile.

2.3.2. Number of supervisory board members joining and leaving in 2010

The 103 companies in the survey together have 512 supervisory board members. Table 12 provides an overview of the number of supervisory board members joining and leaving in 2010.

Table 12

	AEX	AMX	AscX	Local	Total
Number of companies	20	24	21	38	103
Members in 2009	159	126	87	140	512
Reappointed in 2010	31 (21%)	20 (16%	13 (14%)	18 (13%)	82 (16%)
Left in 2010	18 (12%)	16 (13%)	13 (14%)	27 (19%)	74 (14%)
Joined in 2010	10 (7%)	17 (13%)	16 (18%)	31 (22%)	74 (14%)
Members in 2010	151	127	90	144	512

As many supervisory board members left as joined (74) in 2010. In the case of the AEX companies, the number of supervisory board memberships declined in absolute terms; all other indices showed a slight increase. Generally speaking, the larger the company, the higher the percentage of supervisory board members who are reappointed and the smaller the company, the lower the percentage of members leaving and newly appointed. It may be inferred from the table that no change occurred in respect of 438 supervisory board memberships (86% of the total of 512).

2.3.3. Ratio of men to women

Most seats on supervisory boards are held by men: 90% of members are men and 10% are women. Table 13 shows that the smaller the company, the fewer the number of female members of the supervisory board. The number of supervisory boards without a female member increased from 64 of 99 (65%) in 2009 to 68 of 103 (66%) in 2010.

Table 13

	AEX	AMX	AscX	Local	Total
Number of men	124 (82%)	115 (91%)	84 (93%)	138 (96%)	461 (90%)
Number of women	27 (18%)	12 (9%)	6 (7%)	6 (4%)	51 (10%)
Boards with 0 women	6	14	15	33	68
Boards with 1 woman	3	8	6	4	21
2 or more women	11	2	0	1	14

2.3.4. Gender trend

Table 14 gives a gender breakdown into three categories: supervisory board members who left (L) or were reappointed (R) or newly appointed (N).

Tabel 14 (L = left; R = reappointed; N = newly appointed).

	AEX			AMX			AscX			Lokaal			Totaal		
	L	R	N	L	R	N	L	R	N	L	R	N	L	R	N
Men	16	25	9	15	20	14	11	12	15	25	18	29	67	75	67
Women	2	6	1	1	0	3	2	1	1	2	0	2	7	7	7
No. of observations	18	31	10	16	20	17	13	13	16	27	18	31	74	82	74

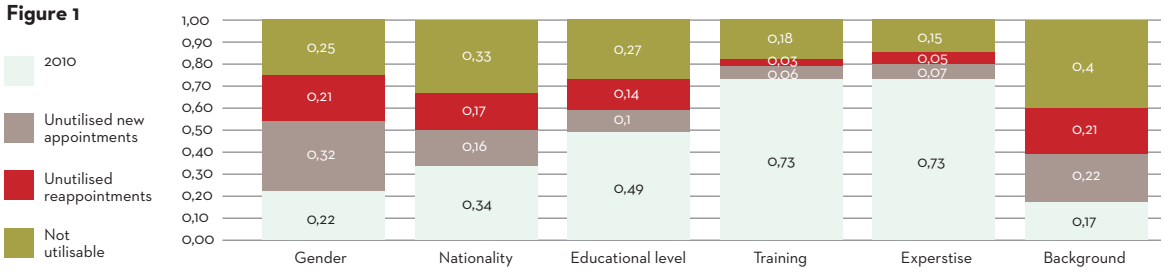
Whereas the number of female supervisory board members rose in the 2009 financial year (10 more women were appointed as supervisory board members in 2009), this growth appears to have ground to a halt in the 2010 financial year. On balance, 14 supervisory board vacancies arose as a result of the departure and reappointment of female members in 2010. Seven women were reappointed, seven left and seven were newly appointed. In absolute terms, the number of female supervisory board members increased by one in 2010 compared with the random sample in 2009. However, this was due to a change in the sample in relation to last year's survey. Of the total number of newly appointed supervisory board members fewer than 10% were women.

2.3.5. Unutilised scope for change

To get a good idea of how diversity is evolving at corporate level, the survey examined the extent of the unutilised scope for change in respect of various diversity characteristics. For this purpose the maximum achievable diversity (given the number of vacancies) was calculated for each diversity characteristic. The next step was to examine to what extent the diversity had actually been achieved. The difference between the maximum achievable diversity and the diversity actually achieved is described as the 'unutilised scope for change'.

