Responses to the Proposal for a Revision of the Dutch

CORPORATE GOVERNANCE CODE

Explanation of the Work Carried out by the Committee

UNOFFICIAL TRANSLATION

Monitoring Commissie
CORPORATE GOVERNANCE CODE

December 2016

CONTENTS

INTRODUCTION

The Corporate Governance Code (referred to below as the Code) has been revised. The revision was made possible in part thanks to the many valuable responses to the amendments to the Code adopted by the Frijns Committee in 2008 (referred to below as the 2008 Code) which were submitted for consultation.

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

The numbering of the principles and best practice provisions in the revised Code has been amended in some places as compared with the text submitted for consultation. Unless stated otherwise, the present document refers to the numbering as applied in the revised Code published on 8 December 2016.

Revision process

The Code was adopted in December 2003 by the Tabaksblat Committee and was last revised in December 2008 by the Frijns Committee. On 11 February 2016, at the request of the National Federation of Christian Trade Unions in the Netherlands (CNV), Eumedion, Euronext, the Federation of Dutch Trade Unions (FNV), the Association of Stockholders (VEB), the Association of Securities-Issuing Companies (VEUO) and the Confederation of Netherlands Industry and Employers (VNO-NCW) (referred to below as the supportive parties), the Commission presented a proposal for a revision of the Code (referred to below as the Proposal).

The consultation period lasted eight weeks, running until 6 April 2016 inclusive. More than 100 responses to this Proposal were received. Views on and suggestions were also expressed during meetings within various forums, in the press and in professional journals. A separate consultation took place with regard to a proposal for the application of the Code by companies with a one-tier board. The consultation period for this proposal ran from 3 August 2016 to 28 September 2016 inclusive and the Committee received 20 responses.

The Committee is grateful that so many people took the time and trouble to make their opinions known from a variety of perspectives. The responses received were examined with much interest and prompted the Committee to improve the principles and best practice provisions submitted for consultation. Unfortunately, owing to the large number of responses received, it is not possible to deal with every single response and these notes are limited to the most important areas to have been changed as compared with the proposals.

The responses to the Proposal for revision and the proposal for the application of the Code by companies with a one-tier board are available on the Committee's website: www.mccg.nl.

Notions underlying the revision

The objective that the Committee set itself in the Code's revision was to incorporate developments to do with topical corporate governance issues into the Code. Based on the responses received, the Committee has been able to form a clear picture of whether the proposed amendments to principles and best practice provisions are sufficiently aligned with the requirements existing in practice.

The Code is a product of self-regulation and was therefore created by, and is intended for, the parties that it addresses. Support among the parties involved is essential for self-regulation. This is why support was also an important underlying principle for the Committee, both when it was drafting the proposals and when it studied and processing the responses produced by the consultation. Some responses contained interesting suggestions for a more far-reaching updating of the Code, often referred to as a missed opportunity. The Committee was reluctant however to introduce any further new elements over and above those in the proposed text because they had not been submitted for consultation. Only suggestions involving minor modifications of substance which the Committee imagines will accord with day-to-day practice or which are important to ensure support for the Code have been incorporated. That said, suggestions for further updates were taken to heart and have been analysed so that they can be included in the future activities of the Committee and its successors.

The Code is applicable to listed companies and regulates relations between the management board, the supervisory board and the shareholders. Any suggested changes to the Code were subjected to a critical assessment to establish whether they will result in an improvement of the governance of listed companies. The Committee is aware that, in practice, application of the Code goes beyond the group of listed companies. However, the Committee remains primarily focused on listed companies in the belief that they have a specific dynamic of their own in the relationship between the management board, supervisory board and shareholders.

When formulating the proposals and processing the responses, the Committee started from the basic premises that the Code should be based as far as possible on principles, overlaps with legislation should be avoided and sufficient awareness of the national and international context within which the Code is applied and companies and shareholders operate should be maintained.

1. LONG-TERM VALUE CREATION

The Code centres on the importance of long-term value creation: this is a central theme throughout the Code. Long-term value creation requires management board members and supervisory board members to act in a sustainable manner by making conscious choices concerning the sustainability of the strategy in the long term. It is essential that the interests of stakeholders are taken into consideration in this process. Long-term value creation is mentioned specifically in the preamble and in principle 1.1 and the accompanying best practice provisions. The consultation responses reflect broad support for the Committee's choice here. Changes have been made in the proposed text on the following points.

Weighing of stakeholders' interests

A number of respondents expressed their concern that the Proposal appears to imply that the interests of all stakeholders involved with the company should be *represented* for the purposes of long-term value creation. The Committee understands that concern. After all, it is not possible to represent the interests of all stakeholders in all cases. The basic premise is that the interests of the stakeholders involved should be duly *weighed*. The text of the preamble and best practice provision 1.1.1, part vi, has been amended to reflect this.

Long-term value creation

The need for the term 'long-term value creation' to be given more context was expressed in a number of responses. The Committee's reason for making long-term value creation the central theme of the Code is to encourage people to act in a sustainable manner. Management board members and supervisory directors are expected to heed the long-term consequences of decisions and their impact on stakeholders. Aspects which play a role in the development of the long-term value creation strategy are listed in best practice provision 1.1.1. The context is thus outlined in the Code. However, the interpretation of long-term value creation will vary from company to company and will depend, for example, on the market within which the company's affiliated enterprise operates. The Committee is working on the assumption that companies will use the scope offered by the Code to interpret the meaning of long-term value creation for the company and render account thereof.

Long-term value creation strategy – best practice provision 1.1.1

The phrase 'non-financial aspects of doing business relevant to the company' in best practice provision 1.1.1, part v, has been replaced by 'other aspects relevant to the company'. The Committee has taken on board the suggestion for a redefinition because the aspects mentioned could also have a financial impact. The Code's explanatory notes to best practice provision 1.1.1 explain that 'other aspects relevant to the company' in any case means the aspects of doing business specified in the EU Directive on disclosure of non-financial and diversity information (2014/95/EU). That Directive is transposed into national legislation.

Furthermore, the phrase 'the chain within which the enterprise operates' has been added to the list of 'other aspects relevant to the company' in part v. The addition is in keeping with long-term value creation and the greater attention given in the Code to acting in a sustainable manner. The OECD guidelines for Multinational Enterprises provide useful guidance for companies with international operations in fulfilling their chain responsibility.

Involvement and role of the supervisory board – best practice provisions 1.1.2 and 1.1.3
Some respondents pointed out to the Committee that the proposed wording in best practice provision 1.1.2 could create a problem as regards the performance by the supervisory board of its supervisory duties intended by the legislator. The text of best practice provision 1.1.2 explains that the supervisory board does not approve the strategy, but is involved in its formulation, and also explains how it then monitors the implementation of that strategy. An explanation is also given of the aspects on which the supervisory board renders account in its report, namely the supervisory board members' involvement in the establishment of the strategy and its implementation.

Finally, a technical change has been made in that the proposed best practice provision has been split into two provisions: best practice provision 1.1.2 relates to the manner in which the management board involves the supervisory board in the strategy, and best practice provision 1.1.3 concerns the supervisory role of the supervisory board.

Other points – long term value-creation
A few respondents mentioned the financial reporting of companies as a factor with the potential to hamper the realisation of long-term value creation. They have the impression that companies tend to apply accounting principles with a short-term focus. The Committee believes that companies could place a greater emphasis on long-term considerations in their reporting than is presently the case. However, for an essential change to be made with regard to this point consideration will have to be given to an amendment of reporting standards.

2. RISK MANAGEMENT

An adequate risk management system is essential for creating long-term value. All too often a one-sided focus on short-term gains has come at the expense of long-term results. Today's profits may result in future losses. Besides financial losses, there can be reputational damage or the need to make radical changes to the revenue model. A good system for weighing opportunities and risks should make it possible to deliver results today without harming value creation in the future. This is why the Committee proposes giving more attention to risk management in the Code. The Proposal contained an explanation of what effective risk management entails and who bears responsibility for it within the corporate relationships. Good interaction between the management board, the supervisory board and the audit committee along with effective communication with the internal audit function and the external auditor are important. For shareholders, it is important that they gain a reasonable degree of insight into the design and operation of the internal risk management and control systems.

Risk management – principle 1.2

The 2008 Code outlines how a company is expected to give shape and substance to its internal risk management and control systems. In the Proposal it was suggested that the risk *assessment*, implementation and evaluation phases should be given a more prominent role by transferring the description of those phases from the explanatory notes in the Code to the best practice provisions. There was nothing in the consultation responses to prompt a major amendment of the proposed text; the only changes made are the clarification in the text of principle 1.2 and the accompanying best practice provisions and amended wording in some areas. For instance, *risico assessment* has been replaced by *risicobeoordeling* (in the Dutch version) and the examples of risks forming part of the risk analysis given in best practice provision 1.2.1 have been deleted. In the explanatory notes is included that risks comprise both internal and external risks, including the remuneration structure.

