

Corporate Governance Code Monitoring Committee

Report on the evaluation and updating of the Dutch corporate governance code

June 2008

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SUMMARY

1. The context of the Code

Code is self-regulation tool

1. The Dutch corporate governance code (the Code), which was introduced in 2003, is a self-regulation tool whose aim is to promote sound corporate governance in Dutch listed companies. The Code contains principles, elaborated in the form of specific best practice provisions, which focus on the company's stakeholders (including members of the management board and supervisory board) and other parties (including institutional investors). Code-based self-regulation was chosen because it was thought that market participants are themselves best placed to draw up rules of conduct in response to changing market conditions and practices, and because the delivery of a tailor-made product was deemed desirable.

Position of the Code

2. The Code is not an isolated set of rules, but part of a larger system, together with Dutch and European legislation and case law on corporate governance, which must be viewed in its entirety. Since the introduction of the Code, new developments have occurred at national and international level in the area of legislation, codes, case law and the market. The Supreme Court has given judgments in which provisions of the Code have been described as representing the prevalent legal view in the Netherlands and judgments concerning the manner in which company stakeholders should act.

Since 2007 the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten / AFM*) may check, pursuant to the Financial Reporting (Supervision) Act (*Wet toezicht financiële verslaggeving*), whether a listed company has included a statement of compliance with the Code (a corporate governance statement) in its annual report (presence check) and whether the content of this statement is consistent with the remainder of the annual report and other disclosures (consistency check). Nonetheless, the assessment on Code compliance, including acceptance of any explanation given for derogations, remains a matter solely for the shareholders. AFM is not authorised to assess whether the corporate government statement is substantively correct.

Role of the Code in social debate

3. The Code also plays a role in social debate. Over the years various proposals have been made to extend the Code to cover new themes, the most striking issues being diversity / position of women and sustainability / corporate social responsibility. In addition, the level of remuneration of some management board members has caused political and social indignation. The activities of some shareholders and foreign takeovers of leading Dutch companies have also sparked social debate.

Market developments – company and shareholders

4. Large Dutch listed companies in particular are for the most part in the hands of foreign shareholders. Many companies – sometimes under market pressure – have dismantled their anti-takeover mechanisms, for example by abolishing certain forms of depositary receipts. Since the introduction of the Code shareholders have taken a more active approach and exercised their rights to a greater extent. In some cases this has resulted in disputes between management (and the supervisory board) and shareholders, which have been the subject of interesting rulings by the Enterprise Division (of the Amsterdam Court of Appeal) and the Dutch Supreme Court.

Market developments – management board and supervisory board

5. The procedures and functioning of management and supervisory boards have also evolved since the introduction of the Code. Internal risk management has gained in importance, and the role of the supervisory board member has become more intensive and specialised owing in part to the way in which the various supervisory board committees function. The level of management board remuneration in Dutch listed companies has risen considerably in recent years. This is in keeping with the situation in Europe generally.

Market developments – takeover bids

6. Since the Code came into force in 2004, Dutch listed companies have increasingly come under the influence of the market for corporate control (mergers and acquisitions). The relatively large number of public takeover bids in recent years illustrates this. In some cases the bids were preceded by a bidding war and/or bids were made by consortiums. Various companies were delisted following acquisition.

Company as long-term alliance

7. The Code is based on the principle accepted in the Netherlands that a company is a long-term form of alliance between the various parties involved in the company. See also preamble no. 3 to the Code. According to the Preamble, the management board has overall responsibility for weighing up these interests, generally with a view to ensuring the continuity of the enterprise. The company endeavours in this connection to create long-term shareholder value. The management board does not stand alone in carrying out its duties. The role of the supervisory board is, after all, to supervise the policy of the management board and to assist it by providing advice. See also Principle III.1 of the Code in this connection. The Monitoring Committee believes that this assumption is still correct. However, in takeover situations in particular, there is a risk that certain sectional interests may get the upper hand.

Decisions by management board and supervisory board

8. It is the role of the management board and supervisory board to weigh up the different interests in keeping with the principles described above in order to determine a strategy. Both these organs of the company are accountable to the general meeting of shareholders for their decisions. To ensure that the processes involving management board, supervisory board and shareholders (i.e. the general meeting of shareholders) are conducted smoothly and that an optimum balance is achieved between

the various interests, good relations between the various stakeholders are of great importance, particularly in the form of a continuous and constructive dialogue between the company and its shareholders.

Responsibility of shareholders

9. Unlike the management board and the supervisory board, the other stakeholders in the company are, in principle, not bound by the guidelines of the interests of the company and its affiliated enterprise. For example, the shareholders may, in principle, act in their own interests, subject to the dictates of reasonableness and fairness as laid down in Article 2:8 of the Dutch Civil Code. The Monitoring Committee considers it important to emphasise that the responsibility of a shareholder increases in keeping with its influence. The greater the interest that a shareholder has in the company, the greater is its responsibility towards the minority shareholders and other stakeholders.

Role of the management board and supervisory board in acquisitions

10. In view of the risk that certain sectional interests may gain the upper hand in takeover situations, a special involvement is required on the part of the supervisory board in cases where the shares of a company are to be acquired by means of a public bid or where a company makes a substantial acquisition. This involvement does not detract from the responsibility of the management board. The supervisory board should monitor the impact of a takeover or acquisition on the strategy of the company and assess the takeover negotiating process, the desirability of the acquisition and the relations with shareholders, particularly minority shareholders, and other stakeholders in connection with the acquisition process, taking into account the effects of the (financial) interests of the management board.

Activities of the Monitoring Committee

11. Each year since 2005 the Monitoring Committee has published a report on compliance with the Code. In these reports the Committee made good practice recommendations concerning internal risk management, remuneration and diversity in the composition of the supervisory board. In December 2006, the Committee published a consultation document on the company-shareholder relationship and on the scope of the Code. This was followed by the submission of an advisory report to the government in May 2007. In its advisory report the Committee recommended, among other things, the introduction of a response time of 180 days for the management board to react to the proposals of shareholders who wish to bring about a change of strategy or the dismissal of the management board or supervisory board. The Committee also made recommendations to the legislator to increase the transparency on the part of shareholders.

2. Survey of perceptions of institutional investors

12. On behalf of the Monitoring Committee, the Amsterdam Centre for Law and Economics (ACLE) and Rematch BV conducted a survey in early 2008 among 118 institutional investors that had invested at least 5 percent of their assets in Dutch listed companies. The investors were asked about their perception of the corporate governance of Dutch listed companies and how this compared in their view with the situation in the United States. The main findings were as follows:

- The perception of institutional investors is that Dutch corporate governance rules and practices are less effective in protecting investors than those in the United States (Delaware).
- Institutional investors have a preference for the corporate government mechanisms relating to share ownership of the management board, transparency about the shareholdings of major shareholders, supervisory board independence, high free-float and share-based remuneration.
- The majority of the investors consider that the level of management board remuneration in the Netherlands should not be lowered, unlike the severance pay awarded to management board members. The investors would like to see a larger proportion of management board remuneration consist of or be linked to shares.
- The investors do not prefer the one-tier model to the two-tier model.

13. The Monitoring Committee sees the survey as confirmation of previously identified trends and of the analysis which formed the basis for the advisory report to the government in May 2007.

3. Evaluation of compliance 2005-2007 (for the 2004-2006 financial years)

Compliance by listed companies

14. The rate of compliance with the Code by listed companies rose from 92% in 2005 (for the 2004 financial year) to 95% in 2007 (for the 2006 financial year), while the rate of application rose from 87% to 90%. On average, explanations of non-application were given for 5% of the provisions. The Monitoring Committee believes that compliance with the Code should be 100%. All parties concerned are responsible for ensuring that the Code remains an effective instrument as an alternative to legislation. If a company decides not to apply a best practice provision, it should give sound reasons.

Compliance by institutional investors

15. The rate of compliance by institutional investors with parts IV.1 to IV.3 has also risen since 2005, but is still not 100%. The five largest collective investments schemes had an average rate of compliance of 87% in 2007 (for the 2006 financial year). In the case of the five largest life insurers, this rate was 53%. The compliance rate of the five largest company pension funds was 60%. By contrast, the industry-wide pension funds had a 100% compliance rate. The rate of application was the same as the rate of compliance; there were no explanations of non-application. The Monitoring Committee would emphasise that compliance with the Code by institutional investors should be 100%. This is all

the more imperative since Dutch institutional investors have had a legal duty of compliance since 1 January 2007. If an institutional investor decides not to apply a best practice provision, it must give sound reasons for this.

Quality of the explanation

16. The Monitoring Committee has also monitored the quality of explanations for non-application since 2006 by reference to the following dimensions: comprehensibility, verifiability, legitimacy and plausibility. The Monitoring Committee has noted that increasingly standardised explanations are given for non-application of the Code, which it considers to be an undesirable trend. This applies in particular to the relatively common statement that the company applies its own provision rather than the Code. If the company does not give more detailed reasons for this, the Monitoring Committee considers that the explanation is inadequate. The company should explain why it applies its own provision.

Attendance rate at general meetings of shareholders

17. Since 2005 the average attendance rate at general meetings of shareholders has gradually risen (from 54% in 2005 to 57% in 2007). The Monitoring Committee trusts that the use of electronic means of communication, for which a legal basis has existed since 1 January 2007, will produce a further improvement in attendance rates in the future.

4. Proposals for amending the Code

18. At the request of the organisations behind the introduction of the Code and at the request of the trade unions, the Monitoring Committee has produced proposals for amending the Code on the basis of the recommendations contained in the three compliance reports and the advisory report of May 2007 to the government, with due regard for relevant corporate governance trends since the entry into force of the Code in 2004.

19. In doing so, the Committee has taken into account new and future legislation, particularly European legislation, on issues that come within the scope of the Code. The Committee has proceeded on the assumption that any overlap between legislation and the Code does not necessitate amendment of the Code, unless the provisions are mutually incompatible. If the Code contains rules that elaborate or go beyond the legislation, this does not, in the opinion of the Committee, result in a conflict with the legislation. Situations may occur in which a provision of the Code corresponds with the statutory provision. In such a case, a company or shareholder no longer has any scope for explaining non-application of the provision of the Code. None of this alters the fact that if the Code is found to be inconsistent with the legislation, the legislation naturally prevails.

20. Everyone is cordially invited to comment on the Committee's proposals for amendment of the Code until 15 September 2008 (secretariaat@monitoringcommissie.nl). Reactions that are received will be published on the Committee's website, unless the sender objects. The Committee intends to adopt the amended code in the light of these reactions in December 2008 and to send it to the government with a request that a statutory basis be provided for the Code.

21. The proposals for amending the Code are set out below. The proposed amendments to the original provisions of the Code are underlined. The proposed deletions from the code have been crossed out. Some new provisions are also proposed. You will find the full version of the amended Code in the annex.

Chapter II: The management board

II.1.4 Internal risk management and control systems

In the annual report the management board shall provide:

- a) a description of the design and operation of the internal risk management and control systems for the main risks that could have occurred in the financial year;
- b) a description of any major failings in the internal risk management and control systems which have been discovered in the financial year, any significant changes that may have been made to these systems and any important improvements to the systems that are planned, and shall confirm that they have been discussed with the audit committee and the supervisory board.

The management board shall provide clear substantiation of this.

II.1.4a Statement concerning financial reporting risks

As regards financial reporting risks the management board states in the annual report:

- a) that the internal risk management and control systems ~~are adequate and effective~~ provide a reasonable assurance that the financial reporting does not contain any errors of material importance;
- b) that the risk management and control systems worked properly in the year under review;
- c) that there are no indications that the risk management and control systems will not work properly in the current year.

The management board shall provide clear substantiation of this.

II.2.6 Ownership of securities

This provision is deleted.