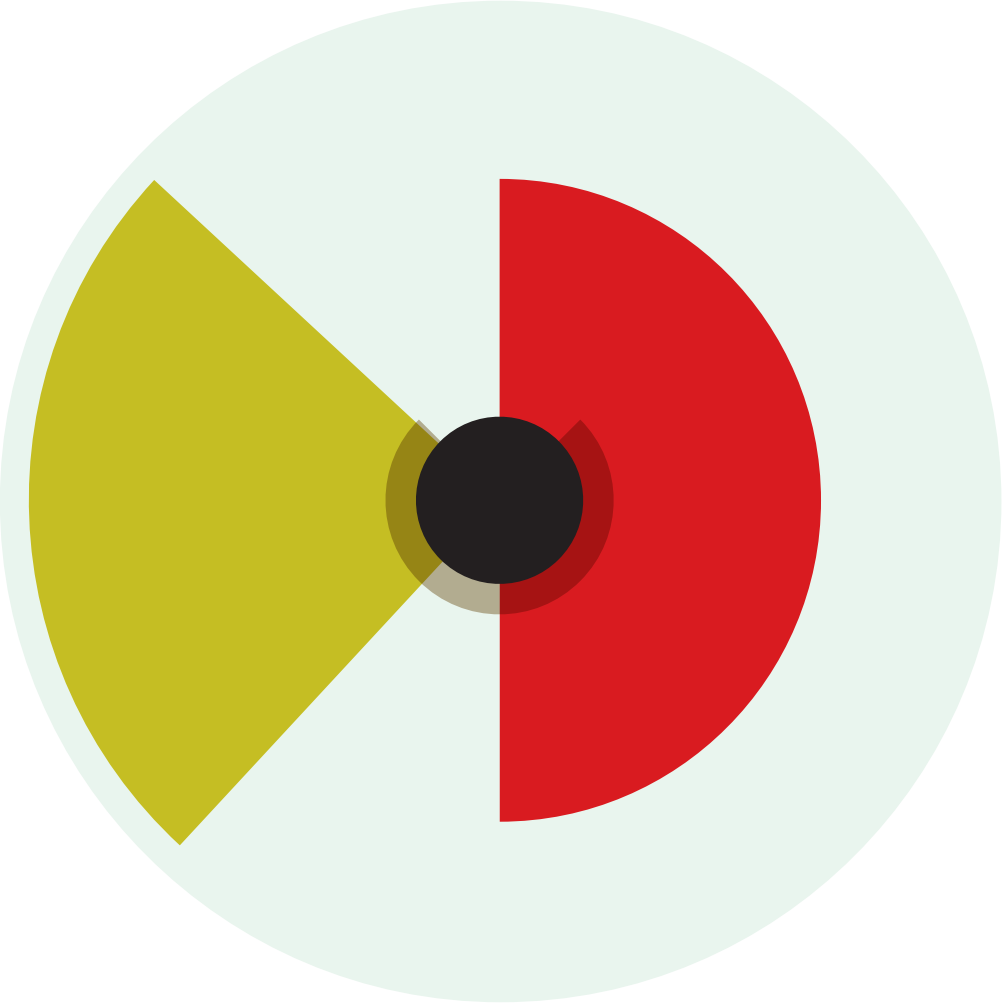
Figure 1 provides an overview of the unutilised scope for change, including reappointments. The lowest figures in each column show the diversity achieved in 2010. The next set of figures above them indicate what scope was left unutilised when new appointments were made. The figures at the third level show what scope was left unutilised on account of reappointments of supervisory board members. Finally, the uppermost figures indicate the unutilised scope (the supervisory board members in office).

Figure 1



The unutilised potential is substantially greater in the case of gender, nationality and background than in the case of the other diversity characteristics. This picture is in keeping with the findings for the 2009 financial year. It is noteworthy that the unutilised scope for change in relation to these three variables increased relative to the 2009 financial year.

Finally, the Committee would like to point out that it does not consider optimal utilisation of the scope for change to be desirable in the case of all diversity criteria. In general, diversity does not have a quantitative optimum.



3. GENERAL MEETING OF 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.

The survey of shareholder compliance with the Code concentrated on the above provisions. Like last year, the survey was conducted among institutional investors. Other shareholders fall outside the scope of the survey. However, the composition of the survey population is different from that of last year's survey. Whereas the survey for the 2009 financial year was conducted among all Dutch institutional investors, the Committee decided this year to carry out a more in-depth survey of specific issues. This is why the survey of compliance with best practice provisions IV.4.1 to IV.4.6 among Dutch institutional investors was confined to the 25 largest investors divided across the categories of insurers, pension funds, investment firms and asset managers.[22] The more in-depth nature of this year's survey is reflected above all in the study of compliance with best practice provisions IV.4.4 to IV.4.6 by foreign investors who play a role as shareholders in Dutch listed companies. It is assumed, after all, that approximately 75% of the shares in Dutch listed companies are held by foreign investors. For this purpose the Committee commissioned research among fourteen major foreign asset managers.[23]

The survey was carried out by means of a questionnaire and, in the case of foreign asset managers, by conducting interviews. Both types of research were on the basis of voluntary participation.