Internal audit function – principle 1.3

The management board's task of assessing the design and operation of internal risk management and control systems is an essential part of effective risk management. The Code starts on the basic premise that the management board will establish an internal audit department for the performance of this task so that the implementation and effectiveness of the systems can be assessed objectively. One aspect from the 2008 Code which remains unchanged is that the internal auditor reports to the management board. The Committee believes that the company's management board is primarily responsible for risk management. That said, the supervisory board should be more closely involved in the appointment, assessment and dismissal of the internal auditor. Some respondents refer to situations in practice where the internal auditor works under the responsibility of the supervisory board. In accordance with the 'comply or explain' principle, the Code offers companies the scope to opt for a different arrangement.

Absence of an internal audit department – best practice provision 1.3.6

Best practice provision 1.3.6 relates to the situation where the company has not established an internal audit department. In the explanatory notes to the Proposal it was stated that a purely financial argument is insufficient to justify the absence of an internal auditor. The Committee has received the necessary comments on this position. Such a requirement would be too onerous for small or relatively small companies. The Committee understands that financial arguments may play a role when considering the matter of whether or not to establish an internal audit department. What is important is that the decision on whether or not to establish an internal audit department should be a conscious one and that alternative measures should be taken in the absence of an internal auditor. For that reason, it is clarified in best practice provision 1.3.6 that the supervisory board's report must also state which alternative measures were taken.

Other changes – internal audit function

Prompted by the consultation responses, the text of best practice provisions 1.3.1 and 1.3.3 has been changed so that it better reflects the corporate relationships, for instance by giving authority to grant approval of appointment and dismissal of the internal auditor to the supervisory board instead of to the audit committee. The audit committee undertakes preparatory work for the supervisory board's decision-making.

The best practice provision in the Proposal which suggested that the culture within the enterprise and the conduct of the management board and the audit committee should be discussed with the internal audit function has been removed. See, in this context, the explanatory notes on the changes made to the principle and best practice provisions relating to culture.

Statement by the management board – best practice provision 1.4.3

It was proposed that the management board's statement concerning risk management should be expanded in respect of two points, namely by cancelling the link to financial reporting risks and introducing a forward-looking statement expressing the expectation that the company's continuity has been safeguarded for the next twelve months.

The consultation responses showed that there would be insufficient support for the in-control statement included in the Proposal. The proposed wording was considered to be too broad because, unlike in the 2008 Code, it was not limited to financial reporting standards and, for example, also referred to operational and strategic risks and uncertainties surrounding laws and regulations. It was pointed out that this wider scope could lead to existing control structures being expanded and, therefore, to higher costs. Various respondents also suggested that the wording chosen would make the statement sound too much like a guarantee, which could result in, on the one hand, management board members being exposed to liability risks or, on the other, boiler-plate texts. The proposed wording would also be too great a departure when considered in an international context.

The consultation responses prompted the improvement of the in-control statement in a number of areas with a view to making it more workable. First, the wording of the title of the best practice provision was changed to make it more neutral, namely 'Statement by the management board'. The amended best practice provision 1.4.3, part i, requires the management board to provide sufficient insights into any failings in the effectiveness of the internal risk management and control systems. The forward-looking statement has also been amended. In the management report the management board states that, based on the current state of affairs, it is justified that the financial reporting is prepared on a going concern basis. The forward-looking statement also covers the mentioning in the report of those material risks and uncertainties that are relevant to the expectation of the company's continuity for the period of twelve months after signing.

The statement remains broader than that contained in the 2008 Code in that it does not restrict itself to financial reporting risks only in parts i and iv. This makes the statement an extension of the internal risk management

and control systems, which are not limited to financial reporting risks either. This broader scope does not imply however that the statement must be underpinned by the same control structure for each risk. The basic principle is that any material failings and risks are mentioned in the management report and that the management board declares that the information presented is complete to the best of their knowledge. This has to do with material risks which have been identified or can reasonably be foreseen at the time the statement is made.

Role of the supervisory board – principle 1.5

The duties and responsibilities of the audit committee are described in best practice provision 1.5.1. The question of whether this description of duties might be too limited was raised in some responses. However, many important rules relating to audit committees are already included in the EU amending directive on statutory audits of annual accounts (Directive 204/56/EU)[1], which is set to be implemented in Dutch legislation shortly.[2] The rules to be implemented pertain to, for example,
the expertise and composition of the audit committee and also to the duties of the audit committee in the financial reporting process and the assessment of the internal risk management and control system. To avoid overlaps with legislation, these rules are not reiterated in best practice provision 1.5.1. The explanatory notes to the Code do contain a reference to the aforementioned legislation.

Best practice provision 1.5.1, part iii, explains that the audit committee monitors the application of information and communication technology by the company, including risks related to cybersecurity. Cybersecurity is a current risk which every company will experience to a greater or lesser extent. Best practice provision 1.5.1 also clarifies the description of the audit committee's duties, remaining in line with the text of the 2008 Code.

Other changes – audit committee

Best practice provision 1.5.2 has been amended and now specifies that, in principle, the CFO should also attend meetings of the audit committee alongside the internal auditor and the external auditor. This approach is more in line with practice. Naturally, the audit committee is free to hold meetings without the CFO, the internal auditor and the external auditor in attendance. The role of the supervisory board with regard to the supervision of irregularities was included in best practice provision 1.5.5 in the Proposal. In the revised Code, this provision was placed below the new principle pertaining to misconduct and irregularities. See the explanatory notes to principle 2.6.

Best practice provision 1.5.3, which pertains to the audit committee's report, has been re-worded to bring it into line with the text of best practice provision 1.4.3, which covers the statement by the management board.

1 Article 39 of Directive No 2006/43/EG of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Directive No 78/660/EEG and repealing Directive No 84/253/EEC (OJ L 157 of 9 June 2006, p. 87). Directive 2006/43/EC was last amended by Directive No 2014/56/EU of 16 April 2014 (OJ EU 2014, L 158).

2 Decision of 26 July 2008 implementing Article 41 of Directive No 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Directives No 78/660/EEC and No 83/349/EEC of the Council of the European Communities and repealing Directive No 84/253/EEC of the Council of the European Communities (Bulletin of Acts and Decrees 2008, 323).

External auditor – principles 1.6 and 1.7

Principles 1.6 and 1.7 and the accompanying best practice provisions, which pertain to the external auditor, largely remain unchanged as compared with the Proposal. Changes have been made regarding the following points, though:

- Best practice provision 1.6.2 is new and its insertion was prompted by the consultation responses. According to that provision, the supervisory board should give the external auditor a general idea of his performance. Based on best practice provision 1.6.1, the supervisory board assesses the performance of the external auditor. Naturally, the external auditor is provided with a general idea of the content of the assessment.
- Best practice provision 1.6.4 pertains to the supervisory board's conclusions concerning the nomination of the external auditor. The part which states that the supervisory board, where necessary, if it does not accept the audit committee's advice concerning the external auditor's appointment, should advise the general meeting accordingly and mentions this in its report, has not been included. That part of the provision could interfere with the collective responsibility of the supervisory board for decision-making.
- In best practice provision 1.6.5 it has been clarified that the obligation to publish a press release pertains to the early departure of the external audit firm and not to the early departure of the auditor as a natural person.
- Best practice provision 1.7.5 from the Proposal regarding the identification of irregularities by the external auditor is placed under principle 2.6, which pertains to misconduct and irregularities.
- Best practice provision 1.7.7 from the Proposal, which assigned a role to the external auditor in the identification of failings as regards compliance with the Code, has not been included. It was not the Committee's purpose to expand the duties of the external auditor. The management board and the supervisory board should be able to rely on the external auditor reporting what he sees, based on his role as auditor of the company. This also applies to compliance with the Code and observations concerning the governance of the company.

3. EFFECTIVE MANAGEMENT AND SUPERVISION

The Committee has noticed a development where supervisory board members are being given a more prominent position within the corporate relationships and the checks and balances within the company. Supervisory board members are expected to monitor the management board more closely. The Committee has also observed that companies, even more than before, are influenced by factors of an external nature, which, among other things, influences the decision-making on matters such as the company's strategy, risk management and remuneration policy. The aforementioned developments have prompted the Committee to place the emphasis on new aspects or shift the emphasis on existing aspects in Chapter 2 of the revised Code. The revised Code will mean that the management board and supervisory board are better able to address such developments within the company and to ensure the most effective management and supervision possible.

The consultation responses to the proposals concerning this chapter show that respondents value the attention given by the Committee to effective management and supervision. The responses include suggestions that the best practice provisions should be amended or tightened up to make them more in line with the Committee's efforts to bring about effective management and supervision. Others express the view that the Proposal, in the effort to respond to developments, does not make a sufficiently clear distinction between the tasks and responsibilities of the management board and the supervisory board in this section. The Committee examined the suggestions carefully and included them in its considerations when finalising the provisions.

Executive committee – best practice provision 2.1.3

An increasing number of listed companies are establishing executive committees. The 2012 Monitoring Report on compliance with the Code in the 2011 financial year observed that almost half of all companies had established an executive committee. The structure of an executive committee will often depend on the specific characteristics of the company. Since the existence of an executive committee may have an impact on the checks and balances within the company, the Proposal included a best practice provision regarding the safeguarding of the requisite expertise and the management board's responsibilities, and the adequate provision of information to the supervisory board.