II.2.7 Severance pay

The ~~maximum~~ remuneration in the event of ~~dismissal~~ early termination of the contract shall not exceed one year's salary (the 'fixed' remuneration component). If the maximum of one year's salary would be

manifestly unreasonable for a management board member who is dismissed during his first term of office, such board member shall be eligible for severance pay not exceeding twice the annual salary.

II.2 Determination and disclosure of remuneration

The report of the supervisory board shall include the principal points of the remuneration report of the supervisory board concerning the remuneration policy of the company, as drawn up by the remuneration committee. This shall describe transparently and in clear and understandable terms the remuneration policy that has been pursued and give an overview of the remuneration policy to be pursued. The notes to the annual accounts shall, in any event, contain the information prescribed by law on the level and structure of the remuneration of the individual members of the management board, and the full remuneration broken down into its various components shall be clearly presented in the remuneration report. The remuneration policy proposed for the next financial year and subsequent years as specified in the remuneration report shall be submitted to the general meeting of shareholders for adoption. Every material change in the remuneration policy shall also be submitted to the general meeting of shareholders for adoption. Schemes whereby management board members are remunerated in the form of shares or rights to subscribe for shares, and major changes to such schemes, shall be submitted to the general meeting of shareholders for approval. The supervisory board shall determine the remuneration of the individual members of the management board, on a proposal by the remuneration committee, within the scope of the remuneration policy adopted by the general meeting of shareholders.

II.2.8a Scenario analyses (new)

Before the remuneration policy is drawn up and before the remuneration of individual board members is adopted, the supervisory board shall analyse the possible results of the variable remuneration components and how this affects the remuneration of the management board member(s).

II.2.8b Ultimate remedy; claw back clause (new)

If a variable remuneration component (shares, options or a bonus) conditionally awarded in a previous financial year would, in the opinion of the supervisory board, produce an unfair result on account of incorrect financial data or special circumstances in the period in which the predetermined performance criteria have been or should have been achieved, the supervisory board may adjust the value downwards or upwards. This power of the supervisory board shall in any event be included in new remuneration contracts with management board members.

II.2.10 Content of remuneration report

The overview referred to in II.2.9 shall, in any event, contain the following information:

- ~~a) a statement of the relative importance of the variable and non-variable remuneration components and an explanation of this ratio;~~
- ~~b) an explanation of any absolute change in the non-variable remuneration component;~~

- a) an overview of the costs incurred by the company in the financial year in relation to management board remuneration. The overview shall give a breakdown showing fixed salary, annual cash bonus, shares conditionally or unconditionally awarded, options conditionally or unconditionally awarded and pension rights granted. The costs shall be valued in accordance with IAS 19 and IFRS 2;
- b) a summary of the results of the scenario analyses referred to in II.2.8a;
- c) for each management board member the bandwidth within which the number of shares and/or options conditionally granted in the financial year may be set at the time the management board acquires them after achieving the set performance criteria;
- d) a table showing the following information for each year in which shares or options have been awarded over which the management board member did not yet have unrestricted control at the start of the financial year:
- the value and number of the conditional/unconditional shares and/or options on the date of grant;
 - the present status of the shares and/or options awarded: whether they are conditional or unconditional and the year in which the vesting period and/or lock-up period ends;
 - the value and number of the shares and/or options conditionally awarded under (i) at the time when the management board member obtains ownership of them (end of vesting period), and
 - the value and number of the shares and/or options conditionally awarded under (i) at the time when the management board member obtains unrestricted control of them (end of lock-up period);
- e) if applicable: the composition of the group of companies (peer group) whose remuneration policy determines in part the level and composition of the remuneration of the management board members;
- f) a summary and explanation of the company's policy with regard to the term of the contracts with management board members, the applicable periods of notice and redundancy schemes and an explanation of the extent to which best practice provision II.2.7 is endorsed;
- g) a description of the specified and objectively quantifiable performance criteria on which the performance-related part of the variable remuneration is dependent;
- h) an account of the relationship between the chosen performance criteria and the strategic objectives applied;
- i) a description and account of the discretionary part of the variable remuneration that can be fixed by the supervisory board as it sees fit;
- g) a summary of the methods that will be applied in order to determine whether the performance criteria have been fulfilled and an explanation of the choice of these methods;
- k) if performance criteria are based on a comparison with external factors: a summary should be given of the factors that will be used to make the comparison; if one of the factors relates to the performance of one or more companies (peer group) or of an index, it should be stated which companies or which index has been chosen as the yardstick for comparison;
- l) an account of the relationship between remuneration and performance not only beforehand but also afterwards;
- m) a description and explanation of each proposed change to the conditions on which a management board member can acquire rights to options, shares or other variable remuneration components;

- n) if any right of a management board member to options, shares or other variable remuneration components is not performance-related: an explanation of why this is the case;
- o) current pension schemes and the related financing costs;
- p) agreed arrangements for the early retirement of management board members.

II.2.11 Disclosure of main elements of management board members' contracts

The main elements of the contract of a management board member with the company shall be made public immediately after it is concluded. These elements shall in any event include the amount of the fixed salary, the structure and amount of the variable remuneration component, any agreed redundancy scheme and/or severance pay, any conditions of a change-of-control clause in the contract with a management board member and any other remuneration the prospect of which has been held out to the management board member, pension arrangements and performance criteria.

II.2.12 Explanation of severance pay

If a management board member or former management board member is paid severance pay or other special remuneration during a given financial year, an account and an explanation of this remuneration shall be included in the remuneration report. ~~The remuneration report shall in any event account for and explain remuneration paid or promised in the year under review to a departed management board member by way of severance pay.~~

Chapter III: The supervisory board

III.1.6 Definition of supervisory function

The supervision of the management board by the supervisory board shall include:

- a) achievement of the company's objectives;
- b) corporate strategy and the risks inherent in the business activities;
- c) the structure and operation of the internal risk management and control systems;
- d) the financial reporting process;
- e) compliance with the legislation and regulations.
- f) the company-shareholder relationship.

III.1.7 Evaluation

The supervisory board shall discuss at least once a year on its own, i.e. without the management board being present and, if desired, with an external adviser, ~~both~~ its own functioning, the functioning of the separate committees and that of its individual members, and the conclusions that must be drawn on the basis thereof. The desired profile, composition and competence of the supervisory board shall also be discussed. Moreover, the supervisory board shall discuss at least once a year without the management board being present both the functioning of the management board as an organ of the company and the performance of its individual members, and the conclusions that must be drawn on the basis thereof. ~~Reference to these discussions shall be made in~~ The report of the supervisory board

shall state how the evaluation of the functioning of the supervisory board, the separate committees and the individual supervisory board members has been carried out.

III.1.8 Discussion of strategy and risks

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

III.3 Expertise and composition

Each supervisory board member shall be capable of assessing the broad outline of the overall policy. Each supervisory board member shall have the specific expertise required for the fulfilment of the duties assigned to the role designated to him within the framework of the supervisory board profile. The composition of the supervisory board shall be such that it is able to carry out its duties properly. The supervisory board shall aim for a diverse composition in terms of such factors as gender and age. A supervisory board member shall be reappointed only after careful consideration. The profile referred to above shall also be applied in the case of a reappointment.

III.3.1 Profile

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

III.4.4 Role of the vice-chairman (new)

The vice-chairman of the supervisory board shall deputise for the chairman when the occasion arises. By way of addition to best practice provision III.1.7, the vice-chairman shall act as contact for individual supervisory board members and management board members concerning the functioning of the chairman of the supervisory board.

III.5.12a Principles of remuneration policy (new)

The remuneration committee shall determine the basic principles of the remuneration policy and take the initiative in determining the performance criteria;

III.5.12b Consultation with management board member or prospective member (new)

The consultation with a management board member (or prospective member) about his remuneration shall be conducted by the remuneration committee (or its chairman), possibly in the presence of the chairman of the supervisory board and the remuneration consultant.

III.5.12c Independence of remuneration consultant (new)

If the remuneration committee makes use of the services of a remuneration consultant in carrying out its duties, the consultant concerned shall not provide any advice to a management board member of the company.

III.6.5 Rules on conflicts of interest and trading in securities

The regulations of the supervisory board shall contain rules on dealing with conflicts of interest and potential conflicts of interest between management board members, supervisory board members and the external auditor on the one hand and the company on the other. The regulations shall also stipulate which transactions require the approval of the supervisory board. The company shall draw up regulations governing ownership of and transactions in securities by management or supervisory board members, other than securities issued by their 'own' company.

III.7.3 Ownership of securities

This provision is deleted.

Chapter IV: The shareholders and general meeting of shareholders

IV.1.6 Discharge of the management board and supervisory board

Resolutions to approve the policy of the management board (discharge of management board members from liability) and to approve the supervision exercised by the supervisory board (discharge of supervisory board members from liability) shall be voted on separately in the general meeting of shareholders. Compliance with the Code shall be reported on before the resolution to approve the policy of the management board and supervisory board is put to the vote.

IV.1.8 Limiting the speaking time at meetings (new)

The chairman of the general meeting is responsible for ensuring the smooth transaction of business at meetings and may for this purpose put reasonable limits on the speaking time.

IV.3.6 Provision of information to shareholders on the website

The company shall place and update ~~all~~ information which is relevant to the general meeting of shareholders and which it is required to publish or deposit pursuant to the provisions of company law and securities law applicable to it, in a separate section of the company's website. ~~(i.e. separate from the commercial information of the company) that is recognisable as such.~~ It is sufficient for the

company to establish a hyperlink to the website of the institutions that publish the relevant information electronically pursuant to statutory provisions or the stock exchange regulations.

IV.3.7 Provision of information to shareholders in the event of approval or authorisation

~~If a right of approval is granted to the general meeting of shareholders by law or under the articles of association of the company (e.g. in the case of option schemes, far-reaching decisions as referred to in draft article 2:107a Civil Code), or the management board or the supervisory board requests a delegation of powers (e.g. issue of shares or authorisation for the repurchase of shares), the management board and the supervisory board shall inform the general meeting of shareholders by means of a 'shareholders circular' of all facts and circumstances relevant to the approval, delegation or authorisation to be granted. A resolution for approval or authorisation to be passed by the general meeting of shareholders shall be explained in writing. In its explanation the management board shall deal with all facts and circumstances relevant to the approval/delegation/ or authorisation to be granted. The shareholders' circular explanation with the agenda shall, in any event, be posted on the company's website~~

IV.3.10 Deposit of voting proxies with an independent third party (new)

The company shall give shareholders and other persons entitled to vote the possibility of depositing their voting proxies with an independent third party prior to the general meeting.

IV.3.11 Communication with shareholders outside the general meeting (new)

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

IV.4 Responsibility of institutional investors

Institutional investors shall act primarily in the interests of the ultimate beneficiaries or investors and have a responsibility to the ultimate beneficiaries or investors and the companies in which they invest, to decide, in a careful and transparent way, whether they wish to exercise their rights as shareholder of listed companies.

~~Institutional investors~~ Shareholders shall be prepared to enter into a dialogue with the company if they do not accept the company's explanation of non-application of a best practice provision of this Code. The guiding principle in this connection is the recognition that corporate governance requires a tailor-made approach and that derogations from individual provisions by a company may be justified and should be properly reasoned.

IV.4.4 Response time (new)

A shareholder may exercise the right to add items to the agenda only after he has discussed this with the management board. If the aim of putting an item on the agenda is to change the strategy of the company or may result in the dismissal of management board members and/or supervisory board members, the item may be put on the agenda only after the management board has responded to this.

The management board shall respond within a reasonable period, which may not in any event exceed 180 days from the date of submission of the proposal to add the item to the agenda. The same response time applies to a request for judicial authorisation to convene a general meeting. The management board shall use the response time for further deliberation and constructive consultation, in any event with the shareholder who has expressed the wish to add the item to the agenda, and shall consider the alternatives. The supervisory board shall monitor this.