22 These are asset managers all of whom manage Dutch pension assets amounting to at least EUR 10 billion, the six largest pension funds in terms of invested assets, the four largest life insurers and investment firms that have investments in Dutch listed companies and participate in Eumedion.

23 These are foreign asset managers which are known to have holdings in Dutch listed companies. More active investors have also been included in this research.

In the case of Dutch institutional investors one party did not wish to take part this year. Two respondents could be classified under multiple categories of institutional investor and opted for one category. In the other category they did not take part in the survey. This explains why the formal response rate was 89%. The composition of the group of Dutch respondents is as follows:

Table 15

	n	%
Asset manager	12	48%
Investment firm	5	20%
Life insurer	2	8%
Pension fund	6	24%
Total	25	100%

All the selected foreign asset managers took part in the survey.

The questionnaire gave the parties the possibility of not answering questions. As a result, the number of respondents per question can differ. Where relevant, the number of respondents is therefore indicated.

As the sample for the compliance survey was considerably more limited this year than last, it is not possible to make comparisons between the two years. However, the picture that emerged from last year's survey, namely that large institutional investors indicate a high rate of compliance with the Code, is reaffirmed. According to the survey the application rate is very high, with the exception of best practice provision IV.4.4 (response time). Here the application rate is around 60%, with many different reasons being given to explain non-application.

The results of the survey among both Dutch institutional investors and foreign asset managers as regards a limited number of best practice provisions are analysed below in section 1.1. Section 1.2 deals with shareholder engagement among both Dutch and foreign respondents. Sections 1.3 and 1.4 address a supplementary survey into voting and communication behaviour, which was conducted only among the foreign asset managers.

3.1. Responsibility of shareholders

3.1.1. Provision IV.4.4: response time

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.

This was the best practice provision for which an explanation of non-application was given most often. The question put to the institutional investors was whether, if they were to exercise their right to put an item on the agenda, they would give the management board the opportunity to stipulate a reasonable period in which to respond to the proposal.

15 of the 25 Dutch institutional investors (60%) replied that they would indeed give the management board this opportunity. Ten respondents (40%) stated that they would not do so. Last year the Committee already indicated that if a shareholder would in no circumstances respect a term not exceeding 180 days stipulated by the management board and would instead apply a 90-day period as fixed policy, the Committee would treat this as non-compliance.
The respondents were also asked what they would generally consider to be a reasonable term for the company to respond to a proposal to put an item on the agenda. This question was answered by all 25 Dutch respondents. Of the 25, 11 (44%) opted for a period of between 30 and 59 days, eight (32%) for a period of 7-29 days, three (12%) for a period of between 60 and 89 days and a further three for a period of between 90 and 179 days.

The same questions were put to the foreign asset managers. 11 of the 14 respondents (79%) stated that they would give the management board the opportunity to stipulate a reasonable period in which to respond to a proposal to put an item on the agenda. As regards the question about a reasonable response time, six respondents (43%) opted for a period of 30-59 days and four (29%) for a period of 60-89 days. A further four respondents considered that even the minimum period for calling for a general meeting of shareholders was too long. It was also apparent from the questionnaire and the interviews that foreign institutional investors seldom make use of the possibility of putting an item on the agenda. Where necessary, they make contact directly with the company, separately from a meeting of shareholders. Twelve foreign respondents indicated that the response time should depend on the subject and on how important it is to obtain an answer.

This best practice provision has already been dealt with in the broad outline of the report. It was observed in that chapter that if a company acts in accordance with the Code and engages in a constructive dialogue with the shareholders, the response time stipulated by the management board cannot simply be disregarded by the shareholder by means of an explanation of non-application, except in very exceptional situations.

3.1.2. Provision IV.4.5: voting as one sees fit

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 judgement on the voting policy of this adviser and the voting advice provided by him.

In answer to the question whether Dutch institutional investors voted as they saw fit or formed their own opinion on the voting policy of an adviser and the voting advice provided by the adviser, 23 of the 25 respondents (92%) stated that this was indeed the case. Two respondents (8%) said that they had not done so. One of them gave an explanation for non-application and one failed to comply with the Code.

In answering the questionnaire for foreign investors, all fourteen respondents stated that they had voted as they saw fit.

Various topics relevant to the subject of voting as one sees fit do not follow directly from the Code, but are important in forming an overall picture of compliance with this best practice provision.

Hiring of proxy advisory firms
All 25 Dutch respondents answered the question of whether they made use of the voting advice of third parties. 22 (88%) confirmed that they made use of the voting advice of third parties. Like last year the most popular proxy advisory services were ISS and Glass Lewis.