Some respondents expressed their concerns about the consequences, including legal consequences, of establishing an executive committee and advised the Committee to elaborate further on the requirements included. Since not all members of the executive committee are officially management board members, they fall outside the statutory framework law regarding supervision and accountability. In the opinion of those respondents, this may adversely affect the system of checks and balances. The Committee has observed that no blueprint exists of how a company with an executive committee should organise its governance model and is reluctant at present to formalise the arrangements with additional requirements. It may be appropriate to discuss this point further in future.

Nevertheless, the Committee believes that companies with an executive committee should be aware of the risks associated with such a governance model as regards effective corporate governance. The Committee seeks to elaborate on this with best practice provision 2.1.3. In part prompted by the consultation responses received, the Committee supplemented this provision further, to the effect that that the supervisory board – in companies with an executive committee – should pay specific attention not only to the dynamics within but also to the relationship *between* the management board and the executive committee. The Committee has made a further addition to best practice provision 2.3.1, stating that the supervisory board's terms of reference should include a paragraph concerning dealings with the executive committee. That paragraph will also improve the safeguards and may create clarity concerning the role of the executive committee internally and externally.

Expertise – best practice provision 2.1.4

Best practice provision 2.1.4 pertains to the expertise of supervisory board and management board members. Given the critical responses, the proposed additional requirement that at least one supervisory board member should have specific expertise in the area of technological innovation and new business models has been dropped. In general, the importance of such expertise in the supervisory board is acknowledged, but it is not considered desirable to have such a condition included in a best practice provision and to have one supervisory board member made responsible for knowledge in both areas. The respondents believe that the supervisory board should be able to assess itself the expertise required, depending on the circumstances and having regard to the size and complexity of the enterprise. Moreover, a disproportionately great importance would be attached to those areas of expertise compared with other relevant and useful areas of expertise.

However, the Committee notes that expertise in the area of technological innovation and new business models is in many cases of substantial importance for a company and is inextricably linked with long-term value creation. The Committee chose a different approach and addressed the matter in a more general sense. In the explanatory notes to best practice provision 2.1.4 on expertise it is explicitly stated that there must be sufficient expertise within the management board and the supervisory board to enable opportunities and risks which may be associated with innovations in business models and technologies to be identified in good time. This matter is also addressed in the explanatory notes to best practice provision 1.1.1 on long-term value creation.

Diversity – best practice provisions 2.1.5 and 2.1.6

The Committee believes that diversity within the management board and the supervisory board is beneficial to proper decision-making and the effective functioning of these bodies. When revising the Code, the Committee carefully considered what the Code could add and how existing initiatives in the area of legislation and otherwise could be reinforced. The added value of the Code lies in its prescribing a diversity policy with concrete targets and accountability provisions. The accountability about diversity covers the state of affairs and the efforts that have been made and are being made to achieve the targets. The Committee hopes thus to encourage companies to conduct an effective and transparent diversity policy for their upper management levels. This was the reason why the scope of the diversity provision was expanded to include the management board in the Proposal.

Prompted by the consultation responses, the best practice provision pertaining to diversity policy and rendering account for it was somewhat amended and the content divided into two best practice provisions, 2.1.5 and 2.1.6. It was already stated in the Proposal that in their diversity policy companies should deal with the diversity aspects of relevance to the company such as nationality, age, gender and background in terms of education and professional experience.

The Committee expanded the scope of the diversity provision further by including the executive committee. The Committee also notes that diversity should not be limited to the upper management levels, but should play a role for all layers within the enterprise. To achieve diversity at the top it is essential that the inflow of people who may rise to the top is diverse.

To promote diversity the Committee also believes it would be useful to have attention for diversity in decisions regarding the succession of management board members and supervisory board members. Best practice 2.2.4, which pertains to succession planning, explicitly states that diversity should be part of the plan for succession.

Enkele respondenten zijn van mening dat de verwijzing naar het wettelijk streefcijfer inzake de verhouding man-vrouw in best practice bepaling 2.1.6 overbodig is. De Commissie beschouwt de verwijzing als van

toegevoegde waarde en heeft de verwijzing behouden. De passage heeft ten doel de werking van het wettelijk Some respondents believe that the reference to the statutory target figure for the male to female ratio in best practice provision 2.1.6 is superfluous. The Committee regards the reference as representing added value and has retained it. The purpose of the paragraph is to reinforce the effect of the statutory target figure by requiring account to be rendered on the measures which have been taken, and are taken where the stated targets are not achieved. At the time the Code was being drawn up, the parliamentary process regarding the continued application of the statutory target figure in respect of the male to female ratio was still in progress.[3] The Committee has opted for future-proof wording for this point in anticipation of any changes that might subsequently be introduced.

Some respondents also noted that the best practice provision overlaps with the European Directive as regards disclosure of non-financial and diversity information by certain large undertakings and groups,[4] which is currently being transposed into national law. The Code stipulates that listed companies must account for the measures they took if the targets set in the diversity policy were not achieved. This is not provided for in the Directive. Furthermore, the scope of the Code differs from that of the EU Directive. The Code is applicable to all listed companies, whilst small and medium-sized companies are excluded from the provisions of the EU Directive.

Independence of supervisory board members – best practice provisions 2.1.7 and 2.1.8

The Committee has proposed introducing a change to the requirements in respect of the independence of supervisory board members. According to the 2008 Code, the number of dependent supervisory board members on the supervisory board should be limited to one at most. The proposal was to make it possible for multiple supervisory board members with a shareholding of at least ten per cent in the company to form part of the board, provided that the majority of the board comprises independent supervisory directors.

Many respondents raised the subject of the independence of supervisory board members, and their responses were divided. On the one hand there are respondents who are quite happy with the proposed best practice provisions. On the other, some parties object to the option which makes it possible for multiple supervisory board members who are not independent to be appointed. Supervisory board members who are or represent major shareholders would have a great influence, or too great an influence, on the decision-making process within the supervisory board and jeopardise the independence of the supervisory board.

The independence of the supervisory board is of paramount importance to the Committee and, with a view to underlining that fact, it has added the following passage from the 2008 Code to the beginning of best practice provision 2.1.7: 'The composition of the supervisory board is such that the members are able to operate independently and critically vis-à-vis one another, the management board, and any particular interests involved.'

The Committee believes that a shareholding of ten per cent or more is usually a sign of long-term involvement and that the interests of the supervisory board member with such a shareholding usually coincide with those of the company. The same applies to a supervisory board member representing a major shareholder. The nature of the supervisory board member's involvement fits in well with long-term value creation for the company. Furthermore, the independence of the supervisory board is safeguarded by the setting of a stepped limit for the number of dependent supervisory board members. Within the meaning of parts i to v inclusive of best practice provision 2.1.7 the number of dependent supervisory board members is limited to one at most. Together with the number of supervisory board members who are not independent in terms of the number of shares they hold or represent as defined in parts vi and vii, the number of dependent super-

3 Parliamentary Papers II 2015-2015, 34 435.

4 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial information and diversity information by certain large undertakings and groups (OJ EU 2014, L 330).

visory board members is less than half of the total number of supervisory board members. This means that the majority of supervisory board members remain independent. The Committee also wished to safeguard a balanced distribution among the supervisory board by stipulating that each shareholder or group of affiliated shareholders should not be represented by more than one supervisory board member.

Finally, the Committee has amended best practice provision 2.1.7, part iii, further by eliminating an unintended distinction between a direct and indirect shareholding. It now follows from best practice provision 2.1.7 that a supervisory board member who personally has a shareholding of more than ten per cent and also a supervisory board member who represents a legal entity holding more than ten per cent of the shares may be appointed.

Appointment and reappointment periods supervisory board members – best practice provision 2.2.2

It was suggested that the appointment period for supervisory board members should be changed from a maximum of three 4-year terms to a maximum of two 4-year terms. Thereafter, reappointment would be possible only in special circumstances, for up to two additional 2-year terms. A number of respondents expressed their preference for preserving the situation as set out in the 2008 Code involving three 4-year terms. The Committee has not taken up this suggestion. The Committee attaches importance to the alertness of supervisory board members who should maintain sufficient distance and have a fresh way of looking at the company when performing their supervisory role. Reducing the overall number of years of office for supervisory board members may encourage this. The basic principle in the revised Code is an appointment period amounting to two 4-year terms. Account should be rendered of the reasons for any subsequent reappointments in the report of the supervisory board.

The Committee acknowledges that in certain cases companies will nevertheless consider it useful to reappoint a supervisory board member after a period of eight years. That is why the Committee has removed the passage in the Proposal that any such reappointment will 'be possible only in certain circumstances' from best practice provision 2.2.2.

The provision concerning the entry into force of the Code includes a transitional provision about the revision of the term of appointment. Best practice provision 2.2.2 does not apply to supervisory board members who, as of the date of the entry into force of the Code, have already held office for more than eight years, provided that best practice provision III.3.5 of the 2008 Code is being complied with. The same applies for supervisory board members who are to be nominated for reappointment for a third four-year term at a general meeting in 2017.