IV.4.5 Exercise of voting right (new)

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

IV.4.6 Openness (new)

If a shareholder has put an item on the agenda, he shall explain this at the meeting and, if necessary, answer questions about it.

Chapter VI: The position of the management board and supervisory board in the case of takeovers (new)

Principle VI Takeover bid for shares in the company

In the event of any (proposed) takeover bid for shares in the company the management board and the supervisory board shall carefully weigh all the interests involved. The management board shall be guided in its actions solely by the interest of the company and its affiliated enterprise. The supervisory board shall be closely involved in the takeover process.

- VI.1 The management board and the supervisory board shall discuss the possibility of a takeover bid being made for the shares of the company and shall consider how the supervisory board members should guide a takeover process.
- VI.2 If one or more management board members of the company conduct consultations about a takeover bid (proposed or otherwise) with a potential bidder, the supervisory board shall be immediately informed of this.
- VI.3 The supervisory board shall ensure that the negotiating process with a bidder or potential bidder proceeds properly. This applies in particular if one or more management board members have a considerable personal (financial) interest in the takeover or potential takeover.

- VI.4 If the company arranges for a fairness opinion to be produced in the context of a takeover bid, the person engaged to produce this opinion shall be an expert who has no (financial) interest in the success or failure of the takeover. The management board shall submit the expert's engagement to the supervisory board for approval.
- VI.5 In the position it takes on the takeover bid as referred to in the Public Bids Decree (*Besluit openbare biedingen*), the management board shall outline the consequences of the success of the bid for the company's stakeholders, including the shareholders, employees and creditors.
- VI.6 As soon as the management board of a company in respect of which a takeover bid has been announced or issued receives a request from a third party who is a competing bidder (or potentially competing bidder) to inspect the particulars of the company in the same way as the bidder, the management board shall immediately discuss the request with the supervisory board.

5. Recommendations to the legislator

22. As mentioned previously, legislation, in addition to the Code and case law, forms part of the corporate governance system, which must be viewed in its entirety. The Monitoring Committee endorses the principle that new regulations should be introduced only with restraint and that preference should be given to self-regulation. However, legislation in the corporate governance field may be necessary for certain specific subjects.

23. For example, in response to questions of the government, the Monitoring Committee made recommendations in its advisory report of May 2007 on the company-shareholder relationship and on the scope of the Code. The recommendations to the legislator in the advisory report on lowering the threshold for disclosure of interests, the obligatory disclosure of intentions, facilitating the identification of shareholders and raising the threshold for the right to put corporate governance issues on the agenda have been largely adopted by the government. A bill is currently being prepared to implement them.

24. In its advisory report of May 2007 the Monitoring Committee advised on the scope of the Code in the following terms:

With regard to the application of the Code to alternative trading systems

The Monitoring Committee recommends that compliance with the Code should not be made legally compulsory for trading in shares of small and medium-sized enterprises (SMEs) on alternative trading systems (ATs). The Monitoring Committee also calls on the operators of these trading systems to make clear that the corporate governance rules that apply to their systems differ from those that apply to companies whose shares are traded on the regulated market.

With regard to local companies

The Monitoring Committee considers that the Code offers local companies sufficient opportunities to explain in accordance with the Code why provisions are not applied. It follows that there is no need for a recommendation to the legislator.

With regard to Dutch companies exclusively listed abroad

The Monitoring Committee considers that the existing 'comply or explain' rule provides sufficient scope for Dutch companies listed abroad to comply with the Code by applying a foreign corporate governance code. It follows that there is no need for a recommendation to the legislator.

The Monitoring Committee sees no reason to reconsider these recommendations. To apply the Code to alternative trading systems, an amendment to the Royal Decree of 23 December 2004 adopting further rules concerning the content of annual reports (Corporate Governance Code Decree) is being prepared.

25. Notwithstanding the basic principle that restraint should be observed in relation to regulation, the Committee is considering making a recommendation to the legislator for the legislation to be amended in two respects in order to improve the process in connection with takeovers both before ("*put up or shut up*") and after the event (squeeze-out procedures).

I "Put up or shut up"

The Monitoring Committee is considering recommending that the legislator examine whether it is possible to amend the Dutch bidding rules in such a way that the company is not subject to takeover speculation for longer than necessary. Consideration can be given in this connection to the possibility of making an addition to the Public Bids Decree (*Besluit openbare biedingen*) to the effect that a bidder (or prospective bidder) is given the choice, in the case of takeover speculation, of announcing within a given period either that it intends to make a bid or that it has decided against doing so. In the latter case the party concerned should then not be permitted to make a subsequent bid for the company for an extended period.

II Squeeze-out procedures

Reports have reached the Monitoring Committee that in practice the squeeze-out procedures do not function as well as they might in all respects. Companies have indicated that squeeze-out procedures are often protracted and sometimes relatively expensive for them. Shareholders doubt whether the existing squeeze-out procedures provide adequate protection for the remaining minority shareholders in all cases, taking into account the criteria of reasonableness and fairness.

The Monitoring Committee requests stakeholders to indicate whether they consider it desirable for a recommendation to be made to the legislator that it consider amending the existing squeeze-out procedures and, if so, what aspects should be amended.

INTRODUCTION

The Corporate Governance Committee (also known as the 'Tabaksblat Committee') adopted the Dutch Corporate Governance Code (the Code) on 9 December 2003. The Code was drawn up at the request of Euronext Amsterdam, the Netherlands Centre of Executive and Supervisory Directors (NCD), the Foundation for Corporate Governance Research for Pension Funds (SCGOP), the Association of Stockholders (VEB), the Association of Securities-Issuing Companies (VEUO) and the Confederation of Netherlands Industry and Employers (VNO-NCW) and at the invitation of the Ministers of Finance and Economic Affairs. The Code came into force with effect from the financial year starting on 1 January 2004.

The Minister of Finance, acting on behalf of the Minister of Justice and the State Secretary for Economic Affairs, set up the Corporate Governance Code Monitoring Committee (the Committee) on 6 December 2004. The Committee's official terms of reference are to help ensure that the Code is practicable and up to date and to monitor compliance by Dutch listed companies and institutional investors. It has therefore been agreed that the Monitoring Committee should publish a compliance report annually. The Monitoring Committee published compliance reports in December 2005, December 2006 and December 2007.

You have before you the Committee's evaluation report. This takes stock of compliance with the Code after three years of monitoring. It examines how compliance with the Code and its various parts has evolved since the Code's introduction. The report also examines corporate governance developments that have occurred since that date.

In addition to an evaluation the report also contains proposals for amendments to the Code. These proposals follow a request by VNO-NCW, VEUO, VEB, Eumedion, NCD and NYSE Euronext in April 2008 to the Committee to update the Code. The FNV and CNV trade union federations have also requested the Committee to review the Code. The Committee considers it desirable to hold public consultations about the proposals.

The report has been structured as follows. Chapter 1 outlines the developments that have occurred in the corporate governance field since the introduction of the Code. It also discusses the main results of a survey commissioned by the Monitoring Committee into foreign investors' perceptions of the corporate governance of Dutch listed companies. Chapter 1 also reviews the main compliance monitoring results in the 2004-2006 financial years. The remaining chapters follow the structure of the Code:

- chapter 2: the management board
- chapter 3: the supervisory board
- chapter IV: the shareholders and general meeting of shareholders

- chapter V: the audit of the financial reporting and the position of the internal audit function and of the external auditor

Chapter 6 deals with a new part to be added to the Code to cover the position of the management board and supervisory board in the event of takeovers.

The proposals for amending the Code have been included in boxes in chapters 2 to 6. Amendments to existing provisions are underlined. Where words have been dropped, the text has been struck through. In the case of new provisions the number is underlined.

The Monitoring Committee cordially invites all interested parties to communicate their views on the proposals before 15 September 2008. The reactions received will be published on the website of the Monitoring Committee (www.corpgov.nl), unless there are express objections to this. The Monitoring Committee would greatly appreciate your response and thanks you in advance for your assistance.

You may send your response to:

The Monitoring Committee

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The Monitoring Committee intends to adopt the amended Code, after taking account of the reactions received, and to present it to the government in December 2008, with a request that a statutory basis be provided for the Code.

A change occurred in the composition of the Committee on 1 May 2008. On that date Professor R.H. Maatman left the Committee to join the management board of the Netherlands Authority for the Financial Markets. His successor on the Monitoring Committee is Mr R.M.S.M. Munsters MiF. The Committee is very grateful to Mr Maatman for the valuable contribution he made and for his great commitment.

CHAPTER 1

EVALUATION OF THREE YEARS OF COMPLIANCE MONITORING

Introduction

The Corporate Governance Committee (the Tabaksblat Committee) introduced the Dutch corporate governance code on 9 December 2003, at the request of Euronext Amsterdam, the Netherlands Centre of Executive and Supervisory Directors (NCD), the Foundation for Corporate Governance Research for Pension Funds (the forerunner of Eumedion), the Association of Stockholders, the Association of Securities-Issuing Companies (VEUO) and the Confederation of Netherlands Industry and Employers (VNO-NCW) and at the invitation of the Ministers of Finance and Economic Affairs.

The Code came into force with effect from the 2004 financial year. It has been designated by the government by order in council as a regulation with which Dutch listed companies must comply (i.e. the Code has a statutory basis). Companies comply with the Code either by applying its provisions in full or by explaining in their annual report why they do not apply a provision.

The Minister of Finance, acting on behalf of the Minister of Justice and the State Secretary for Economic Affairs, set up the Corporate Governance Code Monitoring Committee (the Committee) on 6 December 2004. The Monitoring Committee's official terms of reference are to help ensure that the Code is practicable and up to date and to monitor compliance by Dutch listed companies and institutional investors. It has therefore been agreed that the Monitoring Committee should publish a compliance report annually.

The Monitoring Committee published its annual compliance report in December 2005, 2006 and 2007. It also published a consultation document on the role of shareholders and the scope of the Code in December 2006, partly in response to questions from the government. This consultation document resulted in an advisory report to the government in May 2007.

You have before you the Monitoring Committee's evaluation report. This contains the Committee's evaluation of the findings of compliance monitoring over three financial years and outlines relevant developments that have occurred since (and, in some cases, as a result of) the coming into force of the Code. In response to a request of VNO-NCW, NCD, VEUO, VEB, Eumedion and NYSE Euronext and the FNV and CNV trade union federations to update the Code, the Monitoring Committee has also prepared proposals for amending the Code. The Minister of Finance, the Minister of Economic Affairs and the Minister of Justice have informed the Committee that they can agree to this approach (see annexes). The Monitoring Committee considers it desirable to hold public consultations about the proposals.

1. The ever-changing context of the Code

Code is self-regulation tool

The Dutch corporate governance code (the Code) is a self-regulation tool whose aim is to promote sound corporate governance in Dutch listed companies. The Code contains principles, elaborated in the form of specific best practice provisions, which focus on the company's stakeholders (including members of the management board and supervisory board) and other parties (including institutional investors). Code-based self-regulation was chosen because it was thought that market participants are themselves best placed to draw up rules of conduct since they can deliver a tailor-made product and respond quickly to changing market conditions and practices.

Background to the Code's introduction

The Code was introduced in response to national and international developments:

- evaluation of the 40 recommendations of the Peters Committee: much improvement still possible and desirable;
- report of the High Level Group of Company Law Experts entitled 'A Modern Regulatory Framework for Company Law in Europe': each EU member state should draw up a national corporate governance code based on the 'apply or explain' principle;
- scandals, particularly accounting scandals, involving companies in both the United States and Europe, which had, to some extent, undermined confidence in the management and supervision of listed companies.¹

Position of the Code – corporate governance developments

The Code is not an isolated set of rules, but part of a larger system, together with Dutch and European legislation and case law on corporate governance, which must be viewed in its entirety. Since the establishment of the Code, new developments have occurred at national and international level in the area of legislation, codes, case law and the market.