To obtain a better understanding of the influence that proxy advisory services have on the votes cast, the Dutch institutional investors were asked whether they automatically followed the voting advice, for example by means of an automated system. This question was answered by 23 respondents. 21 stated that the voting advice was not automatically followed. The other two stated that the advice was automatically followed, save for exceptional situations.

Some foreign asset managers indicated that they did make use of the services of proxy advisory firms. As separate in-depth research was carried out into the voting policy and voting behaviour of these respondents, this is dealt with below in section 3.3.

Mandates
Of the Dutch respondents the group most likely to outsource asset management were the pension funds. All six of the pension funds included in the survey indicated that they completely outsourced the management of capital invested in shares of Dutch listed companies. Almost half of the Dutch asset managers stated that this management was outsourced.

The question whether and, if so, to what extent the management of the capital invested in shares of Dutch listed companies was outsourced was also put to the foreign asset managers. Of the fourteen respondents two (14%) indicated that this was partially outsourced. Twelve respondents (86%) did not outsource asset management. In addition, the foreign asset managers were asked whether their asset management mandates with their clients included specific provisions on who had ultimate responsibility for compliance with the Code. Twelve of the respondents replied that the mandates made no provision for apportionment of responsibility.

The Committee noted that the division of responsibilities between the parties in respect of voting behaviour and compliance with the Code under an asset management mandate is sometimes unclear even to the parties themselves. For example, there was a case in which a pension fund stated that compliance with the Code was a matter for the asset manager, whereas the asset manager stated that this was the responsibility of its client, the pension fund. In such a situation, none of the parties may feel responsible for compliance with the Code and the likelihood of non-compliance is greatly increased. It is therefore advisable to include clear agreements on this subject, certainly where management has been outsourced to foreign asset managers whose activities, as the survey shows, are not guided first and foremost by the Dutch Corporate Government Code. The Monitoring Committee therefore calls on the parties to these asset management mandates to ensure that the mandates deal specifically with the subject of corporate governance and compliance with the Code. The basic principle is that the party entitled to the shares is obliged to comply with the Code. The Committee intends next year to devote specific attention to these mandates in its survey.

3.2. Shareholder engagement

This section deals with two aspects of shareholder engagement. These aspects are not directly related to a specific provision of part IV.4 of the Code. They involve the influence and significance of codes and guidelines that contain principles for shareholders in Dutch listed companies and the extent of their familiarity with the Code. Although the Code does not deal with this subject, this information can shed light on how a vote comes about.

3.2.1. Influence and significance of codes and guidelines

The respondents were asked to indicate what importance they attached to various specified international codes and guidelines, including the Dutch Corporate Governance Code. Respondents could give a score ranging from 1 (least importance attached to the code or guideline concerned) to 8 (most importance). The answers of the 23 Dutch respondents to this question are shown in Table 16.

Table 16

	n	avg.	1	2	3	4	5	6	7	8
Dutch Corporate Governance Code	23	7,4	0	0	0	0	1	0	10	12
United Nations Principles for Responsible Investing	24	6,4	0	0	0	3	0	13	0	8
Eumedion Corporate Governance Handbook	24	5,4	1	0	3	4	2	6	7	1
ICGN Statement on Global Principles for Corporate Governance	24	5,3	0	1	4	2	7	2	5	3
OECD Principles for Corporate Governance	24	4,2	1	1	2	10	9	0	1	0
UK Stewardship Code	21	3,4	0	4	11	2	3	0	1	0
ISS voting behaviour guidelines	23	3,0	6	8	1	2	2	3	1	0
Glass Lewis & Co. voting behaviour guidelines	20	1,8	11	6	1	1	0	1	0	0

On average, the Dutch code was regarded as the most important by Dutch institutional investors. The United Nations Principles for Responsible Investing (UNPRI) also scored highly.

The question to indicate the importance that is attached to codes and guidelines was also put to foreign asset managers. Their answers are shown in Table 17, once again ranging from 1 (least important) to 8 (most important).

Table 17

	n	avg.	1	2	3	4	5	6	7	8
UK Stewardship Code	11	5,8	2	0	0	0	0	3	4	2
Dutch Corporate Governance Code	13	5,3	0	0	2	2	4	2	1	2
United Nations Principles for Responsible Investing	12	5,3	1	2	1	0	1	2	2	3
OECD Principles of Corporate Governance	11	4,4	0	3	3	1	0	1	1	2
ISS voting behaviour guidelines	12	4,3	4	1	0	1	2	0	0	4
ICGN Statement on Global Principles for Corporate Governance	11	3,9	1	0	5	2	1	0	2	0
Eumedion Corporate Governance Handbook	10	3,7	2	2	0	1	3	2	0	0
Glass Lewis & Co. voting behaviour guidelines	11	3,7	2	2	1	3	0	1	2	0