Composition of the committees – best practice provision 2.3.4

It was stated in the Proposal that the chairman of the supervisory board should not be the chairman of the board's committees. However, many consultation responses emphasised that the chairman of the supervisory board is precisely the right person to chair the selection and appointment committee. The chairmanship of that committee is regarded as one of the core duties of the chairman of the supervisory board. The Committee agrees with the comments received and has therefore amended the text of best practice provision 2.3.4. However, it remains a basic principle that the audit committee and the remuneration committee should not be chaired by the chairman of the supervisory board or by a former member of the company's management board.

One technical improvement introduced in respect of a few best practice provisions is the amendment of the wording relating to the duties of the supervisory board and its committees. As a result, the text is more in keeping with the corporate relationships. For example, in a number of best practice provisions it is clarified that the committees perform the preparatory work for the decision-forming process of the supervisory board.

Decision-making and functioning – principle 2.4

The provision of information and being provided with information within the company is essential if the management board and the supervisory board are to be able to perform their tasks in a balanced and effective way. The Committee has carefully considered ways of ensuring that the Code helps to create and maintain an environment where as much information as possible is available and provided in a timely manner.

Some respondents believed that the Code should pay more attention to the supervisory board members' obligation to request information and made a number of suggestions as regards wording. The Committee acknowledges that it is important that adequate arrangements are put in place within the company to ensure information is available and that everyone is personally responsible for gathering accurate information; this is reflected in the principle and also in best practice provisions 2.4.7 and 2.4.8. The Committee emphasises that this responsibility applies equally in respect of the management board members' obligation to *provide* information to supervisory board members. The amendments to the principle and the best practice provisions are intended to make this clearer than it was in the Proposal. They are aimed, to an even greater extent than in the Proposal, at making companies aware of the importance of the adequate and timely provision of information and encouraging them to ensure such takes place.

A new best practice provision (2.4.1) pertaining to stimulating openness and accountability has been added to principle 2.4 Decision-making and functioning. In the Proposal, that provision was included in principle 2.5, which pertains to culture,. In terms of content, the best practice provision is better placed here because it concerns the interaction within the management board and within the supervisory board. Openness and accountability are essential for decision-making and functioning in particular.

Misconduct and irregularities – principle 2.6

The Committee has merged the best practice provisions in respect of reporting misconduct and irregularities as included in the Proposal to form a new principle with accompanying best practice provisions. This approach is in keeping with the thematic structure of the Code. Merging the best practice provisions helped to streamline the terminology used and remove any overlap in terms of content. The best practice provisions in respect of misconduct and irregularities are better aligned as a result. By clustering the provisions, the subject has gained a more prominent place in the Code, and rightly so, since misconduct and irregularities can undermine long-term value creation.

Principle 2.6 is new and is intended to ensure that the management board and supervisory board are alert to indications of actual or suspected misconduct and irregularities. The management board should establish a procedure for making reports and for following them up. The supervisory board should supervise the functioning of the reporting procedure and the independent investigation. The idea is that it will be possible to report not only misconduct of public interest – stemming from the House for Whistleblowers Act[5] – but also other misconduct and irregularities. This makes the Code broader in scope than the statutory provisions.

The content of the accompanying best practice provisions is largely based on the texts from the Proposal.

- Best practice provision 2.6.1, which is partly based on provision 2.5.3, as set out in the Proposal, pertains to the arrangements for reporting. Prompted by the consultation responses, it was expanded to include the management board having to ensure that employees can file a report without jeopardising their legal position.
- Best practice provision 2.6.2 deals with the role of the chairman of the supervisory board. This best practice provision provides that the management board should inform the chairman of the supervisory board without delay of any actual or suspected material misconduct or irregularities. The best practice provision also provides that, where the actual or suspected misconduct or irregularity pertains to the functioning

5 Section 1(d) of the House for Whistleblowers Act (*Wet Huis voor klokkenluiders*).

of a management board member, employees can report this directly to the chairman of the supervisory board. A substantial part of this provision is based on best practice provision 2.5.2, as included in the Proposal.

- Best practice provision 2.6.3 concerns notifications by the external auditor and is the result of a partial merging of best practice provisions 1.5.5 and 1.7.5, as included in the Proposal. Prompted by the consultation responses, this provision was expanded to include the external auditor being required, in principle, to inform the chairman of the audit committee without delay if he observes or suspects any misconduct or irregularities during the performance of his task. However, if the actual or suspected misconduct or irregularity pertains to the functioning of a management board member, the external auditor should approach the chairman of the supervisory board.
- Finally, best practice provision 2.6.4 is aimed at the role of the supervisory board. The provision is largely derived from best practice provision 1.5.5, as included in the Proposal. It has been clarified that the supervision by the supervisory board is aimed at the reporting procedure, the management board's investigation of the signs, and, if misconduct or an irregularity is confirmed, at the proper follow-up of any recommendations for remedial action. The supervisory board's opportunity to initiate an investigation independently is limited to situations where the management board is itself involved. The management board remains primarily responsible for carrying out investigations.

Preventing conflicts of interest – principle 2.7

The proposed principle and the accompanying best practice provisions in respect of preventing conflicts of interest were largely based on the best practice provisions from the 2008 Code. The best practice provisions for management board members and supervisory board members were merged and the best practice provisions which overlapped with the law were deleted. It was apparent from the consultation responses that the relationship between the conflict of interest provision in the Proposal and the provision in the law (in Book 2, Section 129(2) of the Dutch Civil Code and Book 2, Section 140(5) of the Dutch Civil Code) was unclear. The Committee has amended the text, taking as its basic premise the fact that the Code is aimed at preventing conflicts of interest in the broadest sense and also further defines the conflict of interest provision in the law.

In Book 2 of the Dutch Civil Code (referred to below as BW), the term 'conflict of interest' is interpreted as a situation where, in the case of deliberation and decision-making, a direct or indirect personal interest of the management board member or supervisory board member is in conflict with the interests of the company and its affiliated enterprise. The law provides that a management board member or a supervisory board member shall not take part in the decision-making process if he has an interest which is contrary to, or in conflict with, that of the company.

The Committee believes that, in general, the prevention of conflict of interests should be a matter to be addressed by the company, regardless of whether deliberations are taking place or decisions being taken. The Committee interprets the term 'conflict of interest' more broadly than the term 'conflicting interest'. Principle 2.7 is aimed to preventing conflicts of interest. Best practice provision 2.7.1 states that management board members and supervisory board members should be alert to conflicts of interest (or circumstances giving rise to such conflicts). Finally, the scope of best practice provision 2.7.2 has been expanded with the result that the supervisory board's terms of reference now include rules on how to deal with conflicts of interest.

The Code also sought consistency with the conflict of interest provision in the law, as can be seen in best practice provisions 2.7.3 and 2.7.4. The list in best practice provision 2.7.3 has been amended as compared with the Proposal, bringing the definition of a conflict of interest into line with the definition used in the law. In addition, it is stated in best practice provision 2.7.3 that in a situation where there might be a conflict of interest (i.e., a potential conflict of interest), the supervisory should decide on whether there is in fact a conflict of interest.

Other changes – conflict of interest

- The word 'major shareholder' has been included in principle 2.7 to bring the principle and best practice provision 2.7.5 more into line with each other.
- For clarity's sake, a sentence concerning the provision of relevant information about relatives by blood or marriage up to the second degree has been included in best practice provision 2.7.3 in the part concerning the reporting of a potential conflict of interest of a supervisory board member. This is in line with the provisions in respect of management board members.

Takeover situations – principle 2.8

As compared with the 2008 Code, the Proposal contained a new principle and accompanying best practice provisions in respect of takeover situations. In a number of consultation responses it was pointed out to the Committee that the principle, in addition to a takeover bid for shares or depositary receipts for shares, should also cover a private bid for a business unit or participating interest (with reference to Book 2, Section 107(a) BW). That change was implemented in best practice provision 2.8.1. Best practice provisions 2.8.2 and 2.8.3 have been amended slightly, so that they now refer to a situation where a takeover bid for shares or depositary receipts for shares has been announced or made, or to a situation where a private bid has been made public.

In addition, 'other substantial changes in the structure of the company' have been included in the principle. These include situations such as a merger or demerger. Finally, the principle has been broadened in that it also covers any conflicting interests among management board members. Furthermore, it was stated several times in consultation responses that the role of the participation body in takeovers should be included in the principle. However, the Committee is of the opinion that this role already follows from the Works Councils Act (*Wet op de ondernemingsraden*). Section 25(1) of this Act provides that the participation body has a right to prior consultation in respect of proposed decisions on a takeover or merger.

Special committee for takeovers

There was a critical response to the proposal for two best practice provisions in respect of the establishment of a special committee for takeover situations (2.7.4 and 2.7.5 of the Proposal). The proposed rules were considered to be too detailed, whereas flexibility is required. A 'one size fits all' approach is not appropriate here. Whether or not a special committee is established is determined far too much by the circumstances of the case. Respondents also stated that the composition of the special committee and the choice as regards its chairmanship should be a matter left to the company to decide. Concerns were also expressed concerning the role of the supervisory board. The best practice provisions proposed would take insufficient account of the fact that the management board and the supervisory board have different roles in the assessment of a takeover. Supervisory board members should have to limit themselves to their supervisory role. There were also concerns about the possible participation of dependent supervisory board members in the special committee.