Of special importance in the legislative field are the amendments to Book 2 of the Dutch Civil Code (adjustment of the dual-board company structure, electronic means of communication and implementation of the Takeover Directive), parts of the new Financial Supervision Act (*Wet op het financieel toezicht*) (market abuse, disclosure of major holdings, prospectus rules, transparency rules and takeover bids, and the obligation of institutional investors to have a transparent voting policy) and the new Financial Reporting (Supervision) Act (*Wet toezicht financiële verslaggeving*). Under the latter Act the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten / AFM*) may check whether a listed company has included a statement of compliance with the Code (a corporate governance statement) in its annual report (presence check) and whether the content of this statement

¹ See the Dutch corporate governance code, December 2003, p. 67.

is consistent with the remainder of the annual report and other information available publicly (consistency check). Nonetheless, the assessment on Code compliance, including acceptance of any explanation given for derogations, remains a matter solely for the shareholders. AFM is not authorised to assess whether the corporate government statement is substantively correct.²

As far as the development of company law is concerned, the judgments of the Enterprise Division of the Amsterdam Court of Appeal (*Ondernemingskamer van het Gerechtshof Amsterdam*) and the Dutch Supreme Court (*Hoge Raad*) are of major importance. The Enterprise Division can decide by means of an inquiry procedure whether the policy of a company meets the test of criticism, and it also has the power to take (immediate) measures where necessary. This can include assessment of how the powers of the management board and supervisory board as well as those of the shareholders (i.e. the general meeting of shareholders) are exercised. The various stakeholders in the company are required to treat each other in accordance with the criteria of reasonableness and fairness. The Enterprise Division and the Supreme Court have given important judgments in recent years on the relationship between a listed company's stakeholders.

The Code also plays a role in the social debate. Over the years various proposals have been made to extend the Code to cover new themes, the most striking issues being diversity / position of women and sustainability / corporate social responsibility. In addition, the remuneration of some management board members has caused widespread indignation among the general public. The activities of some shareholders and foreign takeovers of leading Dutch companies have also been a subject of social debate.

One of the Code's aims was to restore confidence in the private sector. Whereas before the introduction of the Code, the management board and supervisory board were able to operate relatively autonomously, partly as a result of the manner of appointment of the members and the existence of anti-takeover mechanisms, the Code (and subsequently the legislation to adapt the dual-board system) put the emphasis on the accountability of the management board and supervisory board to the general meeting of shareholders. Shareholders should be better informed and have more powers (approval of important resolutions and adoption of remuneration policy). Shareholders have also been given the power to put forward items for the agenda and the registration date has been introduced to enable shareholders to exercise their voting rights more effectively.

Market developments – company and shareholders

Large Dutch listed companies in particular are for the most part in the hands of foreign shareholders. Many companies – sometimes under market pressure – have dismantled their anti-takeover mechanisms, for example by abolishing certain forms of depositary receipts. Since the introduction of the Code shareholders have taken a more active approach and exercised their rights to a greater extent. Dutch listed companies have become acquainted with (relatively) new types of shareholder:

² See the explanatory memorandum to the financial reporting (supervision) bill (Parliamentary Papers II 2005/06, 30 336, no. 3,

private equity parties, hedge funds, sovereign funds and strategic shareholders. Some of these shareholders may take an active stance and request the company (sometimes very insistently) to change its strategy. In some cases this has resulted in disputes between the management board (and the supervisory board) on the one hand and shareholders on the other, which have been the subject of interesting rulings by the Enterprise Division of the Amsterdam Court of Appeal and the Dutch Supreme Court.

Market developments – management board and supervisory board

The procedures and functioning of management and supervisory boards have also evolved since the introduction of the Code. Internal risk management has gained in importance and the role of the supervisory board member has become more intensive and specialised, owing in part to the creation of supervisory board committees. An ever larger part of executive pay is performance-related and granted in the form of options and/or shares. The management board's freedom of manoeuvre seems to be limited by the increased pressure of the international capital market. Greater emphasis is put on achieving focus, restructuring and repaying excess cash to shareholders; the number of takeovers has increased.

The level of management board remuneration in Dutch listed companies has risen considerably in recent years. This is in keeping with the situation in Europe generally. The size of companies has also increased significantly in this period. The remuneration level in large companies is higher and rises faster than in small companies. Moreover, the remuneration of the chairman of the management board appears to rise faster than that of the other board members. There is also a positive correlation in the Netherlands between shareholder value and the level of the overall remuneration. There is a positive correlation between the cash bonus and turnover and profitability. The majority of management board members whose employment is terminated receive severance pay in excess of the basic level (a year's salary). Internationally too, severance pay is generally higher than one year's salary. The government presented a bill to the Lower House of Dutch Parliament in May 2008 containing measures designed to discourage certain excessive forms of executive pay.

Market developments – takeover bids

Since the Code came into force in 2004, Dutch listed companies have increasingly come under the influence of the market for corporate control (mergers and acquisitions). The relatively large number of public takeover bids in recent years illustrates this. In some cases the bids were preceded by a bidding war and/or bids were made by consortiums. A number of these bids resulted in public-to-private transactions. Whereas formerly a takeover was generally set in motion by the bidder and target company together (friendly takeover) or by the bidder alone (hostile bid), a few cases have occurred in recent years in which the position taken by active shareholders may have influenced the timing and nature of the transaction. Partly as a consequence of these developments, the idea of introducing in a

Dutch takeover panel along the lines of the British Takeover Panel has been launched. The government has announced that it will publish a consultation document on this subject later this year.

Company as long-term alliance

The Code is based on the principle accepted in the Netherlands that a company is a long-term form of alliance between the various parties involved in the company. See also preamble no. 3 to the Code. According to the Preamble, the management board has overall responsibility for weighing up these interests, generally with a view to ensuring the continuity of the enterprise. The company endeavours in this connection to create long-term shareholder value. The management board does not stand alone in carrying out its duties. The role of the supervisory board is, after all, to supervise the policy of the management board and to assist it by providing advice. See also Principle III.1 of the Code in this connection. The Monitoring Committee believes that this assumption is still correct. However, the Committee notes that there is a risk in takeover situations in particular that certain sectional interests may gain the upper hand.

Decisions by management board and supervisory board

It is the role of the management board and supervisory board to weigh up the different interests in keeping with the principles described above in order to determine a strategy. Both these organs of the company are accountable to the general meeting of shareholders for their decisions. To ensure that the processes involving management board, supervisory board and shareholders (i.e. the general meeting of shareholders) are conducted smoothly and that an optimum balance is achieved between the various interests, good relations between the various stakeholders are of great importance, particularly in the form of a continuous and constructive dialogue between the company and its shareholders.

Responsibility of shareholders

Unlike the management board and the supervisory board, the other stakeholders in the company are, in principle, not bound by the guidelines of the interests of the company and its affiliated enterprise. For example, the shareholders may, in principle, act in their own interests, subject to the dictates of reasonableness and fairness as laid down in Article 2:8 of the Dutch Civil Code. The Monitoring Committee considers that the limits that may be imposed on shareholders in terms of the reasonableness of their actions can be defined in more detail and makes proposals to this effect in chapter 4. The Monitoring Committee considers it important to emphasise that the responsibility of a shareholder increases in keeping with its influence. The greater the interest that a shareholder has in the company, the greater is its responsibility towards the minority shareholders and other stakeholders, particularly if its vote can have a decisive influence on the result of the vote.

Role of the management board and supervisory board in takeovers

In view of the risk that certain sectional interests may gain the upper hand in takeover situations, a special involvement is required on the part of the supervisory board in cases where the shares of a

company are to be acquired by means of a public bid or where a company makes a substantial acquisition. This involvement does not detract from the responsibility of the management board. The supervisory board should monitor the impact of a takeover or acquisition on the strategy of the company and assess the takeover negotiating process, the desirability of the acquisition and the relations with shareholders, particularly minority shareholders, and other stakeholders in connection with the acquisition process, taking into account the effects of the (financial) interests of the management board. The involvement of supervisory board members is also important on account of possible conflicts of interest between management board members and shareholders in the event of takeovers and the personal interests that management board members can have in takeovers. It follows that the supervisory role of the supervisory board becomes more intensive in these cases, for example by preventing the personal interests of the management board members from giving rise to a conflict of interest and by involving an ad hoc committee more actively in the negotiations.

Activities of the Monitoring Committee – government proposals

Partly in consequence of questions from the government about the position taken by activist shareholders, the Monitoring Committee published a consultation document on the role of shareholders and the scope of the Code in December 2006. This was followed by an advisory report to the government on the same subject in May 2007. The government has now held consultations on a draft Bill to implement the advisory report. There have also been consultations on a draft bill on the right of the works council to address the general meeting of shareholders. The advisory report of the Social and Economic Council on 'Balancing the interests in an enterprise' was adopted on 15 February 2008.

The Monitoring Committee endorses the principle that new regulations should be introduced only with restraint and that preference should be given to self-regulation. However, legislation in the corporate governance field may be necessary for certain specific subjects. For example, in response to questions of the government, the Monitoring Committee made recommendations in its advisory report of May 2007 on the company-shareholder relationship and on the scope of the Code. The recommendations to the legislator in the advisory report on lowering the threshold for disclosure of interests, the obligatory disclosure of intentions, facilitating the identification of shareholders and raising the threshold for the right to put corporate governance issues on the agenda have been largely adopted by the government. A bill is currently being prepared to implement them.

In its advisory report of May 2007 the Monitoring Committee advised on the scope of the Code in the following terms:

With regard to the application of the Code to alternative trading systems

The Monitoring Committee recommends that compliance with the Code should not be made legally compulsory for trading in shares of small and medium-sized enterprises (SMEs) on alternative trading systems (ATSs). The Monitoring Committee also calls on the operators of these trading systems to make clear that the corporate governance rules that apply to their systems differ from those that apply to companies whose shares are traded on the regulated market.

With regard to local companies

The Monitoring Committee considers that the Code offers local companies sufficient opportunities to explain in accordance with the Code why provisions are not applied. It follows that there is no need for a recommendation to the legislator.

With regard to Dutch companies exclusively listed abroad

The Monitoring Committee considers that the existing 'apply or explain' rule provides sufficient scope for Dutch companies listed abroad to comply with the Code by applying a foreign corporate governance code. It follows that there is no need for a recommendation to the legislator.

The Monitoring Committee sees no reason to reconsider these recommendations. For the application of the Code to alternative trading systems an amendment to the Royal Decree of 23 December 2004 adopting further rules concerning the content of annual reports (Corporate Governance Code) is being prepared.

One-tier board

On 20 March 2008 the Ministry of Justice published a consultation document on a management and supervision bill (to facilitate one-tier boards). There seems to be no clear preference in the Netherlands for a one-tier or a two-tier (dual) board system, with each having its advantages and disadvantages. This is illustrated in part by the survey conducted by ACLE/Rematch among institutional investors.³ The Monitoring Committee considers it important for the law to lay down the parameters within which companies can make an informed decision on which model to adopt. The Monitoring Committee considers that the Code provides sufficient scope to allow both models to function properly.⁴

2. International developments

Corporate governance codes based on the 'apply or explain' principle have been adopted throughout Europe and beyond since 1995. Some monitoring committees are entirely independent, such as the Financial Reporting Council in the United Kingdom, and others are appointed by the government, such as the German *Regierungskommission Deutscher Corporate Governance Kodex*. And there are also committees that are part of the national stock exchange authority, such as in Italy and Spain. What all these committees have in common is that they are responsible both for monitoring the Code and for proposing amendments after one or more rounds of public consultation. Amendments to the Kodex are made almost annually in Germany, whereas most other committees have adopted amendments only after a few years.⁵ Below is a summary of corporate governance developments in the European Union and in other countries.

³ See section 3.

