

**ICGN**

International Corporate Governance Network

13 April 2015

Monitoring Commission
Dutch Corporate Governance Code
The Secretariat: mss I.L.J.M. Heemskerk and K. van Kalleveen
PO BOX 20401
2500 EK The Hague
The Netherlands

By email: secretariaat@mccg.nl

To the Monitoring Committee:

Re: proposal for the revision of the Dutch Corporate Governance Code ('Code'), April 2016

The International Corporate Governance Network (ICGN) is an investor-led organisation of governance professionals with members including institutional investors responsible for assets under management in excess of US\$ 26 trillion.¹ Our mission is to promote effective standards of corporate governance and investor stewardship to advance efficient markets and sustainable economies worldwide. As such we, as an organization of members with significant investments in Dutch companies, welcome the opportunity to share our comments in respect to the process of further improving the corporate governance of listed companies in Dutch and European financial markets. We also appreciate the extension of the consultation period for overseas submissions.

ICGN recognises the progressive and innovative contributions to corporate governance that have come from the Netherlands, and the Dutch Corporate Governance Code (Code) has stood the test of time admirably since its launch in 2003. ICGN's own Dutch-based members have been active in their support of the Dutch Code, and have contributed separate submissions to the Monitoring Committee's consultation. The ICGN submission benefits from these local perspectives, but also reflects ICGN's more global perspective on the governance issues being reviewed in the revision to the Code. In particular, ICGN's Global

¹ For more information about ICGN, please visit <https://www.icgn.org>

Governance Principles and related ICGN policy guidance form the foundation for our own feedback to the Monitoring Committee².

Relating the ICGN policy framework to the revised Code, we are supportive of the key themes of focus:

- long-term value creation (draft provision 1.1.1);
- internal culture (draft principle 2.5 and the corresponding draft provisions);
- the effectiveness of the internal risk management and control systems (draft provision 1.4.2);
- the increase in the number of provisions concerning the internal audit function (draft principle 1.3 and the corresponding draft provisions);
- the emphasis on good succession planning (draft provision 2.2.4);
- the composition, size and responsibilities of supervisory board (draft principles 2.1, 2.3 and 2.4)
- remuneration of supervisory board members (draft provisions 3.3.1. and 3.3.2)
- relationship with shareholders (section 4)

Code compliance and quality of explanations

Good corporate governance demands customization at the individual company level; there is no 'one size fits all' approach that works for every company. The 'comply or explain' principle accordingly provides the management board, the supervisory board and the shareholders the opportunity to adapt governance practices to the specific characteristics of the business and its own needs. ICGN believes that there should be clear and bespoke explanations for a non-compliance with the Code-- not a generic statement. ICGN therefore welcomes the Monitoring Committee's guidance in the revised Code as to which elements should be contained in the explanation.

Long term value creation and company culture (draft provision 1.1.1, draft principle 2.5 and the corresponding draft provisions)

ICGN supports the Code's focus on long-term value creation, particularly as a starting proposition. Linked to this we also support the focus on company culture, as we think that the business, ethics, tone at the top and sensitivities to stakeholders and societal impact are critical components to a company's ability to create value sustainably. ICGN has recently published a report on culture, ethics and risk which explores how "red flags" of cultural risk may be identified by investors and other stakeholders³. ICGN believes that better reporting on cultural factors could establish

² For ICGN policy documents please see: <https://www.icgn.org/policy>

³ See: <https://www.icgn.org/sites/default/files/redflagsfinal.pdf>

a positive atmosphere for more engagement between stakeholders and a better dialogue between the management, the supervisory board and shareholders.

Risk management and internal control (draft provision 1.4.2, draft principle 1.3 and the corresponding draft provisions)

ICGN welcomes the revised Code's increased focus on risk management. We think it is highly relevant that the Monitoring Committee is taking into consideration both the internal and external audit functions; and we support the increase of provisions relating to internal audit. The latest financial crisis showed that risk management is extremely important for listed companies to be able to adapt to accelerating issues threatening the company's *going concern* position.