One striking thing that emerges from this table is that the voting behaviour guidelines of ISS, the largest proxy advisory service, are mentioned most frequently (four times) by foreign asset managers as being the most important. On average, the UK Stewardship Code heads the list for foreign asset managers, with the Dutch code in second place and the UNPRI in third place. It is apparent from the interviews that the foreign asset managers consider the Dutch Corporate Governance Code to be important mainly as regards the provisions relating to companies. It would therefore seem that the Code's importance is not really attributable to the provisions that are intended for shareholders themselves and that therefore

affect their own behaviour. Foreign asset managers use the Dutch Code mainly to identify corporate governance risks within Dutch listed companies. It also emerged from the interviews that the various codes and guidelines are used by foreign asset managers as input for their own principles.

3.2.2. Familiarity with the Code

The results of the survey show that 22 of the 25 large Dutch institutional investors (88%) stated that they were 'familiar' with the content of the provisions relevant to them. The other three (12%) stated that they were 'somewhat familiar' with these provisions.

In reply to the question about familiarity with the Code eight of the fourteen foreign asset managers (57%) stated that they were 'somewhat familiar' with best practices IV.4.1 to IV.4.6. Four respondents (29%) stated that they were 'very familiar' with these best practices[24] and two (14%) that they were 'entirely unfamiliar' with them. These results were discussed in more detail in the interviews with foreign respondents. In these interviews the respondents generally indicated that they did not consider the responsibilities for shareholders as set out in these best practice provisions to be unimportant. However, they did state that they were guided in respect of these subjects by other codes and guidelines and that the shareholder provisions in the various codes and guidelines tended to resemble one another quite closely.

3.3. Voting policy and voting behaviour of foreign asset managers

An in-depth survey of the voting policy and voting behaviour of foreign asset managers was carried out. Twelve of the fourteen respondents stated that in the 2011 shareholder season they had always voted by proxy in the case of AEX companies. The category mentioned most frequently as proxy holders were the custodian banks (nine times), followed by local voting agents (three times).

In the interviews twelve respondents indicated that they always voted. They considered this to be a responsibility they owed to their clients. US managers particularly saw this as their fiduciary duty, partly as a consequence of the SEC Rule on Proxy Voting. All fourteen respondents said that the key priority in voting policy was the return on invested capital.

Of the fourteen respondents twelve indicated that they made use of proxy advisory services. Broadly speaking, ISS and Glass Lewis were consulted to an equal extent. Eleven respondents stated that the proxy advisory services were used mainly for proxy research. The extent to which the different services were used is shown in Table 18.

Table 18

	n=	%
Proxy research	11	78,6%
Proxy voting services, such as ProxyExchange (ISS) or ViewPoint (Glass Lewis)	8	57,1%
Customised voting policies	6	42,9%
Special voting policies on subjects such as sustainability, social responsibilities, public funds, labour unions and charities	2	14,3%
Securities class action services	2	14,3%
Standard benchmark voting policies	1	7,1%
Other	0	0,0%

24 These were institutional investors with concentrated portfolios and multiple interests in Dutch listed companies.

Foreign respondents indicated in interviews that they used proxy advisory services mainly as 'information agents'. Eleven of the fourteen respondents stated that the proxy research served as input in making their own decisions on how to vote. Eleven respondents also stated that they took into account the voting advice of third parties, but ultimately always took the decision themselves on how to vote. Two respondents took no account whatever of voting advice.

The respondents were asked how much influence the proxy advisory services had over the vote to be cast. Twelve respondents answered this question. The answers are shown in Table 19.

Table 19

	n=	avg.	1=not at all	2	3	4	5=leading
For investments in Dutch listed companies	12	2,6	3	2	4	3	0
For investments in non-Dutch listed companies	12	2,5	3	2	5	2	0
For investments in your home country	12	2,0	3	7	1	1	0

As the table shows, none of the respondents indicated that the proxy advice services played a decisive role in how the vote was cast. Strikingly, these results reveal that respondents generally rely less on the voting advice in the case of investments in the investor's home country. This is in keeping with the answers given by Dutch investors about the difference in their approach to Dutch and foreign shares.

Of the twelve respondents who answered the question as to what extent investors check the substance of voting advice, five indicated that they always made a check. The majority indicated that they did not always check the advice, but did so regularly. The answers are shown in Table 20.

Table 20

	n=	avg.	1=not at all	2	3	4	5=always
For investments in Dutch listed companies	12	3,8	0	1	5	1	5
For investments in non-Dutch listed companies	12	3,8	0	1	5	1	5
For investments in your home country	12	3,7	1	1	4	1	5

Voting chain

The foreign asset managers were asked which categories of professional adviser influenced how they actually voted and to what extent. The respondents indicated that custodians and sub-custodians were the most important link in the chain, but also mentioned the ISS voting platform. The results are shown in Table 21.