⁴ See also chapter 3, III.8.

⁵ Since 2003 the Combined Code on Corporate Governance has applied in the United Kingdom. The Financial Reporting Council made a number of changes in June 2006. In 2005 the Turnbull Guidance on internal control was reviewed. In Germany the *Deutscher Corporate Governance Kodex* has been in force since February 2002. The *Regierungs-kommission Deutscher Corporate Governance Kodex* amended the Kodex in November 2002, July 2003, 2005, 2006 and 2007. Belgium has had a corporate governance code since 2004. Consultations were held in 2007 on amendments to the Code. Italy has had a *Codice di Autodisciplina* since 1999. The Codice was amended in 2002 and 2006 by the *Comitato del corporate governance* issued by the Borsa Italiana.

European Union

In recent years the Company Law Action Plan of the European Commission has set the agenda in the corporate governance field.

On 10 January 2006, the European Commission published a proposal for a directive on shareholder rights designed to facilitate the exercise of cross-border voting rights by introducing minimum standards, for example with regard to the period of notice for general meetings, the right to add items to the agenda and the right to ask questions. The European Corporate Governance Forum made a recommendation on 24 July 2006 that securities intermediaries should be obliged to facilitate the exercise of voting rights by their clients.

On 6 March 2006, the European Corporate Governance Forum issued a statement clarifying the 'comply or explain' principle. To ensure that the principle is effective, there must be a real obligation to comply or explain. There should also be a high degree of transparency while shareholders should be able to hold company boards accountable for this.

On 17 May 2006, the Council and the European Parliament adopted Directive 2006/43/EC on statutory audits (amending the Eighth Council Directive on company law). The purpose of the Directive is to strengthen and harmonise statutory audits. It introduces, among other things, an obligation for listed companies to establish an audit committee.

On 14 June 2006, the Council and the European Parliament adopted Directive 2006/46/EC (amending the Fourth and Seventh Directives on annual accounts). The Directive introduces an obligation to disclose information about transactions with related parties and off-balance sheet arrangements. It also introduces an obligation to disclose a corporate governance statement as a specific section of the annual report.

On 24 July 2006, the European Corporate Governance Forum issued a statement on internal risk control. The Forum does not at present see any need to introduce a legal obligation at EU level for company boards to certify the effectiveness of internal controls.

On 27 February 2007 the European Commission published a report on the implementation of the takeover directive. The report shows that many Member States have used or will use the options and exceptions which the directive provides in order to protect companies from takeovers.

On 27 February 2007, the European Commission published a report on the implementation of the Takeover Directive. The report showed that many member states have invoked or will invoke the options and exceptions available under the directive to protect companies from hostile takeovers.

On 4 June 2007, the European Commission published a study on the proportionality between ownership and control. The study showed that there is no conclusive evidence of a causal link between deviations from the 'one share, one vote' principle and the economic performance of companies or their directors. The study did find, however, that some investors take a negative view of these deviations and prefer greater transparency in this area to help them take investment decisions.

On 14 July 2007, the Shareholders' Rights Directive was published.⁶ This directive introduces minimum standards that are intended to ensure that shareholders in listed companies receive information on the general meeting in time and are given the opportunity to vote by proxy or by electronic means. It also sets minimum standards for shareholders' rights to ask questions or put items on the agenda of the general meeting. The Directive introduces a minimum notice period of 21 days and a maximum registration period of 30 days for the general meeting. Member states have until 3 August 2009 to transpose the Directive into national laws.

On 19 July 2007, the European Commission published two reports on the application by member states of the recommendations on the remuneration of directors and the independence of non-executive directors or supervisory board members.⁷ Both reports show that although the application of corporate governance standards in this area has improved, there is room for further improvement.

On 25 August 2007, the European Corporate Governance Forum published a statement in response to the proportionality study. The Forum calls for greater transparency in relation to the application of non-proportional mechanisms. Companies should be required to provide for a reasoned explanation of the use of these mechanisms, as well as the suitability of these mechanisms for achieving the set objectives. Furthermore, shareholders who have voting rights on the basis of these mechanisms should be required to provide insight into the size and nature of their shareholdings and well as their policy on the exercise of powers attached to their holdings. These shareholders should also explain what objectives are being pursued by the relevant mechanisms and how they can be justified in view of the interest of the other shareholders. And specific disclosure requirements should be introduced in respect of the use of mechanisms decoupling voting rights from economic ownership, such as securities lending.

On 3 October 2007, Commissioner Charlie McCreevy announced that on the basis of the proportionality study he saw no need for action at the European level. Nor would the European Commission put forward a draft directive on transfers of registered office within the EU.

United Kingdom

⁶ Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (EC L 184).

⁷ Report on the application by the Member States of the EU of the Commission Recommendation on the role of non-executive or supervisory board members of listed companies and on the committees of the (supervisory) board 13 July 2007, SEC (2007) 1021; Report on the application by Member States of the EU of the European Commission Recommendation on directors' remuneration, 13 July 2007, SEC(2007) 1022, (www.europa.eu/internal_market/company).

On 13 October 2005, the Financial Reporting Council published a Revised Turnbull Guidance on internal risk control. This has applied to listed companies since 1 January 2006. The changes in relation to the 2003 Turnbull Guidance are limited.

- A new preface has been added in order to encourage boards to study the application of the guidance constantly, and to review whether they can make more of the opportunity provided by the internal control statement to communicate with shareholders about internal risk management and control.
- The introduction has been reorganised to enhance the message that the guidance is intended to reflect sound business practice, and to help companies to implement the requirements of the Combined Code relating to internal control.
- The responsibility of directors is clarified in the sense that directors are expected to exercise the same standard of care when viewing the effectiveness of internal control as is applicable to them in the exercise of their general duties.
- The guidance on internal audit has been moved to the Smith guidance on audit committees.
- Boards should confirm in the annual report that the necessary actions have been or are being taken to remedy any significant failings or weaknesses identified in the course of the internal risk control process, and should include in the annual report the information they consider necessary in order to assist shareholders' understanding of the main features of the company's risk management process and system of internal control.

A small number of changes were made to the Combined Code on Corporate Governance on 27 June 2006. The main changes are as follows:

- The limitation that the company chairman may not sit on the remuneration committee has been changed in that he may now do so if he is considered independent on appointment. It is nevertheless recommended that he should not chair the committee.
- A 'vote withheld' option has been added to proxy appointment forms to enable shareholders to indicate if they have reservations on a resolution, but do not wish to vote against it.
- It is recommended that companies publish, on their website, the details of proxies lodged at a general meeting where votes are taken on a show of hands.

The Companies Act 2006 was passed on 8 November 2006. The legislation is the result of eight years' preparation for a complete overhaul of the Companies Act 1985. The aim of the Act is to simplify company law for private companies. The main changes are:

- The responsibility and liability of directors is laid down in the Act. It is provided, among other things, that directors must act in the interests of the shareholders, while simultaneously taking account of the long-term consequences of a decision and the interests of the company's employees, suppliers, customers and the environment.
- There is an obligation for listed companies to devote attention to the future in their reports, including future risks and opportunities.

- It will be easier for indirect investors to exercise their rights. Shareholders can also limit the liability of the company's external accountant to what is fair and reasonable.
- A new sanction is introduced for providing untrue or misleading information in the audit report.
- An obligation is introduced for institutional investors to disclose voting information.
- Private companies no longer need to have a company secretary or to hold an annual general meeting. The model articles of association have also been modified.

The Act came into effect in stages in the period from January 2007 to October 2008, and applies to the United Kingdom as a whole.

In the spring of 2007, the Financial Reporting Council (FRC) held a public consultation on the operation of the Combined Code. As a result of this consultation, the FRC proposed two amendments to the Combined Code on 11 October 2007:

- to remove the restriction on an individual chairing more than one FTSE-100 company (the 'one chair, one company' principle);
- to allow the chair of a smaller listed company to be a member of the audit committee where he or she was considered independent on appointment.

The consultation process on these amendments ended on 14 March 2008.

On 12 November 2007, the Financial Services Authority (FSA) published a consultation paper on 'Disclosure of Contracts for Difference'. At the moment contracts for differences (CfDs) are used mainly as derivatives of shares which entitle the holder a right to the economic interest in these shares without any disclosure requirements for these derivatives.⁸ The FSA has concluded that CfDs are not used systematically as alternatives to shares, but that there are situations in which CfDs are used to exercise influence in the company in question on an undisclosed basis. The FSA is consulting on two options:

- 1) to require disclosure of economic interests above a certain threshold, unless the holder of that interest has taken measures not to exercise influence over the underlying shares;
- 2) to require all holders of an economic interest in a company of 5% or more to disclose this fact.

The consultation period ended on 12 February 2008.

Germany

On 1 November 2005, the *Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts* (UMAG) and the *Kapitalanleger-Musterverfahrensgesetz* (KapMuG) came into force. The KapMuG introduces the possibility of instituting a class action. The main provisions of the UMAG are as follows:

- it is easier for the company to bring a claim for damages against the management and supervisory boards before the courts;

⁸ The mirror image of CfDs is a shareholder who has legal title to but no economic interest in the shares, which may influence how the shareholder exercises the voting rights. The Monitoring Committee made a recommendation to the government on this issue in May 2007; see the recommendations on 'empty voting / securities lending'.

- better protection is now afforded against misuse of the shareholders' ability to bring an action to have a resolution set aside;
- a 21-day registration date has been introduced to make it easier for shareholders to exercise their voting rights.

A law regulating the transparency of executive pay came into force in Germany in 2006 under which companies are obliged by law to publish the amount and structure of the remuneration of individual directors (*Vorstandsvergütungsoffenlegungsgesetz*).

Under § 161 Aktiengesetz, the management board and the supervisory board of listed companies are required to state annually that the Kodex is applied or to explain which recommendations have not been applied.

Changes were made to the German Corporate Governance Kodex on 12 June 2006. The main changes are:

- the remuneration of individual directors should be disclosed;
- the length of a normal meeting of shareholders should be limited to 4-6 hours.

On 14 June 2007, the Regierungskommission Deutscher Corporate Governance Kodex adopted changes to the German corporate governance code. The main changes are:

- the restriction of the severance pay for directors to two years;
- the formation of an appointment committee from supervisory board members, but only from shareholders' representatives; the appointment committee will propose candidates to the supervisory board for appointment by the general meeting.

On 24 October 2007, the German government published a bill aimed at containing the risks associated with financial investments (*Gesetz zur Begrenzung der mit Finanzinvestitionen verbundenen Risiken*).

The bill includes the following provisions:

- a more detailed definition of the concept of 'acting in concert';
- a requirement on one or more shareholders representing more than 10% of the voting rights to notify the company of their intentions and the source of their financial means;
- further measures on the identification of shareholders;
- tighter legal sanctions (namely a 6-month voting ban) for non-compliance with the various notification requirements.

Belgium

On 1 October 2007, the Belgian Commission on Corporate Governance published a consultation paper on the country's Corporate Governance Code ('Lippens Code'). The Lippens Commission wants to examine to what extent the Lippens Code contributes adequately to the development of governance practices promoting entrepreneurship and risk management. The Commission is interested in

particular in receiving opinions and suggestions on the Lippens Code's effectiveness (i.e. contribution to improved governance and value creation over the long term), its structure and reach (such as questions on Code's transparency and comprehensiveness), the approach on the basis of the 'apply or explain' principle (i.e. the Code's flexibility and supervision of compliance), and, finally, the announcement of the Code's provisions. In late June 2008 the Committee will launch a proposal for an amended Code, which will be finally adopted at the end of 2008 after contacts with various stakeholders.