If there is no explicit internal audit function within the company, the audit committee should among other things assess whether adequate alternative measures have been taken (draft provision 1.3.6). Accordingly, ICGN would like to recommend that the Code might better clarify the alternative measures that have been taken in the report of the supervisory board, and recommend adjusting draft provision 1.3.6 in this way.

The ICGN strives for a more informative report from the supervisory board with regard to audit and control. More specifically, the supervisory board should demonstrate its accountability externally on matters such as the effectiveness of the external and internal audit processes and the substantive considerations with regard to financial reporting.

In the Dutch legal context since the financial year 2014 the external accountant has an obligation to disclose the key points of the audit in his comprehensive audit opinion. These are the matters that, in the professional opinion of the external auditor, were the most significant in the audit of the annual accounts. The information coming forward because of this duty of disclosure is valuable for all stakeholders. The supervisory board, as first point of contact for the external auditor, should state in the report on its activities that the key points of the external audit were also the most important points discussed between the audit committee/supervisory board and the external auditor, and that information is provided on how these points were addressed.

Yet it still occurs too often in practice that the audit opinion from the external auditor offers more insight into the risk profile of the company than the management report and the report of the supervisory board. Therefore, ICGN would like to recommend the Monitoring Committee to also consider including a reference to draft provision 1.5.3 in the provision regarding the content of the report of the supervisory board (draft provision 2.3.11). Such a provision would give a positive signal to the

international governance community that the supervisory board has to be actively engaged in oversight of risk management within listed companies.

Remuneration of supervisory board members (draft provisions 3.3.1. and 3.3.2)

Regarding the remuneration of supervisory board members, ICGN recognizes there are arguments both for and against the use of shares as a component of supervisory board remuneration. Cash fees are considered by some to be the most suitable form of remuneration for supervisory board members or non-executives, to ensure the greatest degree of director objectivity and independence. In some situations, however, such as for companies in the early stage of their life cycle-- where financial stability is yet to be established-- ICGN appreciates that the award of cash fees may be problematic in such cases.

ICGN's own guidance on non executive remuneration therefore allows for a mixture of cash and shares and takes the view that remuneration of supervisory boards can include share-based elements. For example, part or all of this award may be granted in the form of nil-cost or fully paid non-performance-based shares. This may be a viable alternative when seeking to attract and retain supervisory board members, and can help to align these members' with the company's long-term performance— perhaps particularly so in the early stages of a company's life cycle.

But any equity-based remuneration must first be qualified by certain conditions that may help to preserve objectivity, independence or long-term perspectives. For example, ICGN does not support the use of share options or any form of performance-based remuneration for supervisory board members, non-executive directors or chairs. Performance-based remuneration has significant potential to conflict with a non-executive director's primary role as an independent representative of shareholders and the company's own long-term success.

The ICGN encourages supervisory board members or non-executive directors and chairs to purchase company shares on an ongoing basis to ensure that they are aligned with shareholders' long-term interests whilst not hindering their independent judgement. In achieving this balance, it is appreciated that the level of shareholding will differ according to the individual supervisory board member or non-executive director's personal situation. Companies may wish to consider introducing formal shareholding guidelines and, in turn, adopt anti-hedging policies.

ICGN also believes that any shares owned should be retained beyond retirement or resignation from the company's board; with a suggested retention period of two years post the date of departure. The provision in the Code that such shares and/or rights to shares are held for at least two years following the end of the appointment period (draft provision 3.3.2 under i) should be revised to the extent that the appointment

period implies the complete period from 'appointment till retirement' as a supervisory board member.

Board composition and succession planning (draft provision 2.2.4, draft principles 2.1, 2.3 and 2.4)

ICGN supports many aspects of the section 2 of the code with respect to management and supervision. In particular we are pleased to see the emphasis on orderly succession planning, and believe this can be of greatest relevance in controlled companies where a controlling owner is also in a management role.