Table 21

	n=	avg.	none	1=very limited	2	3	4	5=very large
Voting platforms ISS	14	2,6	5	2	0	0	0	7
Voting platforms Glass Lewis & Co.	14	1,2	9	2	0	0	0	3
Broadridge/others	14	2,1	6	2	0	0	2	4
Proxy sollicitors	14	0,5	8	5	1	0	0	0
Custodians	14	3,1	3	0	1	1	3	6
Sub-custodians	14	3,1	4	0	1	0	4	5
(Civil law) notary	13	0,2	10	3	0	0	0	0

The foreign investors were also asked whether they checked that the voting instructions had actually been carried out. Of the fourteen respondents eight stated that this was always checked and four that it was almost always checked. The respondents were then asked whether they checked that the vote had actually been cast in accordance with the voting instructions. Only five of the fourteen respondents stated that they indeed checked this or that the vote was cast in accordance with the voting instructions. The answers to both questions are shown in Table 22, where 1 is never and 5 is always.

Tabel 22

	n=	avg.	1	2	3	4	5
Did my institution vote?	14	4,43	0	0	2	4	8
Was the vote carried out in accordance with the voting instructions?	14	3,64	1	1	5	2	5

The main factors that influence the willingness of a foreign investor to check whether a vote has been cast in accordance with the voting instruction are the extent of the investors' interest in the company and the degree of transparency in the voting chain. The subject on which the vote is cast can also be a reason for foreign investors to check whether a vote has been cast in accordance with the voting instruction.

In the interviews ten of the thirteen respondents indicated that they encountered problems in the voting chain in the case of cross-border voting. According to them, the various links in the chain meant that there was insufficient transparency and the process was unclear. Owing to the lack of transparency it was not possible for them to check whether the vote had actually been cast or, above all, how it had been cast. The respondents found it difficult to ascertain how the various links in the chain had dealt with the vote and where they could obtain information about this at any particular stage.

3.4. Communication behaviour of foreign asset managers

This part of the survey deals with the dialogue between shareholders and listed companies other than in AGMs and should be viewed in the light of the principle set out in chapter IV.4 of the Code:

Responsibility of shareholders
Shareholders shall act in relation to the company, the organs of the company and their fellow shareholders in keeping with the principle of reasonableness and fairness. This includes the willingness to engage in a dialogue with the company and their fellow shareholders.

Six of the fourteen respondents indicated in the survey that they had bilateral contacts outside the AGM on between two and four occasions with Dutch listed companies in which they invested. This did not include more formal opportunities for communication such as the publication of quarterly figures and road shows. The asset managers were asked in this context who had contacted the Dutch company on their behalf. The answers to this question are shown in Table 23.

Table 23

	n=	avg.	0=no importance	1=least important	2	3	4	5=most important
Portfolio-/investment manager	14	3,4	3	0	0	1	5	5
Corporate governance ('ESG') specialist	14	2,9	3	0	1	5	1	4
Analyst	14	2,9	4	0	0	2	5	3
Voting advisory firms	14	0,7	7	4	3	0	0	0
Other	14	0,6	10	1	2	1	0	0