The Committee inferred from the critical responses that the need and support for a compulsory special committee in the event of takeovers are insufficient and therefore did not include the proposed best practice provisions in the revised Code. It remains important to ensure that the supervisory board is kept abreast of the takeover process and that conflicting interests are prevented in takeover situations. The latter is dealt with in principle 2.8. In addition, best practice provision 2.8.1 already included reference to the need for the supervisory board to be kept abreast of the takeover process. Owing to the amendments to best practice provision 2.8.1 explained earlier, this provision also pertains to a situation where preparations are being made for a private bid or to other significant changes in the structure of the company.

4. CULTURE

In the Proposal the Committee introduced a principle and a number of best practice provisions based on the notion that culture is one of the driving forces of an effective operation of the company's corporate governance. Culture can encourage people to take action by providing guidance in everyday choices. Culture and conduct also play an important role in the degree to which a company contributes to creating long-term value.

Respondents generally appreciated the fact that the Committee had placed a greater emphasis on the subject of culture in the Code. It was acknowledged in the consultation responses that culture and behaviour play and important role in respect of the performance of the enterprise. Trust and security are important preconditions for conduct and interaction. Doubts were expressed however regarding the practicability of the proposed best practice provisions and it was recommended that they be set out in more specific terms. For instance, it was noted that it is not clear how culture is being defined. Some respondents wondered whether the best practice provisions are mainly aimed at the culture at the top of the company or within the broader enterprise. It was stated that more attention should be given to the role of the supervisory board, and it was recommended that links be made with other subjects such as risk management, evaluation of the management board and the supervisory board, and remuneration.

Prompted by the responses the Committee carefully examined the Proposal as regards culture, working on the basis that the subject of culture should be addressed in the Code, but that the Code should not prescribe what culture is or should be.

A culture aimed at long-term value creation – principle 2.5
Principle 2.5 stipulates that the management board is responsible for creating a culture aimed at long-term value creation. This expresses the view that culture can make an important contribution to the realisation of the company's strategic objective. The principle also provides that the supervisory board should supervise the activities of the management board in respect of culture. The Committee made a conscious choice not to specify the type of culture that should exist within the company because the Committee's opinion is that it is a matter for the management board to create an appropriate culture for the enterprise. For clarity's sake, the term culture is defined as follows in the explanatory notes on the principle: '[...] the values which implicitly and explicitly serve as a guide for actions to be taken and the resultant conduct. Culture is a benchmark by which a person's own conduct and that of others is assessed.' As compared with the Proposal, the best practice provision pertaining to the stimulation of openness and accountability has been moved to the best practice provisions under Principle 2.4 because that provision pertains to the interaction within the management board and the supervisory board.

Management board's responsibility for culture – best practice provision 2.5.1
The Committee has tightened up the description of the management board's role in respect of culture. To this end, a clearer distinction is made in best practice provision 2.5.1 between the various steps which should be taken in order to create a culture aimed at long-term value creation and embed it within the enterprise.

These steps involve:
- establishing values which contribute towards a culture aimed at long-term value creation;
- discussing those values with the supervisory board;

- ensuring that the values are embedded in and maintained within the enterprise, with due regard for the environment in which the enterprise operates and the existing culture within the enterprise. The existing culture can be used as a starting-point for creating the desired culture;
- encouraging conduct that is consistent with these values. It is important for this conduct to be encouraged at all levels of the company's affiliated enterprise.

A further role of the management board involves propagating the values and thus setting the right tone at the top. The Committee expects the management board to do this in an active and committed way.

Code of Conduct – best practice provision 2.5.2
The Code of Conduct was already included in the 2008 Code and is addressed in the revised Code in a separate best practice provision, namely best practice provision 2.5.2. This Code of Conduct is an element which can provide a framework for creating the desired culture. A phrase stating that the management board should monitor the effectiveness of, and compliance with, the Code of Conduct has been added to best practice provision 2.5.2. The Committee thinks it is important to regularly consider whether the Code of Conduct is having the desired effect and the extent to which it is being complied with. The management board is expected to inform the supervisory board of its findings in this regard.

For the sake of completeness, it is emphasised that the management board's responsibility in respect of culture is not limited to the drawing up of a Code of Conduct.

Accountability regarding culture – best practice provision 2.5.4
The Committee has set out the text of best practice provision 2.5.4 in more concrete terms. The Code requires the management board to render account for the values which contribute towards a culture of long-term value creation and the way in which it is embedded within the company and its affiliated enterprise. The management board should also render account for the effectiveness of, and compliance with, the Code of Conduct.

Other changes – culture
The Committee has decided against reproducing the parts of the proposed best practice provisions which pertained to the role of the internal audit function and of the external auditor in respect of culture and conduct (1.3.5 and 1.7.2 of the Proposal) in the revised Code. It is a matter for management board members and supervisory board members to determine themselves how they build a picture of the corporate culture and whether they include the observations of the external or internal auditor in the process.

The employee plays an important role within the enterprise and the employee's interests are represented by the employee participation body. Best practice provision 2.5.3, which pertains to the discussion of conduct and culture in consultations between the management board and the employee participation body, has been included in the revised Code. For clarity's sake, the words 'the supervisory board' have been added to the best practice provision. The best practice provision makes implicit reference to the consultation that takes place on the basis of Section 24 of the Works Councils Act and in which both management board members and supervisory board members take part.

5. REMUNERATION

Even more than before, the revised Code takes the personal responsibility of management board members and supervisory board members as its basis. Providing too many detailed rules can divert attention from, and eliminate motivation for, self-reflection. The principles and best practice provisions should be principle-based as far as possible so as to encourage management board members and supervisory board members to put their responsibility into effect in an appropriate manner. This approach can also be seen in the part of the revised Code pertaining to remuneration. Management board members and supervisory board members should be aware of the social context in which the company operates and in which remuneration is granted. As compared with the 2008 Code, the principles and best practice provisions for remuneration have been amended so as to remove any overlap with legislation, and have also been simplified. The Committee pointed out in the Proposal that the introduction of new provisions in respect of remuneration has not resulted in greater transparency. It proposed abandoning the focus on details and returning to the core:

i. a simple and transparent remuneration policy that promotes long-term value creation;
ii. taking the right factors into consideration when determining the levels of remuneration; and
iii. clearer and transparent accountability.

The proposal also contained a few new elements: taking into consideration the management board members' views of their own remuneration and, subject to strict restrictions, permitting the share-based remuneration of supervisory board members.

The consultation responses to these proposals varied widely. On the one hand, appreciation was expressed for the simplification of the principles and best practice provisions. It was said this could make a positive contribution to the societal debate about remuneration. On the other hand, concerns were expressed about the potential impact of the simplification. In view of the fact that the remuneration provisions are among the best practice provisions of the 2008 Code with the poorest compliance record, it was argued that the time is not yet ripe to return to the core. The Committee also received a large number of responses to the new elements included in the Proposal. The many responses prompted the Committee to amend the proposed principles and best practice provisions. The basic principle applied here was to secure the balance between achieving simplification and maintaining a sufficient basis for shareholders to be able to raise the subject of remuneration at the general meeting. Moreover, the Committee considered once again the societal debate on the subject.

Remuneration policy - management board – principle 3.1 and best practice provisions

A few amendments have been made in principle 3.1 as compared with the Proposal. The terms 'clear and understandable' have been chosen in preference to 'simple and transparent' for the description of the remuneration policy. The Committee believes that this terminology describes in more concrete terms what is expected of companies. Those terms have been consistently used in the chapter in the Code (in best practice provision 3.1.1 and principle 3.2). The Committee has also incorporated into the principle the fact that internal pay ratios must be taken into account. The Committee thinks it is important that the broader context in which remuneration is granted should be taken into consideration. Finally, a clear link with the prevention of a conflicting interests is made in the principle with the statement that the remuneration policy should not encourage board members to act in their own interest, and a link is made with risk management, by referring to the risk appetite.

Various amendments have been made to best practice provision 3.1.2, modelled on elements of the best practice provisions in the 2008 Code. Although the structure of the best practice provision has remained unchanged, a number of elements have been added or clarified.

- The phrase stating that scenario analyses should be carried out before the remuneration policy is formulated has been added in part ii. In the explanatory notes to the Code it is explained that scenario analyses means the supervisory board performing an analysis of the potential outcomes of the variable remuneration components and the consequences thereof for the management board members' remuneration when drawing up the remuneration policy and before determining the management board members' remuneration. The supervisory board determines whether the outcome of the scenario analyses represents appropriate remuneration and/or whether measures need to be taken to limit the remuneration.
- It is clarified in part v that there should be an appropriate ratio between the variable and fixed remuneration components, where the variable remuneration component is linked to measurable performance criteria determined in advance, which are predominantly long-term in character. This part replaces the provision on the ratio between the short-term and the long-term variable remuneration components as compared with the fixed remuneration component.
- The conditions governing the awarding of shares are clarified in part vi. Shares should be held for a period of at last five years after they are awarded.
- The conditions governing the awarding and exercising of options are also clarified, in part vii. In any case, options cannot be exercised during the first three years after they are awarded.