Italy

In Italy, the new *Codice di Autodisciplina di Società Quotate* was published in March 2006. This code contains many changes to its predecessor, the most important of which are as follows:

- A so-called lead independent director is introduced if the chairman and the managing director are one and the same.
- Content takes precedence over form in the assessment of the independence of directors. Examples are given of the criteria of independence. The *collegio sindacale* is involved in the correct application of the criteria and provision is made for separate meetings of independent consultants.
- The definition of the structure and terms of the remuneration has been modified by means of a distinction between executive and non-executive directors. The duties of the remuneration committee have also been specified.
- The internal control arrangement has been adjusted to take account of the evolution of international best practice. The roles and relationships between those concerned (in particular the *collegio sindacale* and the internal control committee) have been clarified.
- The arrangement concerning conflicts of interest has been modified.
- Transparency should be provided regarding the choice of a unitary or two-tier board model and the reasons for this.

Italian companies are not legally obliged to comply with the code. Compliance with the code is monitored by Borsa Italiana.

Spain

The new *Código Unificado de Buen Gobierno* was published in Spain in May 2006. The main elements are:

- Binding criteria for independent directors.
- Articles of association of the company should contain limitations on voting rights or other anti-takeover defences.
- The number of executive directors should be kept to a minimum.
- A third of the directors should be independent.
- Introduction of the lead independent director.
- Recommendation on gender diversity.
- The remuneration report should be submitted to the AGM for an advisory vote.

- The remuneration of individual directors should be disclosed in the remuneration report.
- Introduction of a whistleblower's scheme.

The 'comply or explain' principle applies to the Código (Article 116 of the Ley del Mercado de Valores).

The United States

On 14 September 2006, the SEC's arrangement granting certain foreign companies a postponement for the filing of a statement concerning internal risk control was extended to the fiscal year ending on or after 15 July 2007.

On 7 November 2006, new SEC rules came into force concerning the transparency of the remuneration of executives and directors, transactions with related parties, the independence of directors and directors' ownership of shares. The aim of the changes is to make proxy and information statements, reports and registration statements more user-friendly, and to ensure that shareholders are better informed about the remuneration of directors.

On 12 September 2006, the Committee on Markets Regulation, an independent and impartial group of leading members of the investor community, business, finance, law, accounting and academia announced a study to determine how to maximise the competitiveness of the US capital markets. The Secretary of the Treasury, Henry Paulson, has endorsed the value of the study. The Committee published its interim report on 30 November 2006. The report recommends changes in capital markets regulation based on the twin goals of enhancing shareholders rights while reducing excessive and overly burdensome regulation and litigation. Some key recommendations are:

- companies that use classified boards (staggered appointments of board members) should be required to obtain shareholder authorisation to adopt a poison pill; if this is not done within three months, the pill should automatically lapse.
- the appointment of new directors should preferably be made on the basis of an absolute majority rather than a plurality of the votes;
- shareholders should be given the choice of resolving their disputes with their companies in a manner other than that customary at present;
- the SEC should clarify whether shareholders are entitled to ballot access;
- the SEC should move to a more risk-based regulatory process, emphasising the costs and benefits of new rules; in addition, regulations should rely on principles-based rules and guidance, insofar as possible;
- the SEC should adopt a more reasonable materiality standard both for internal controls and financial statements;
- the SEC and the PCAOB should adopt enhanced guidance on auditors' roles and duties in testing for compliance with Section 404;
- if a revised Section 404 is too burdensome for small companies (\$75 million market cap and less), the SEC should recommend to Congress that they be exempted from auditor attestation and be subject to a more reasonable standard for management certification.

On 27 August 2007, the Securities and Exchange Commission (SEC) revised its rules regarding the management report on internal risk management within the framework of financial reporting (ICFR) in order to show that one of the ways in which the required evaluation of the ICFR's effectiveness can take place is through an evaluation which complies with the SEC's interpretative guidance published in No. 34-55929. It also provides a definition of 'material weakness': 'a deficiency, or a combination of deficiencies, in ICFR such as that there is a reasonable possibility that a material misstatement of the registrant's annual or interim financial statements will not be prevented or detected on a timely basis'. The requirements on the auditor's report with regard to the ICFR's effectiveness have also been revised. The changes are intended to facilitate more effective and more efficient evaluations of the ICFR by directors, accountants and auditors.

On 28 November 2007, the SEC announced changes to its rules aimed at stimulating the use of electronic shareholder forums. On the same day the SEC also adopted a change aimed at clarifying the grounds on which companies can refuse to send information to and from shareholders. Specifically, companies may refuse to send out proposals by shareholders on the nomination or election of company directors or the associated procedures.

Australia

On 2 August 2007, the ASX Corporate Governance Council published the revised Corporate Governance Principles and Recommendations. The key changes are as follows:

- 'best practice' has been removed from the title and the text of the document in order to eliminate any perception that the Principles are prescriptive, and so not to discourage companies from adopting alternative practices and 'if not, why not' reporting where appropriate;
- the 'independence' of members of the board of directors is no longer defined; instead the document sets out a list of relationships which may affect the independent status; companies are required to disclose their reasons for considering a director 'independent' despite the existence of one of these relationships;
- companies' trading policies should prohibit hedging unvested options, and companies should disclose their policies on hedging vested options;
- 'material business risks' involve both financial and non-financial risks, including risks relating to corporate social responsibility and sustainability; companies are encouraged to adopt appropriate risk oversight, management policies and internal risk management systems rather than disclosing specific material business risks;
- 'assurance' with regard to financial reporting has been revised: the board of directors is required to disclose that it has received assurance from the CEO/CFO that the declaration under section 295A of the Corporations Act is founded on a sound system of risk management and internal control which is operating effectively in all material respects in relation to financial reporting risks.

The revised Principles become effective for the first financial year commencing on or after 1 January 2008.

3. Survey of institutional investors' perception of the corporate governance of Dutch listed companies

The shares in Dutch listed companies are to a large extent held by investors established or resident outside the Netherlands. For a proper understanding of the functioning of the Dutch corporate governance system, the Monitoring Committee considered it useful to ascertain the views of (foreign) institutional investors on the governance of Dutch listed companies. On behalf of the Monitoring Committee, the Amsterdam Centre for Law and Economics (ACLE) and Rematch BV conducted a survey among 118 institutional investors that have invested at least 5 percent of their assets in Dutch listed companies. The survey covered all categories of investor, including pension funds, collective investment schemes, insurance companies and hedge funds. The survey requested institutional investors to compare Dutch listed companies in respect of the following four points: (i) perception of corporate governance; (ii) shareholder activism; (iii) executive pay; and (iv) dialogue with shareholders and decision-making in meetings of shareholders. They were also asked to make a comparison with US listed companies in respect of these aspects. The full survey results can be found on the Monitoring Committee's website (www.corpgov.nl). The main findings are as follows:

- the perception of institutional investors is that Dutch corporate governance rules and practices are less effective in protecting investors than those in the United States (Delaware);
- institutional investors have a preference for the corporate government mechanisms relating to management board share ownership, transparency about the shareholdings of major shareholders, independence of the supervisory board, high free-float and remuneration in the form of shares;
- the majority of the investors consider that the level of management board remuneration in the Netherlands should not be lowered, unlike the severance pay awarded to management board members; the investors would like to see a larger proportion of management board remuneration consist of or be linked to shares;
- the investors do not prefer the one-tier model to the two-tier model.

The Monitoring Committee considers that these findings confirm the developments identified by the Committee that resulted in its recommendations to the legislator in its May advisory report and in its proposals for amendment of the Code (see chapter 4).

4. Evaluation of compliance in the 2004-2006 financial years

Application and compliance by listed companies - general

In its compliance reports the Monitoring Committee noted that for the most part listed companies had complied well with the Corporate Governance Code, but that the rate of compliance was still not 100% (see table below). The Monitoring Committee believes that compliance with the Code should be 100%. All parties concerned are responsible for ensuring that the Code remains an effective instrument as an alternative to regulatory measures. If a company decides not to apply a best practice provision, it should give its reasons.

Table 1 Compliance and application by listed companies

	2004 financial year			2005 financial year			2006 financial year		
	Comply	Apply	Explain	Comply	Apply	Explain	Comply	Apply	Explain
All Dutch companies	92%	87%	5%	96%	92%	4%	95	90%	5%
AEX	97%	91%	5,5%	97%	94%	3%	96%	92%	4%
AMX	94,5%	91%	3,5%	97.5%	94%	3.5%	96%	92%	4%
AMS	95%	88%	7%	97.5%	93%	4.5%	95%	90%	5%
Local companies	83%	77%	6%	92%	86%	6%	93%	87%	6%

Compliance by institutional investors

The rate of compliance by institutional investors with parts IV.1 to IV.3 has also risen since 2005, but is still not 100%. The five largest collective investments schemes had an average rate of compliance of 87% in 2007. In the case of the five largest life insurers, this rate was 53%. The compliance rate of the five largest company pension funds was 60%. By contrast, the industry-wide pension funds had a 100% compliance rate. The rate of application was the same as the rate of compliance; there were no explanations of non-application.

The Monitoring Committee would emphasise that compliance with the Code by institutional investors should be 100%. This is all the more imperative since the compliance duty of Dutch institutional investors has been law since 1 January 2007. If an institutional investor decides not to apply a best practice provision, it must give reasons for this.

Quality of the explanation

The Monitoring Committee has also monitored the quality of explanations for non-application since 2006 by reference to the following factors: comprehensibility, verifiability, legitimacy and plausibility. The Monitoring Committee has noted that there are increasingly standardised explanations for non-application of the Code, which it considers to be an undesirable trend. This applies in particular to the relatively common statement that the company applies its own arrangement rather than the Code. If the company does not give more detailed reasons for this, the Monitoring Committee considers that the explanation is inadequate. The company should explain why it applies its own arrangement.

Attendance at general meetings

The average attendance rate at general meetings of shareholders has risen since 2005 (see table 2). The Monitoring Committee is hopeful that the use of electronic means of communication, for which a legal basis has existed since 1 January 2007, will produce a further improvement in attendance rates in the future.

Table 2 Attendance at general meetings

AGM attendance (%)	2005	2006	2007
All companies	54	56	57
Excl. companies that have issued depository certificates	40	44	50

Frequently explained provisions

The Monitoring Committee notes that over the years two best practice provisions have been explained far more frequently than others. These are the provisions on the maximum term of office for management board members (II.1.1) and the maximum severance pay for management board members (II.2.7). Other provisions high in the top 10 are the regulations concerning ownership of and transactions in securities by management board members and supervisory board members (II.2.6 and III.7.3). The Committee also notes that some provisions have disappeared from the top 10 after ‘start-up issues’ (e.g. II.1.4 about the in-control statement and II.2.10 about the contents of the remuneration report), whereas others are now explained more frequently (e.g. III.4.3 about the company secretary and II.5.11 about the chairman of the remuneration committee). The Committee also considers it noteworthy that the other provisions in the top 10 in the 2005 financial year were explained less than in 2004 and 2006, while in a number of case the provision was explained more often in 2006 than 2004 (II.2.7 on the maximum severance pay and III.7.3 on the securities ownership of supervisory board members). See table 3 on this subject.

Table 3: Top 10 of frequently explained provisions

Provision	2004 (number)	2005 (number)	2006 (number)
II.1.1 (maximum term of office)	100	94	86
II.1.4 (in-control statement)	24	-	-
II.2.6 (securities ownership management board members)	49	52	56
II.2.7 (maximum severance pay)	81	78	83
II.2.10 (contents of remuneration report)	50	-	-
III.2.1 (independence of supervisory board members)	27	17	21
III.3.5 (maximum term of office of supervisory board members)	27	21	24
III.4.3 (company secretary)	-	19	20
III.5 (committees)	-	38	28
III.5.11 (chairman of supervisory board not chairman of remuneration committee)	-	-	20
III.7.3 (securities ownership supervisory board members)	49	52	56
IV.3.1 (webcasting analysts meetings)	45	37	45
V.3.1 (work schedule internal auditor)	29	15	23

Special areas of attention

The Monitoring Committee has paid special attention in its compliance reports to the internal risk management, management board remuneration and diversity in the composition of the supervisory board. In 2007 the Committee commissioned a survey by the University of Groningen into the relationship between management board remuneration and corporate performance and into diversity in the composition of supervisory boards. Ms T.A. Maas-de Brouwer and Mr A. Westerlaken interviewed 29 supervisory board members about the functioning of the supervisory boards and about the usefulness of diversity in supervisory board composition. The surveys can be viewed at www.corpgov.nl. In May 2007 the Committee published an advisory report on the company-shareholder relationship and on the scope of the Code.