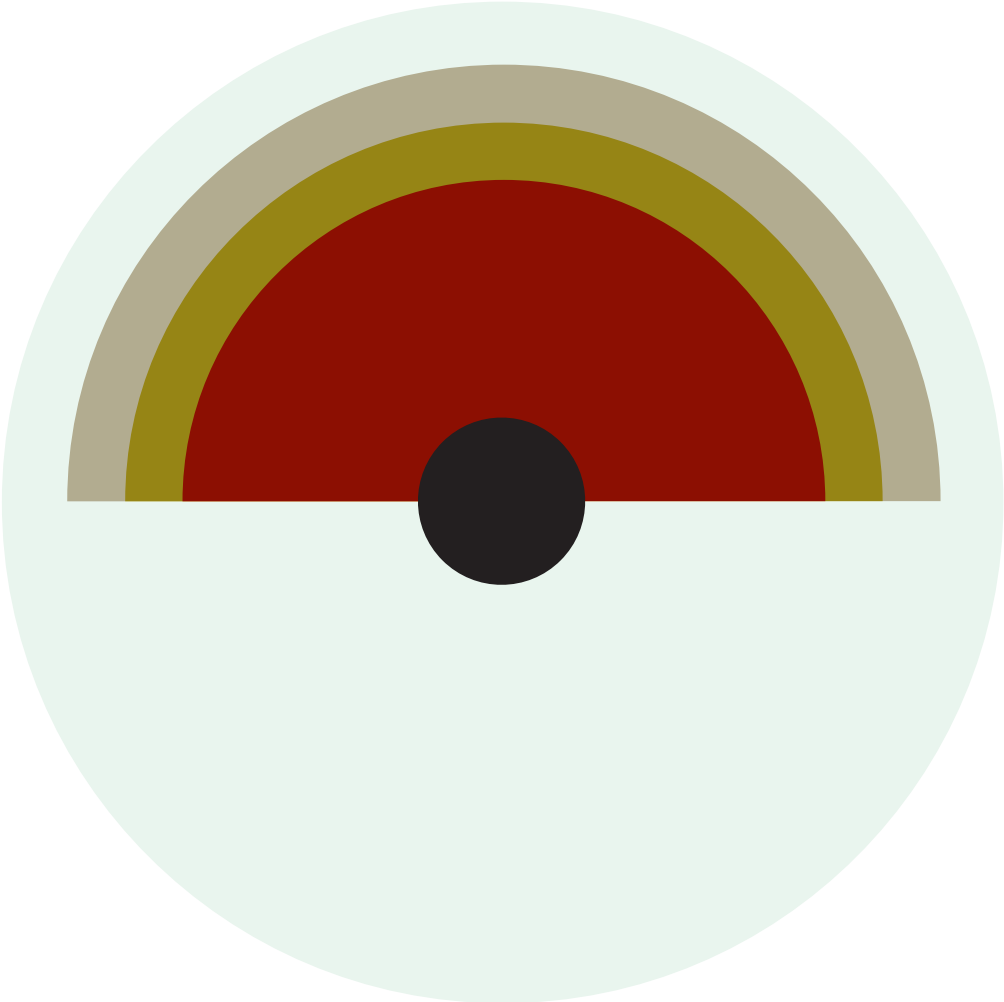
The portfolio manager proved to be the main representative of foreign asset managers in this dialogue with listed companies. Nine of the twelve respondents said that coordination of the dialogue between portfolio managers and ESG specialists on the one hand and Dutch listed companies on the other took place frequently or very frequently. The survey shows that portfolio managers mainly talk to investor relations (six of the eleven respondents) and the CEO (three of the eleven respondents). ESG specialists tended to talk mainly to investor relations (five of the ten respondents) and the chairman of the supervisory board (four of the ten respondents).

The foreign asset managers were asked for their opinion on the frequency and quality of the bilateral contacts with Dutch listed companies. The answers are shown in Table 24.

Table 24

	n=	avg.	1=very poor	2	3	4	5= excellent
Frequency	12	3,8	0	1	4	4	3
Quality of the content	11	4,2	0	0	2	5	4

Seven of the twelve respondents rated the frequency of the dialogue as good to very good and nine of the eleven respondents considered that the quality of the discussions was good to very good. In the interview six of the thirteen foreign asset managers stated that they entered into dialogue with Dutch listed companies only if the outcome of the dialogue could be influenced. The effect and the costs of the dialogue were weighed against each other. An important effect was said to be the influence on shareholder value.



4. INTERNATIONAL DEVELOPMENTS

The Dutch Code does not stand alone, but forms part of an international playing field. Below is a summary of various relevant international developments in the field of corporate governance in 2011.

European Commission: the corporate governance green paper

In April the European Commission published its green paper on corporate governance. According to Michel Barnier, European Commissioner for Internal Market and Services, the aim of this consultation document is to enhance the effectiveness of corporate governance. Barnier believes that this is one of the lessons that can be learned from the financial crisis. The European Commission wonders in this connection whether European legislation is necessary. The green paper relates to all listed companies. It deals with the role of executive directors and supervisory directors, the role of shareholders and also the monitoring and observance of codes. Other topics dealt with in the process include gender diversity, time allocation, the chairman's role, executive remuneration, risk management and long-term investment. The European Commission wonders whether detailed European regulations on explanations in the event of departure from a Code provision are necessary. It also raises the question of whether national authorities should have more say in compliance.

The Dutch government has responded to the green paper. In its response it stresses the importance attached by the Netherlands to the principle of subsidiarity. If the Netherlands – like other European member states – can provide for the desired regime independently and can achieve the set objectives, European legislation is not necessary. It would be logical to introduce European rules if these were more effective than measures taken by the member states. An example would be where a company is required to provide information to its shareholders abroad and the shareholders individually cannot enforce this right easily. In addition, the government highlights a number of issues dealt with in the green paper that are already covered by Dutch legislation or the Dutch corporate governance code. On the subject of compliance the government's response described the Dutch system of 'apply or explain', as laid down by law, and explained the task of the Monitoring Committee and the focus on the quality of the explanation. It also mentions the supervision exercised by the Netherlands Authority for the Financial Markets (AFM) over statements about the Code in annual reports. The government concluded that it saw no reason to change the existing system.