In respect of best practice provision 3.1.3, which pertains to the remuneration of the executive committee, it was pointed out to the Committee that the Proposal would ignore the statutory division of duties and powers among the management board and the supervisory board because the supervisory board would have to establish its own responsibility in consultation with the management board. That is why the revised Code now stipulates that the supervisory board should be informed of the remuneration of the members of the executive committee and that the management board and the supervisory board should consult on that remuneration annually.

Finally, the proposed best practice provision 3.1.4, which pertained to parameters for claw-back or downward adjustment of the variable remuneration, has not been included in the revised Code because the best practice provision could limit the legal options for a claw-back. Book 2, Section 135(8) of the Civil Code provides that variable remuneration may be clawed back in whole or in part where it was granted on the basis of incorrect information. This means a broad basis for a claw-back has already been provided for.

Management board members' views on their own remuneration – best practice provision 3.2.2

The Committee had introduced a best practice provision in the Proposal which pertains to including management board members' views on their own remuneration when formulating a proposal for the level and structure of the remuneration. The underlying idea behind the introduction of that best practice provision was to bring about a greater awareness of management board members. The Committee suggested that management board members should devote attention to the aspects which are taken into account when the remuneration policy is formulated (best practice provision 3.1.2). The management board member was expected to take a critical look at his own remuneration from a broad perspective by including aspects such as the company's performance, the remuneration ratios within the enterprise and an appropriate ratio between fixed and variable remuneration. It was pointed out to the Committee in the consultation responses that a role for management board directors in the proposal for their own remuneration would be at odds with the accountability of the supervisory board and the general meeting.

Prompted by those responses, the Committee has amended the best practice provision. In the revised Code, the provision now stipulates that the remuneration committee should ask the management board members for their views on the level and structure of their own remuneration. This is completely in line with the distribu-

tion of corporate powers and responsibilities. A number of respondents also stated that they feared pressure would be applied to have the management board members' views made public. This is in no way the Committee's intention. The sole purpose of the information concerning the views of individual management board members is to enable the remuneration committee to form an opinion. That is why it is explained in the explanatory notes to this best practice provision that this provision will have no external effect.

Severance payments – best practice provision 3.2.3

The best practice provision in the 2008 Code on severance payments for management board members was reproduced in the Proposal, unchanged. The second sentence of the best practice provision, which deals with the situation where the management board member's dismissal during his first term of office is manifestly unreasonable, was commented on in several consultation responses. It would mean that management board members could be eligible for severance payments of a maximum of twice the annual salary. The impact of the introduction of the Work and Security Act (*Wet werk en zekerheid*) was pointed out to the Committee. As a result of that Act, the 'manifestly unreasonable dismissal' procedure on which this best practice provision is based ceased to apply as at 1 July 2015. Furthermore, since the entry into effect of the Management and Supervision (Public and Private Companies) Act (*Wet bestuur en toezicht*) on 1 January 2013, with a few exceptions, there is no longer a contract of employment between the listed company and the members of its management board.

The Committee therefore decided to work on the basis of severance payments amounting to a maximum of one year's salary for a management board member and to drop the exception for a maximum of twice the annual salary. The Committee also tightened up best practice provision 3.2.3 by including a provision whereby management board members will not receive any severance payments if the agreement is terminated prematurely at the initiative of the management board member or in the event of seriously culpable or negligent behaviour on the part of the management board member. Alignment with Book 2, Section 9 of the Dutch Civil Code was sought in the choice of wording. It is also in line with the principle which states that inadequate performance of duties should not be rewarded.

Supervisory board members and shares – best practice provisions 3.3.2 and 3.3.3

The Committee had included in the Proposal a best practice provision which would make it possible to award supervisory board members remuneration in the form of shares. The reason for this was the Committee's observation that in practice there is a need to be able to award supervisory board members remuneration in the form of shares, as is also customary in other countries. The Committee also wished to eliminate the inconsistency between the best practice provisions in the 2008 Code which state that supervisory board members cannot be awarded remuneration in the form of shares in the company, but may themselves acquire and hold shares. The approach behind the proposal therefore was to set strict conditions for remuneration in the form of shares.

This proposal received much criticism, both in the consultation responses and in the press and the round-table conversation of 8 June this year with the Lower House's Standing Committee on Finance. The responses show that, despite the strict conditions proposed, it was feared that awarding remuneration in the form of shares would impair the independence of the supervisory board. It was also feared that the inclusion of this best practice provision would encourage the awarding of remuneration in the form of shares. The Committee wishes to stress that it never intended to encourage the awarding of remuneration in the form of shares to supervisory board members, but aimed to eliminate the inconsistency in the best practice provision and sought to bring it into line with international practice. However, the responses showed that the need to make it possible to award remuneration in the form of shares is not as great as was initially thought.

Taking everything into account, the Committee decided to reproduce the best practice provisions in respect of supervisory board members' remuneration in the form of shares from the 2008 Code in the revised

Code, unchanged. This means that the basic premise in the Code is that supervisory board members may not be awarded remuneration in the form of shares and that shares held by supervisory board members in the company they serve should be long-term investments only. By stipulating this, the Committee seeks to emphasise that the company has an important role to play in guaranteeing a long-term focus in the holding of shares.

Remuneration report – best practice provision 3.4.1

In line with the amendments in best practice provision 3.1.2 concerning the remuneration policy, the Committee has amended best practice provision 3.4.1 concerning accountability. The amendments are modelled on elements of those provisions in the 2008 Code. In addition, a number of elements have been added or clarified.

- Part i, which stipulates that the report should describe how the remuneration policy has been implemented in the past financial year, has been added.
- Part iii has also been added, namely that the remuneration report should mention that scenario analyses have been taken into consideration.
- Part iv, which stipulates that account be rendered of the internal pay ratios and any changes in those ratios as compared with the previous financial year, has been added. The pay ratios within the company are already taken into account during the formulation of the remuneration policy and they were also addressed in the proposal made by the remuneration committee to the supervisory board in respect of the remuneration of individual management board members. As a result, rendering account with respect to pay ratios is a logical follow-up step. Moreover, an earlier compliance survey shows that 67% of companies are acting in anticipation of this standard by disclosing information on internal pay ratios in their annual reporting.[6] Transparency with respect to internal pay ratios reflects existing practice in the United Kingdom and the United States.
- Part v, which concerns variable remuneration, now clarifies that a description must also be given of the measurable performance criteria determined in advance upon which the variable remuneration depends, and of the relationship between the remuneration and performance. This addition is in line with the amendments made in best practice provision 3.1.2.
- Finally, it is stated in part vi that account should be rendered with regard to severance payments. This has taken the place of the paragraph in the Proposal which stipulated that the payment should not be a reward for inadequate performance of duties. It was pointed out to the Committee that it is not practical to require evidence of something that has not happened.

In view of the fact that European regulations in this area are being prepared, the Committee has not taken up the suggestion that a provision should be included in the Code whereby shareholders are able to vote on the implementation of the remuneration policy (known as 'say on pay').

6 Report 2012 on the monitoring of the 2011 financial year, p. 7.

6. THE GENERAL MEETING

The Committee has not suggested any major modifications of substance in respect of the company's relationship with the general meeting. As was already explained in the Proposal, various developments and discussions relating to the rights and responsibilities of shareholders are currently taking place. Those developments have not yet sufficiently crystallised to enable new elements to be added or other changes to be made to the principles and best practice provisions. Moreover, the current issues are beyond the scope of the Code in several areas and the more logical approach would be to wait until they have been addressed in legislation. The principles and best practice provisions relating to the relationship with shareholders have therefore been adopted from the 2008 Code, more or less unchanged. As a result, the number of consultation responses regarding Chapter 4 is limited. The most eye-catching amendment is the change in the layout, which is intended to clarify the interrelationships between the principles and best practice provisions and to improve ease of reference to them. The key substantive changes as compared with the Proposal pertain to the agenda, the response time and issuing depositary receipts for shares.

Agenda – best practice provision 4.1.3
Various best practice provisions in the 2008 Code state which items are dealt with as separate agenda items during the general meeting. Those topics were combined to form best practice provision 4.1.3 in the Proposal. The following substantive changes have been made as compared with the proposed text. The proposed addition that changes in strategy or other material changes should be dealt with as separate agenda items has been deleted. It was stated in various responses that this addition could cause confusion as regards the distribution of powers among the management board, the supervisory board and the general meeting.

The second change pertains to the addition made to the list in best practice provision 4.1.3 which stipulates that the appointment of the external auditor should also be dealt with as a separate agenda item. It is stated in Book 2, Section 393(1) of the Dutch Civil Code that the general meeting has the power to appoint the external auditor. Various respondents indicated that making the appointment of the external auditor a separate agenda item reflects current practice. This is also the Committee's experience and it is for that reason that the stipulation has been added to the list in best practice provision 4.1.3.

A few respondents indicated that best practice provision 4.1.3 could provide clarification as to whether the agenda items should be presented to the general meeting to be put to the vote, or for discussion. They also said including the list in 4.1.3 could lead to confusion because many topics are already provided for by law. The law specifies whether an item is presented to be put to the vote, or for discussion. The Committee did not intend to make any changes in this respect. The added value of the Code is that the topics mentioned in best practice provision 4.1.3 are dealt with as separate agenda items.