CHAPTER 2

THE MANAGEMENT BOARD

Introduction

Chapter II of the Code deals with the management board. The Monitoring Committee considers it desirable to make amendments to two of the subjects dealt with in chapter II. These are internal risk management and management board remuneration. The Committee already made recommendations on both issues in the three compliance reports that were published.

I. Internal risk management

1. Principle

The provisions on internal risk management as contained in best practice provisions II.1.3 and II.1.4 are intended to implement Principle II.1 of the Code on the role and procedure of the management board.

II.1 Role and procedure

The role of the management board is to manage the company, which means, among other things, that it is responsible for achieving the company's aims, strategy and policy, and results. The management board is accountable for this to the supervisory board and to the general meeting of shareholders. In discharging its role, the management board shall be guided by the interests of the company and its affiliated enterprise, taking into consideration the interests of the company's stakeholders. The management board shall provide the supervisory board in good time with all information necessary for the exercise of the duties of the supervisory board.

The management board is responsible for complying with all relevant legislation and regulations, for managing the risks associated with the company activities and for financing the company. The management board shall report related developments to and shall discuss the internal risk management and control systems with the supervisory board and its audit committee.

The Monitoring Committee considers that this principle is still fully relevant.

2. Existing best practice provisions II.1.3 and II.1.4 and recommendations from compliance reports

The management board is responsible for the adequate functioning of risk management and control systems. The Code defines this responsibility in best practice provisions II.1.3 and II.1.4.

II.1.3

The company shall have an internal risk management and control system that is suitable for the company. It shall, in any event, employ as instruments of the internal risk management and control system:

- a) risk analyses of the operational and financial objectives of the company;
- b) a code of conduct which should, in any event, be published on the company's website;
- c) guides for the layout of the financial reports and the procedures to be followed in drawing up the reports;
- d) a system of monitoring and reporting.

II.1.4

The management board shall declare in the annual report that the internal risk management and control systems are adequate and effective and shall provide clear substantiation of this. In the annual report, the management board shall report on the operation of the internal risk management and control system during the year under review. In doing so, it shall describe any significant changes that have been made and any major improvements that are planned, and shall confirm that they have been discussed with the audit committee and the supervisory board.

The supervisory board supervises the discharge of this responsibility by the management board. This is stated in existing best practice provision III.1.8.

III.1.8

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

Recommendations of first report (December 2005)

In its first report of December 2005 the Monitoring Committee made recommendations for the application of best practice provision II.1.4 after it transpired that listed companies and investor organisations had a greater need of guidance in respect of the declaration of adequacy and effectiveness. In its recommendations the Committee drew a distinction between financial reporting risks ('in control' statement) and other risks (description of internal risk management and control systems and identified weaknesses).

2005 Compliance Report

The Committee considers that best practice provision II.1.4 is fulfilled if:

1. as regards financial reporting risks:
 - it is declared that the risk management and control systems provide reasonable assurance that the financial reporting does not contain any material inaccuracies;
 - it is declared that the risk management and control systems have worked properly in the year under review;
 - it is declared that there are no indications that the risk management and control systems will not work properly in the current year;
 - any material weaknesses which are discovered in the year under review or the current year are specified, together with any changes made or improvements planned.
2. as regards other risks (operational/strategic and legislative/regulatory risks):
 - a description of the risk management and control systems is given on the basis of the identified material risks;
 - if applicable, material weaknesses which are discovered in the year under review are specified, together with any changes made or improvements planned.

The Committee takes 'reasonable assurance' to mean a degree of certainty that would be satisfactory for a prudent manager in the management of his affairs in the given circumstances.

Recommendations of second report (December 2006)

The Sarbanes-Oxley Act (SOX) applies to Dutch companies that also have a listing in the United States. Where the SOX provision on internal control and reporting on this subject is applied in full, the Committee considers that this meets the Dutch requirements in respect of the internal control objective and financial reporting.

Recommendations of third report (December 2007)

In its third annual report the Monitoring Committee considered it useful to formulate further recommendations about the 'in control' statement, building on the good practices described in 2005, for the description of the risk profile and internal risk management and control system. These recommendations relate to all kinds of risks affecting the company. The recommendations are designed to serve the interests of readers of the annual report. The content of the risk report should meet the information needs of shareholders and other stakeholders. The recommendations distinguish between the company's risk profile (description of the main risks) and the organisation of the internal risk management and control system and how this matches the risk profile.

2007 Compliance Report

a) Description of the risk profile

First of all, the company should indicate in its risk reporting what risks it encounters or may encounter in implementing its strategy. This should be included in the description of the corporate risk profile outlining the main risks faced by the company. The company should also state what risks it is prepared to take in order to achieve its objective and quantify them, if possible by means of a sensitivity analysis. This will allow readers of the annual report to decide whether they share the company's attitude to risk. The description of the risk profile should in any event cover the following points:

- explain the main risks related to the company's strategic objectives and its risk appetite;
- describe the main strategic, operational, financial, legislative/regulatory and financial reporting risks of the company, including in any event the qualitative impact of these risks, possibly supplemented by a description of how the company deals with these risks;
- contain a sensitivity analysis of the identified risks if it is reasonable to expect such an analysis in the light of the best practices in the sector in which the company operates

b. Description of the internal risk management and control system

Besides describing the risk profile, the company should explain how the internal risk management and control system is structured and how it matches the risk profile. The description should indicate what measures the company has taken to control the identified risks. It should deal not only with the system itself but also how it is embedded in the organisation. It is recommended that the following points be discussed:

- the risks which are managed by the internal risk management and control system and, if necessary, the reference model used to configure the system;
- the organisation of the internal risk management and control system and how it is embedded in the organisation; the division of responsibilities and the planning, monitoring and evaluation;
- the results of a periodic evaluation of the design and effectiveness of the internal risk management and control system and, in so far as applicable, the improvement measures taken as a result.

3. Relevant European directives

As the Monitoring Committee has pointed out in the past, the Code does not stand alone. The Code, together with (national and European) statute law and case law on corporate governance, forms a structure that must be viewed in its entirety. The following three European directives will shortly be transposed into Dutch law and may affect the Code, particularly in relation to internal risk management and control systems:

- the Transparency Directive (no. 2004/109/EC),
- the modified Fourth and Seventh Directive on company law (annual accounts) (no. 2006/43/EC), and
- the modified Eighth Directive (accountants) (no. 2006/46/EC).

The Transparency Directive introduces continuous information obligations for listed companies. Under the directive the management board and the supervisory board are required to issue a statement that the annual accounts, the annual report and the half-yearly figures provide a true and fair view. The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten / AFM*) will check that the statements are timely and complete and describe the main uncertainties facing the company.⁹

The modified Fourth and Seventh Directives oblige listed companies, among other things, to disclose the annual statement concerning their corporate governance. This corporate governance statement must in any event provide material information about the actual corporate governance practices applied in keeping with the 'apply or explain' principle.

The modified Eighth Directive obliges public-interest entities (in brief, banks, insurers and listed companies) to have an audit committee. Under the directive the audit committee has the following functions:

- a) to monitor the financial reporting process;
- b) to monitor the effectiveness of the company's internal control, internal audit where applicable, and risk management systems;
- c) to monitor the statutory audit of the annual and consolidated accounts;
- d) to assess and monitor the independence of the statutory auditor or audit firm, and in particular the provision of additional services to the audited entity.

The function of the audit committee can also be carried out by the supervisory body as a whole, provided that the chairman of that body is not also charged with executive responsibilities. The directives are implemented by means of legislation.

4. Proposals for amending the Code

As regards the three directives the Committee considers that they need not necessarily result in amendments to the Code. The Code is not inconsistent with the directives. If the transposition of the directives into Dutch legislation nonetheless reveals that the Code is apparently inconsistent with the

⁹ See the Bill implementing the Transparency Directive (Parliamentary Papers II 2008/09, 31 093, no. 2).

law or an order in council, the legislation will naturally prevail. The Monitoring Committee believes that the European directives provide confirmation for the distinction it has made between financial reporting risks and other risks.

The reactions that the Monitoring Committee received to its 2005 and 2007 recommendations concerning the application of internal risk management do not justify reappraisal of the recommendations. The Committee therefore considers that the recommendations can be incorporated into best practice provisions II 1.4, II.1.4a (new) and III.1.8 as follows.

II.1.4 In the annual report the management board shall provide:

- a) a description of the design and operation of the internal risk management and control systems for the main risks that could have occurred in the financial year;
- b) a description of any major failings in the internal risk management and control systems which have been discovered in the financial year, any significant changes that may have been made to these systems and any important improvements to the systems that are planned, and shall confirm that they have been discussed with the audit committee and the supervisory board.

The management board shall provide clear substantiation of this.

II.1.4a Statement concerning financial reporting risks

As regards financial reporting risks the management board states in the annual report:

- a) that the internal risk management and control systems ~~are adequate and effective~~ provide a reasonable assurance that the financial reporting does not contain any errors of material importance;
- b) that the risk management and control systems worked properly in the year under review;
- c) that there are no indications that the risk management and control systems will not work properly in the current year.

The management board shall provide clear substantiation of this.

The Monitoring Committee considers that it is not necessary to introduce a provision in the Code incorporating in full the recommendations made in its third report concerning the description of the risk profile and the internal risk management and control systems. Nonetheless, these recommendations are still relevant to the content of the Code provisions and will therefore be included as explanatory notes to the above-mentioned provision of the Code.

III.1.8 The supervisory board shall discuss at least once a year the corporate strategy and the main risks of the business, and the result of the assessment by the management board of the structure and operation of the internal risk management and control systems, as well as any significant changes thereto. Reference to these discussions shall be made in the report of the supervisory board.

II Management board remuneration

1. Principle – proposal for amending the Code

Principle II.2 of the Code contains detailed provisions on management board remuneration. This Principle can be broken down into two parts. The first part deals with the amount and composition of the remuneration:

II.2 Amount and composition of the remuneration

The amount and structure of the remuneration which the management board members receive from the company for their work shall be such that qualified and expert managers can be recruited and retained. If the remuneration consists of a fixed and a variable part, the variable part shall be linked to previously-determined, measurable and influenceable targets, which must be achieved partly in the short term and partly in the long term. The variable part of the remuneration is designed to strengthen the board members' commitment to the company and its objectives.

The remuneration structure, including severance pay, is such that it promotes the interests of the company in the medium and long term, does not encourage management board members to act in their own interests and neglect the interests of the company and does not 'reward' failing board members upon termination of their employment. The level and structure of remuneration shall be determined in the light of, among other things, the results, the share price performance and other developments relevant to the company.

The shares held by a management board member in the company on whose board he sits are long-term investments. The amount of compensation which a management board member may receive on termination of his employment may not exceed one year's salary, unless this would be manifestly unreasonable in the circumstances.

The Monitoring Committee considers that this part of the principle is still fully relevant. The second part of the principle deals with the determination and disclosure of the remuneration:

II.2 Determination and disclosure of remuneration

The report of the supervisory board shall include the principal points of the remuneration report of the supervisory board concerning the remuneration policy of the company, as drawn up by the remuneration committee. The notes to the annual accounts shall, in any event, contain the information prescribed by law on the level and structure of the remuneration of the individual members of the management board. The remuneration policy proposed for the next financial year and subsequent years as specified in the remuneration report shall be submitted to the general meeting of shareholders for adoption. Every material change in the remuneration policy shall also be submitted to the general meeting of shareholders for adoption. Schemes whereby management board members are remunerated in the form of shares or rights to subscribe for shares, and major changes to such schemes, shall be submitted to the general meeting of shareholders for approval.