At the same time ICGN understands that within the Dutch corporate governance community there are major concerns regarding a number of proposals relating to board independence, particularly the following:

- The proposal to increase the number of dependent members that will serve on the supervisory board (draft provision 2.1.7); and
- the proposal to allow supervisory board members with a personal and financial interest to sit on a special transaction or takeover committee (draft provision 2.7.5).

We share the concern that these provisions may be going in the wrong direction by diluting the basic principle of independent oversight by the supervisory board. ICGN believes that independence of supervisory board members is critical. Any potential conflict that could arise under specific circumstances should be avoided. A specific example is in the area of related party transactions, many investors believe should be overseen by a fully independent board committee—or in the case of large transactions submitted to shareholder votes.

While we agree with the goal of simplifying executive remuneration, we observe that the Monitoring Committee proposes to delete some remuneration provisions that are still debated during the AGM season and in one-on-ones between shareholders and listed companies. For shareholders and other stakeholders it is very important that the supervisory board, when conducting its oversight over company remuneration policy, complies with the generally accepted principles for a remuneration policy within the remuneration report. Furthermore, if these provisions are deleted, it is our understanding that the Netherlands may no longer comply with a recommendation of the European Committee on the subject of executive remuneration. We believe that meeting international standards should have priority for all stakeholders, particularly for the Monitoring Committee. We support similar positions taken by other Dutch investor bodies in this context.

Relationship with shareholders (section 4)

The Code stipulates that the management board can additionally invoke a ‘waiting period’ of no longer than 180 days in the event that a shareholder wishes to place a subject on the AGM agenda that could lead to a change in the company’s strategy. Such a response time is unique in the world, and would constitute an erosion of the shareholder’s right to submit shareholder resolutions; it also conflicts with the European Shareholder Rights Directive. We encourage the Commission to reconsider this provision.

We observe that section 4 of the Code regarding shareholders focuses on the shareholders’ meeting. We agree that this is a critical aspect of the corporate governance process, as is the related area of facilitating cross border proxy voting for institutional investors. Particularly from an international investor’s perspective ICGN would like to encourage the Code to perhaps consider a greater emphasis on a company’s relationship with institutional investors outside the narrow context of the shareholders meeting. In particular we believe it is of fundamental importance for company boards – both management and supervisory—to be held to account by its investors, and that the process of engagement and dialogue is one that can be of benefits for both companies, but also investors seeking to improve their stewardship. The Committee may wish to be more explicit in the Code with regard to encouraging dialogue between boards and key investors.

We also note in the consultation document that the Committee advises a further exploration of investor responsibilities through a stewardship code. We think this is sensible, and that such an exercise will also illustrate the need for company management and supervisory boards to take part in shareholder engagement as part of the stewardship process. In this regard we would highlight that ICGN has developed its own Global Stewardship Principles to serve as a global point of reference for investors, companies and regulatory bodies interested in developing investor stewardship and responsible investment practices. These Principles are in the final stage of development, and will be put to ICGN membership for ratification at our own annual meeting in San Francisco this coming June. We will be happy to share these Principles with you once they have been finalised, and hope that they may be of practical use as you consider aspects of a Dutch stewardship code.

Thank you for the opportunity to provide comments to the proposal for revision of the Dutch Corporate Governance Code.

We wish the Monitoring Committee fruitful and prosperous ongoing deliberations. Should you wish to discuss our comments further, please contact George Dallas, ICGN's Policy Director, by email at george.dallas@icgn.org

Yours faithfully,

Erik Breen

Chairman, ICGN Board

ICGN contacts:

Kerrie Waring, ICGN Executive Director

Carol Drake Nolan and Niels Lemmers, Co- Chairmen ICGN Shareholder Responsibilities Committee