The green paper will be discussed in the European Parliament in January 2012. The Monitoring Committee has discussed the matter with the European Commission and with members of the European Parliament. During these discussions it provided information about the operation of the Dutch Code and the monitoring.

The United Kingdom

Diversity

The Financial Reporting Council announced in November that gender diversity would become part of the UK Code. Companies will be obliged to report on their diversity policy and to what extent they have achieved their aims. However, no statutory quotas for the minimum number of women will be introduced in the Code. Diversity must also be included in the evaluation of the board. The new Code provisions will apply from 1 October 2012. In response to a report of Lord Davies, the British government is currently engaged in consultations on a bill that will oblige companies to disclose the proportion of women on their boards, the number of women in senior executive positions and the number of women in the organisation as a whole. According to the British government, this transparency obligation can help CEOs and chairmen to obtain a better idea of the composition and turnover of their staff. The legislation is due to enter into force on 1 October 2012.

Remuneration

In the consultations referred to above the British government also makes a number of proposals for reporting on remuneration. For example it proposes that one figure be given for the total remuneration of executive directors. This must contain the various remuneration elements. It can be calculated in a variety of ways. The government has asked for suggestions for this. In addition, a discussion paper has been published containing ideas for altering the role of shareholders so that they have a binding rather than an advisory vote on remuneration policy and for appointing representatives of the employees to the remuneration committee.

Annual report

In addition to corporate reporting on diversity and remuneration, the British government is also consulting on reporting in a broader sense. It is proposed that the annual report should be divided into two parts for the sake of readability. The annual report itself should contain the broad outline (such as strategy, risks and the basic financial data) and the rest must be posted on the company's website.

FRC guidance

In March the FRC provided guidance on board effectiveness. The guidance was given in response to amendments to the Code in 2010 and relates to the role of the chairman and the importance of achieving the right balance on the board.

France

In January 2011 the French Senate passed a bill providing that by 2015 management and supervisory boards should have at least 20% male or 20% female representation. This concerns listed companies, other large companies and public sector institutions. All in all, the law relates to some 600 organisations. In 2015 the French government must present a plan to parliament explaining how a minimum of 40% male or 40% female representation can be achieved.

Denmark

In August diversity was also included in the Danish corporate governance code. The code provides that the management board must indicate how diversity can be achieved at management level. The board must set objectives and report on them. Priority must be given to diversity in the appointment process. The nomination committee should observe the objectives that have been set.

Ireland

The Irish Stock Exchange has published a document in which it indicates the substantive requirements that an explanation for departing from the UK Code or the Irish Annex must meet. If a company plans to apply a provision of the Code in the future it must indicate when and how this will happen. If a provision is not applied, a clear reason should be given. Copying texts from the Code or Annex should be avoided. The aim should be to provide shareholders with information about the company and the setting in which it operates. Using the same text year after year for an explanation is not in keeping with the idea behind the Code and does not constitute compliance. The intention here is not to adjust texts for the sake of adjustment, but to consider carefully each year whether the explanation still holds true. This is stated in the new appendix to the Code and Annex.

ESMA

In September the European Securities and Markets Authority (ESMA) published a consultation document on 'empty voting', i.e. a situation in which voting rights are attached to shares without corresponding economic exposure. This means that when votes are cast, it is no longer always apparent how great the shareholder's economic exposure really is. Economic and legal interests are separated by empty voting. This creates a distorted picture of the economic exposure of shareholders. ESMA wishes to examine whether measures should be taken to address the problem. It has called for evidence on how often cases of empty voting have occurred and what cases this involved. It also wonders whether there have been instances of voting in an AGM being influenced by empty voting. ESMA is expected to respond to the consultation evidence next year.

ICGN

The International Corporate Governance Network (ICGN), the worldwide network of institutional investors, has drawn up model texts for use by pension funds (asset owners) in drawing up contracts or mandates with asset managers. The model texts cover subjects such as the integration of sustainability or economic, social and governance (ESG) factors into the investment process. Texts have also been drafted on engagement with companies, in which it is recommended that reference be made to the application of a given code of conduct for institutional investors. Other model texts deal with the exercise of voting rights on shares, share lending, the remuneration structure, the investment horizon, the retention period for shares, risk management, conflicts of interest and reporting to the clients of asset managers.

IIRC

An international committee of large investors, multinationals, regulators, auditors and other service providers has established an International Integrated Reporting Council to promote integrated and comprehensible reporting by companies, in such a way as to provide stakeholders not only with financial data but also with relevant non-financial information needed for a proper understanding of corporate strategy and performance. A discussion paper on a framework for integrated reporting has been released for consultation purposes and pilots are being carried out at various places. The findings will be presented to the G20 in October 2012.

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