Response time – best practice provisions 4.1.6 and 4.1.7
The 2008 Code contained two best practice provisions dealing with the response time the management board may stipulate where one or more shareholders intend to request that an item which may result in a change of the company's strategy be put on the agenda. The best practice provisions were introduced in the Code during the 2008 amendment with the aim of giving the management board time to consider in a responsible way how it should respond to the wishes expressed by shareholders, whilst weighing the interests of all the other stakeholders. With the exception of three changes, the best practice provisions pertaining to the response time were adopted without change in the Proposal.

The proposals made were:

- by making a reference to Book 2, Section 107a of the Dutch Civil Code, to clarify how 'change in the company's strategy' should be interpreted and also no longer to refer explicitly to the dismissal or proposed dismissal of management board members or supervisory board members;
- to add the requirement that the management board should, at the end of the response time, render account to the general meeting of the constructive consultations and the exploration of alternatives for which purpose it had stipulated the response time; and
- to delete the part stating that the shareholder should respect the response time stipulated by the management board.

The responses to the best practice provisions pertaining to the response time were varied. Some respondents expressed a preference for the complete removal of the response time, stating that the response time of 180 days was incompatible with Book 2, Section 114a of the Civil Code in which it is stipulated that any matter proposed by shareholders shall be included by the company on the agenda for the general meeting provided that the request has been received no later than sixty days prior to the general meeting. Some respondents objected strongly to the proposed changes. They considered the approach proposed by the Committee of clarifying how a change in strategy should be interpreted by making a reference to Book 2, Section 107a of the Civil Code and no longer referring explicitly to the dismissal or proposed dismissal of management board members or supervisory board members to be an erosion of the best practice provision and said it would drastically restrict the opportunity to stipulate the response time. They went on to say that these changes are not in accordance with applicable case law. According to one respondent, Book 2, Section 107a of the Civil Code does not refer to the motions initiated by the shareholder, but to resolutions adopted by the management board which result in an important change of the identity or character of the company or enterprise. For this reason, linking the response time to Book 2, Section 107a of the Civil Code may lead to confusion regarding the demarcation of powers between the management board, the supervisory board and the general meeting. The deletion of the part which states that shareholders should respect the response time stipulated by the management board was also questioned.

Opinions were divided on the response time's inconsistency with the statutory time-limit within which an item may be put on the agenda. The Committee believes that whether stipulating the response is justified or not will depend on the circumstances of the case and it will be limited to exceptional cases which have a far-reaching impact on the strategy.

The Committee reconsidered the proposal to make substantive changes to the best practice provisions pertaining to the response time. It is apparent from the consultation responses that the changes have unintentionally caused concern and, hence, are too much at odds with the Committee's basic principle of not making any changes to the part of the Code pertaining to shareholders during the revision. The text from the 2008 Code has therefore been included in best practice provisions 4.1.6 and 4.1.7 in the revised Code.

The only proposed change which the Committee has left in place is the addition to best practice provision 4.1.8 stipulating that at the end of the response time the management board should report to the general meeting on how it used the response time. Reporting on how the time was used reflects the spirit of the best practice provision. No objections were raised in the consultation responses to the proposal to add this sentence to the best practice provision.

Issuing depositary receipts for shares – principle 4.4

The Committee suggested a few changes in the Proposal in respect of the principle and best practice provisions pertaining to the issuing of depositary receipts for shares. It is stated in the 2008 Code that the issuing of depositary receipts for shares should not be used as a protective measure. In the text submitted for consultation it was suggested that the issuing of depositary receipts should be used as a protective measure only in

so far as such would be beneficial to the company's long-term value creation. The reason for the proposal was that it had been noted that issuing depositary receipts for shares e is indeed used as protective measure in some cases. However, the consultation responses showed that although the link to long-term value creation provides direction, it does not yet provide clarity. This could create confusion concerning the relationship with the law since Book 2, Section 118a of the Dutch Civil Code also describes other situations in which the issuing of depositary receipts is permitted. Based on the consultation responses, the Committee decided not to make any changes in this revision to the existing legal provisions regarding the use of depositary receipts for shares as a protective measure. A departure from the Code – within the legal frameworks – is and remains possible based on the 'comply or explain' principle.

The text in principle 4.4 and the accompanying best practice provisions have been brought into line with the text in the 2008 Code. This also includes the sentence pertaining to the issuing of depositary receipts for shares as a means of countering absenteeism. The Committee deleted that sentence was because it had noted that the need to issue depositary receipts for shares as a means of countering the potential consequences of absenteeism has decreased considerably. However, the proposal to delete that sentence met with resistance. It was acknowledged in the consultation responses that absenteeism has decreased, but at the same time respondents stated that the issuing of depositary receipts for shares may still be used to prevent absenteeism. For that reason, the sentence regarding absenteeism has been restored to the best practice provision, with the small change that the phrase 'is a means' has been replaced by 'may be a means'.

As compared with the text in the 2008 Code, two technical changes have been made which relate to the board of the trust office and which were not included in the Proposal. A sentence has been added to best practice provision 4.4.2 to the effect that a board member should be appointed by the board of the trust office after the job opening has been announced on the website of the trust office. In addition, the appointment term for management board members in best practice provision 4.4.3 has been brought into line with the appointment term for supervisory board members.

Availability of information in English

The proposal that information should be made available to shareholders in English and, if need be, in Dutch, has not been adopted in the revised Code. The proposal met practical objections, in particular that it would be too onerous for small or relatively small companies. It was also said that it would be inconsistent with the statutory requirement that items in financial statements are described in Dutch, unless the general meeting has decided on the use of a different language.[7]

7 Book 2, Section 362(7) of the Dutch Civil Code.

7. ONE-TIER GOVERNANCE STRUCTURE

The Netherlands traditionally works with a dualistic governance model (i.e. a two-tier governance structure), and the Code is based on this model. In a company with a two-tier governance structure, management and supervision are divided between two company bodies: the management board and the supervisory board. Companies with a one-tier governance structure have a single management board comprised of executive and non-executive directors. In this situation, the latter supervise the former, and there is no supervisory board. Non-executive directors and executive directors have joint management responsibility. It is important that independent supervision by non-executive directors is sufficiently ensured.

A proposal for the application of the Code to companies with a one-tier governance structure was presented separately for consultation. It was proposed that the principle and the best practice provisions from the 2008 Code should be amended and expanded in some areas. It was also proposed that a guidance document should be published separately to shed light on where differences might lie between one-tier and two-tier governance structures and to indicate where companies with a one-tier governance structure could choose their preferred option. Twenty responses to the proposal were received.

The responses to the consultation produced much valuable input on how one-tier governance structures should be regarded. They reflect a need for sufficient flexibility to decide on the concrete details of governance for one-tier governance structures, that more practical experience is required to be able to identify truly best practices and that there is little need for guidance. Placing the emphasis on independent supervision may suffice.

The consultation responses prompted the Committee to take a step back with respect to the proposed text by amending the best practice provisions in some areas and not publishing the proposed guidance. The one-tier governance structure was introduced into Dutch legislation a relatively short time ago. Since 1 January 2013, a few sections have been included in the Dutch Civil Code on a one-tier governance structure and the law allows companies considerable latitude as regards the concrete details for governance. The consultation responses show that the time is not yet ripe for further elaboration. Nevertheless, the responses have provided much useful information for the activities of the Committee and its successors.

The principle and the best practice provisions are included in a separate chapter, Chapter 5, in the revised Code. It is emphasised in the preamble that independent supervision by non-executive directors must be sufficiently ensured. It is then stated in the explanatory notes that those provisions in the Code which pertain to supervisory board members also apply to non-executive directors, without prejudice to the other responsibilities these non-executive directors may have.

Chairman of the management board - best practice provision 5.1.2

Best practice provision 5.1.2 describes the duties of the chairman of the management board. In the text of the Proposal, the chairman was given primary responsibility for the effectiveness of the management board and the committees. The consultation responses showed that the wording chosen was out of keeping with the basic principle that the management board has collective responsibility and may result in the chairman being subject to increased liability. It was also said that there was too broad a scope for the chairman of the management board also to be held accountable for the effectiveness of the committees. The Committee took the responses on board and improved the wording of the best practice provision. An addition was made, to the effect that the chairman of the management board chairs the meetings of the management board and must ensure that the management board and its committees have a balanced composition and function properly.

The risk of increased liability was also mentioned in relation to the proposed best practice provision concerning the appointment of a CEO from among executive directors, whose duties would include directing the day-to-day affairs and consulting regularly with the chairman of the management board. It was said that the proposed text would also be contrary to the basic principle of collective responsibility and allocating that responsibility to the CEO may isolate the position of the CFO. The Committee has decided against including best practice provision 2.8.6 in the revised Code. It already follows from the law that it may be stipulated in the articles of association that management duties may be distributed among one or more executive directors, and this is also customary in practice.

Composition of committees - best practice provision 5.1.4

It is has been clarified that the chairman of the audit committee and of the remuneration committee should be independent.

Guidance

The responses to the proposal for guidance were cautious. Although guidance is generally an adequate instrument, it is necessary first to acquire more experience in practice of the one-tier governance structure. A further disadvantage identified was that guidance falls outside the 'comply or explain' framework of the Code and, consequently, is not covered in the reporting on compliance with the Code either. Emphasising the supervisory role of non-executive directors in the Code would suffice in place of guidance.

The Committee agrees with the responses and has decided against publishing the proposed guidance. The arguments that the time is not yet ripe and there is limited need for guidance in practice were the decisive factor here. A transition is required in some areas, but, in the Committee's opinion, the Code also offers companies with a one-tier governance structure sufficient basis to organise effective guidance.

8. COMPLIANCE WITH THE CODE

The Code can have an impact only if the principles and the best practice provisions are complied with properly. Unlike legislation, the Code offers companies room for departure. Provided there are sufficient supporting reasons for it, departure also qualifies as compliance. The Committee has proposed clarifying what is required of companies as regards compliance with the Code and which requirements are set in respect of the quality of the explanation.

How the 'comply or explain' principle works

The basic principle on which the Code is based, namely that best practice provisions are applied or a substantiated explanation should be given if that is not the case, was retained in the Proposal. As a supplement to this, it was proposed that companies should state how the principles from the Code were applied. This proposals elicited a range of responses. Several respondents expressed their concerns about this proposal and think it is more likely to turn out to be burdensome for companies to give an explanation concerning principles rather than actually to have any impact. Other respondents referred to the tendency among companies to apply as many best practice provisions from the Code as possible. Departing from a best practice provision and giving an explanation could raise questions about the quality of the governance. Some respondents actually suggested introducing a 'comply *and* explain' principle for principles and best practice provisions, to encourage management board members and supervisory board members to give their views on the way in which the Code contributes to governance.

The Committee opted to retain the 'comply or explain' principle, and clarified that it applies both to principles and best practice provisions. In addition, when drawing up the Proposal, the Committee had already carried out a critical assessment regarding the list of subjects for which it would be useful for the management board or supervisory board to render account. A new element in comparison with the 2008 Code, for example, is the detailed explanation of long-term value creation and culture in the report of the management board. Another example is the requirement that reasons be given for the reappointment of a supervisory director after a term of office of eight years.

Quality of the explanation

A good-quality explanation is essential for the Code to have an effect. It was proposed that the requirements set for the quality of the explanation should be included in the Code. Alignment was sought with the guidance given by the Streppel Committee in the monitoring report on the 2012 financial year and with a European Commission recommendation.[8] It is stated in the recommendation that an explanation shall be given regarding how a decision was reached to depart from a best practice provision. The underlying notion was that the management board and the supervisory board should be involved in the deliberations concerning a departure from the best practice provision. Prompted by the consultation responses, this part has been dropped as a requirement pertaining to the quality of the explanation. Thanks to the statutory basis of the Dutch Code[9], companies are required by law to render account for compliance with the Code in the management board report; in the Committee's opinion, the realisation of this underlying objective has already been sufficiently achieved.

8 Commission Recommendation (2014/208/EU) of 9 April 2014 on the quality of corporate governance reporting ('comply or explain').

9 Decree of 10 December 2009 amending the Decree of 23 December 2004 establishing more detailed provisions concerning the content of the annual report (Bulletin of Acts and Decrees 747), Bulletin of Acts and Decrees 2009, 545.

Some respondents indicated that they struggled with the requirement that the company, where appropriate, should give an explanation of the way in which an alternative measure achieves the underlying objective of the best practice provision. They said any such requirement would unnecessarily complicate compliance with the Code in the event of an explanation having to be given. The Committee nevertheless thinks it is important to retain this element. It is logical for a company, should it opt for an alternative measure, to give an explanation regarding (1) why its own arrangements were necessary and (2) how they align with the principle concerned in the Code. These conditions were already part of the Streppel Committee's guidance.

Other changes - compliance

A few sentences from the 2008 Code have been inserted into the 'Compliance' section. These sentences explain that within the company the management board and the supervisory board are responsible for the governance structure of the company and for compliance with the Code. The areas with regard to which the management board and the supervisory board have to account for compliance have also been specified. It has further been clarified that corporate governance requires a tailor-made approach and that departures may be justified.

9. OVERARCHING SUBJECTS

Role of employee participation

The Committee shares the opinion of a few respondents that constructive consultation between the employee participation body and the management board and supervisory board contributes to good corporate governance. As a complement to legislation, in two provisions the 2008 Code already dealt with contact between the supervisory board and the employee participation body. First, the chairman of the supervisory board ensures that the supervisory board has proper contact with the management board and the works council (or central works council). Second, the supervisory board's terms of reference include a paragraph dealing with its relations with the management board, the general meeting and the works council or central works council.

As a complement to the 2008 Code, the employee participation body was also covered in the new section pertaining to culture. The consultation responses were in part the reason why the employee participation body was also addressed in best practice provisions 2.4.5 and 2.4.8. The employee participation body is thus covered in the following best practice provisions in the revised Code:

- 2.3.1: the supervisory board's terms of reference deal with its relations with the employee participation body;
- 2.3.6, part i: the chairman of the supervisory board ensures that there is proper contact with the employee participation body;
- 2.4.5: the relationship with the employee participation body is covered in the induction programme for supervisory board members;
- 2.4.8: the supervisory board has its own responsibility for obtaining information, including from the employee participation body (if any);
- 2.5.3: discussion of conduct and culture with the employee participation body.

The Works Councils Act provides the framework for whether and at what level a company will establish an employee participation body; this depends on the type of listed company concerned. For that reason the proviso 'if any' has been included in the best practice provisions.

A few responses advocated including in the Code a reference to relevant sections in the Works Councils Act and specifying the subjects which should be covered in discussions between the management board or the supervisory board and the employee participation body. Apart from the newly added best practice provisions and amendments, however, the Committee decided against providing any further detail in the Code. The frameworks are already largely provided for in legislation, in particular in the Works Councils Act and in some sections of the Civil Code. The Committee has therefore held on to the basic principle that overlaps with legislation in the Code should be avoided as far as possible. The provision of further detail would exceed the scope of the Code. While there may well be a need to specify the role of the employee participation body in further detail as regards the subjects covered in the Code, according to the Committee it is more appropriate for such further detail to be provided within the bodies concerned, based on the statutory context..

Small and relatively small companies

Various respondents indicated that in the revision process, more consideration could be given to the differences in the nature and size of companies. They believed the Proposal would be particularly constrictive for small or relatively small companies as regards the following requirements: the supervisory board member having knowledge of technological innovation and new business models, the special committee for takeovers, the availability of information in English for shareholders, the requirements to do with establishing an internal audit function, and formulating a diversity policy. Based on other arguments, these proposed requirements have been amended or dropped, with the exception of the drawing up of a diversity policy. A diverse management board and a diverse supervisory board make a positive contribution towards governance regardless of the nature and size of a company. As for the internal audit function, the Committee noted that an internal audit *function* is not the same as an internal audit *department* and that, where there is a departure from best practice provision 1.3.6, companies can provide a substantiated explanation for that departure – which also qualifies as compliance with the Code.

COMPOSITION

MONITORING COMMITTEE CORPORATE GOVERNANCE CODE

Chairman

prof. dr. J.A. van Manen

Partner at Strategic Management Centre

Vice Chairman of the supervisory board at De Nederlandsche Bank NV

Member of the supervisory board at Bornet Groep Rotterdam BV

Member of the board at Stichting Maatschappij en Veiligheid

Member of the board at Stichting Endowment Museum Boijmans Van Beuningen

Secretariat

mr. I.L.J.M. Heemskerk

Ministry of Economic Affairs, Directorate of Entrepreneurship

K. van Kalleveen, MA

Ministry of Economic Affairs, Directorate of Entrepreneurship

mr. C.M. Molkenboer

Ministry of Economic Affairs, Directorate of Entrepreneurship

Advisors

mr. dr. M. Meinema en mr. L.D.V.M. Kompier

Directorate of Legislation, Ministry of Security and Justice

mr. M. Rookhuijzen

Directorate of Financial Markets, Ministry of Finance

Members

prof. dr. B.E. Baarsma

Director of knowledge Development Rabobank

Professor of market mechanism and competitive economy at the University of Amsterdam

Crown-appointed member of the Social and Economic Council of the Netherlands (SER)

drs. E.F. Bos

Chief executive officer at PGGM

Member of the supervisory council at Nederlandse Opera & Ballet

Non-executive director at Sustainalytics Holding BV

mr. P.J. Gortzak

Head of Policy Group Strategie en Beleid APG

Member of the supervisory council at CFK

Member of the committee Evaluatie Politiewet

Member supervisory council at Nationaal Register

Member of the board at NL Sporter

mr. S. Hepkema

Chairman of the supervisory board at Wavin NV

Member of the supervisory board at SBM Offshore NV

Member of the board at VEUO

R.J. van de Kraats RA

CFO & vice chairman at Executive Board Randstad Holding NV

Non-executive Director at OCI NV

Member of the supervisory board at Schiphol Group

prof. mr. H.M. Vletter-van Dort

Professor of Financial Law and Governance at Erasmus School of Law

Chairman of the supervisory board at Intertrust NV

Member of the supervisory board at NN Group NV

Chairman of the SRB's Appeal Panel

Member of the board at IVO Center for Financial Law & Governance