The supervisory board shall determine the remuneration of the individual members of the management board, on a proposal by the remuneration committee, within the scope of the remuneration policy adopted by the general meeting of shareholders.

In its report of December 2005 the Monitoring Committee advocated greater simplicity and uniformity in reporting on actual remuneration. A year later, in December 2006, the Monitoring Committee noted that it was in favour of remuneration policy and its results being reviewed in a readable and uniform manner in a separate section of the annual report. The Committee also stated that the supervisory board should explicitly report on the effectiveness of the company's remuneration policy.

In consequence, the Monitoring Committee now proposes that the second part of the principle be amended as follows:

II.2 Determination and disclosure of remuneration

The report of the supervisory board shall include the principal points of the remuneration report of the supervisory board concerning the remuneration policy of the company, as drawn up by the remuneration committee. This shall describe transparently and in clear and understandable terms the remuneration policy that has been pursued and give an overview of the remuneration policy to be pursued. The notes to the annual accounts shall, in any event, contain the information prescribed by law on the level and structure of the remuneration of the individual members of the management board, and the full remuneration broken down into its various components shall be clearly presented in the remuneration report. The remuneration policy proposed for the next financial year and subsequent years as specified in the remuneration report shall be submitted to the general meeting of shareholders for adoption. Every material change in the remuneration policy shall also be submitted to the general meeting of shareholders for adoption. Schemes whereby management board members are remunerated in the form of shares or rights to subscribe for shares, and major changes to such schemes, shall be submitted to the general meeting of shareholders for approval.

The supervisory board shall determine the remuneration of the individual members of the management board, on a proposal by the remuneration committee, within the scope of the remuneration policy adopted by the general meeting of shareholders.

2. Best practice provisions – proposals for amending the Code

Principle II.2 is elaborated in the Code in the form of fourteen best practice provisions. The Monitoring Committee explains below which parts of these best practice provisions should be amended.

II.2.6 Ownership of securities

The Monitoring Committee notes that best practice provision II.2.6 on the ownership of securities by management board members (other than securities in their 'own' company) is one of the provisions for which an explanation of non-application is frequently given. In so far as this provision is intended to prevent insider trading, this aim is only partly achieved because the provision is limited to trading in securities in Dutch companies. The Monitoring Committee also notes that the legislation on securities (market abuse and disclosure of major holdings) has been extended in this respect since 2004. In so far as this provision is intended to provide information about possible conflicts of interest involving management board members, the Committee considers that best practice provision II.3.2 is adequate. It states that any conflict of interest or potential conflict of interest that is of material significance to the company and/or to its management board members must be immediately reported by the management board member concerned to the chairman of the supervisory board and to the other members of the management board. Under best practice provision III.6.5, the regulations of the

supervisory board must also contain rules on dealing with conflicts of interest and potential conflicts of interest between management board members, supervisory board members and the external auditor on the one hand and the company on the other. The regulations must also stipulate which transactions require the approval of the supervisory board. The Monitoring Committee considers that it could be useful for the company to have information about the investment portfolios of management board members in order to assess the possibility of conflicts of interest.

The Committee therefore proposes that best practice provision II.2.6 be cancelled. Best practice provision III.6.5 can then be amended as follows:

III.6.5 The regulations of the supervisory board shall contain rules on dealing with conflicts of interest and potential conflicts of interest between management board members, supervisory board members and the external auditor on the one hand and the company on the other. The regulations shall also stipulate which transactions require the approval of the supervisory board. The company shall draw up regulations governing ownership of and transactions in securities by management or supervisory board members, other than securities issued by their 'own' company.

II.2.7 Severance pay

The Monitoring Committee believes that the relatively low compliance rate does not warrant dropping provision II.2.7. To ensure that the provision cannot easily be circumvented by deliberate failure to qualify the termination of employment as 'involuntary', the Committee proposes, in accordance with the recommendation contained in the 2007 Compliance Report, that best practice provision II.2.7, first sentence, be amended as follows.

II.2.7 The ~~maximum~~ remuneration in the event of ~~dismissal~~ early termination of the contract shall not exceed one year's salary (the 'fixed' remuneration component). If the maximum of one year's salary would be manifestly unreasonable for a management board member who is dismissed during his first term of office, such board member shall be eligible for severance pay not exceeding twice the annual salary.

II.2.8a and II.2.8b Further definition of the powers of the supervisory board in relation to remuneration policy

In December 2007 the Monitoring Committee made the following recommendations for further definition of the role of the supervisory board in relation to remuneration policy, partly based on research into the relationship between management board reward and performance.

If remuneration other than fixed remuneration is to be awarded, the supervisory board should arrange for scenario analyses to be carried out periodically in order to identify any undesirable effects of the remuneration instruments that are employed. Account should be taken in this connection of special developments in the equity markets, the performance of the company and the performance of any peer group companies. The effects of possible mergers and acquisitions should also be taken into consideration. The scenario analysis should also cover voluntary and involuntary termination of employment (included in new II.2.8a; see below).

If the variable pay is granted on the basis of incorrect financial or other data, the supervisory board should have the possibility of adjusting it, and the company should be entitled to reclaim from the management board member the variable pay granted on the basis of the incorrect data. This claw back clause should be disclosed (included in new II.2.8b; see below).

In the case of new awards of variable pay to management board members based on quantified performance criteria, the supervisory board should be able to alter this in relation to the level of previous years if this would, in its opinion, produce unreasonable results, taking account of the remuneration policy adopted by the shareholders.

The supervisory board should also have the power to alter existing conditional awards of variable pay based on quantified performance criteria if unaltered application would, in the opinion of the supervisory board, produce an unreasonable and unintended result. The supervisory board should exercise these powers only as a last resort. A passage to this effect is included in new remuneration contracts with management board members (included in new II.2.8b; see below).

It is now proposed that these recommendations should be abridged and incorporated into the Code in the following form before best practice provision II.2.9.

II.2.8a Before the remuneration policy is drawn up and before the remuneration of individual board members is adopted, the supervisory board shall analyse the possible results of the variable remuneration components and how this affects the remuneration of the management board member(s).

II.2.8b If a variable remuneration component (shares, options or a bonus) conditionally awarded in a previous financial year would, in the opinion of the supervisory board, produce an unfair result on account of incorrect financial data or special circumstances in the period in which the predetermined performance criteria have been or should have been achieved, the supervisory board may adjust the value downwards or upwards. This power of the supervisory board shall in any event be included in new remuneration contracts with management board members.

The scenario analysis referred to in II.2.8a can deal, among other things, with market developments, company performance as compared with peer group performance, and possible mergers and acquisitions. The remuneration report contains a summary of the scenario analyses (see proposal II.2.10, at (b) below).

II.2.10 Content of remuneration report

Principle II.2 on the determination and disclosure of remuneration is implemented in the existing best practice provisions II.2.9 to II.2.14. Elaborating on the Code, the Monitoring Committee made various recommendations for disclosure of remuneration (and its structure) in its three annual reports. For example, the Committee recommended in December 2005 that:

The remuneration report should provide information about the following three elements in respect of both the short-term and the long-term variable remuneration:

- a) the maximum variable remuneration, for example as a percentage of fixed income (included in II.2.10 c; see below);
- b) what part of the variable remuneration is linked to measurable quantitative performance criteria and targets and what part is determined by the supervisory board (included in II.2.10 g and j; see below);

- c) a description of the measurable quantitative performance criteria insofar as their disclosure would not harm the competitive position of the company (included in II.2.10 g; see below).

The Committee also believes that the supervisory board should explicitly report on the effectiveness of the company's remuneration policy. In particular, the relationship between remuneration and performance should be made clear not only before but also after the event. Performance should be interpreted in this connection as the contribution to long-term value creation by the enterprise (included in II.2.10 l; see below).

In its December 2007 report, the Monitoring Committee made the following recommendations for disclosure of management board remuneration (and its structure).

Best practice provision II.2.10 provides, inter alia, that the remuneration report should, if applicable, describe the performance criteria and provide an explanation of the criteria chosen. In its reports of December 2005 and December 2006 the Monitoring Committee recommended in particular that the relationship between 'remuneration and performance' should be made visible not only ex ante but also ex post. However, as a result of the variety of performance criteria used, the transparency of the criteria has diminished. Nor is the transparency enhanced by the often fairly general way in which qualitative objectives are described (included in II.2.10 g and l; see below).

The Monitoring Committee considers that the relationship between the performance criteria and the strategic aims of the company should be disclosed in the remuneration report. The performance criteria should be sufficiently definite, quantified and specific for the extent of the true ambition to be apparent from them (included in II.2.10 g and h; see below).

In order to prevent unlimited and unintended rises in variable pay the supervisory board should ensure that when short-term and/or long-term variable remuneration is granted each variable component cannot exceed a given maximum percentage of the fixed gross salary. The policy pursued by the supervisory board with regard to the maximum ratio between fixed and variable remuneration should be disclosed by the company on the date of grant (included in II.2.10 c; see below) .

The supervisory board should apply internal guidelines for a remuneration ceiling on the total remuneration package of the management board members¹⁰. This remuneration ceiling relates to the fixed salary, the short-term variable pay and the long-term variable pay on the date of grant. The supervisory board should state in the remuneration report whether a remuneration ceiling is applied internally (included in II.2.10 c; see below).

The Monitoring Committee considers it desirable to incorporate the last two recommendations into the Code through the definition of a vesting bandwidth for each management board member, indicating the maximum and minimum number of conditionally awarded shares and/or options that the management board member will acquire after fulfilling the performance criteria. The Monitoring Committee proposes to implement these recommendations as follows in best practice provision II.2.10.

¹⁰ In its report of December 2006 the Monitoring Committee indicated that a possible solution for making complex remuneration contracts more manageable (internally) may be the introduction of a pay ceiling. Such a ceiling would determine the total maximum value of the remuneration of a board member who scores 100% in respect of all performance criteria; for this purpose, the value of share-related remuneration elements (whether conditional or otherwise) would be determined at the moment they are granted. This ceiling would operate only internally and could contribute to the better manageability of remuneration for the supervisory board.

The overview referred to in II.2.9 shall, in any event, contain the following information:

a) (see III.3 below)

b) a summary of the results of the scenario analyses referred to in II.2.8a;

c) for each management board member the bandwidth within which the number of shares and/or options conditionally granted in the financial year may be set at the time the management board acquires them after achieving the set performance criteria;

d) (see III.3 below)

e) if applicable: the composition of the group of companies (peer group) whose remuneration policy determines in part the level and composition of the remuneration of the management board members;

f) a summary and explanation of the company's policy with regard to the term of the contracts with management board members, the applicable periods of notice and redundancy schemes and an explanation of the extent to which best practice provision II.2.7 is endorsed;

g) a description of the specified and objectively quantifiable performance criteria on which the performance-related part of the variable remuneration is dependent;

h) an account of the relationship between the chosen performance criteria and the strategic objectives applied;

i) a description and account of the discretionary part of the variable remuneration that can be fixed by the supervisory board as it sees fit;

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

k) if performance criteria are based on a comparison with external factors: a summary should be given of the factors that will be used to make the comparison; if one of the factors relates to the performance of one or more companies (peer group) or of an index, it should be stated which companies or which index has been chosen as the yardstick for comparison;

l) an account of the relationship between remuneration and performance not only beforehand but also afterwards;

m) a description and explanation of each proposed change to the conditions on which a management board member can acquire rights to options, shares or other variable remuneration components;

n) if any right of a management board member to options, shares or other variable remuneration components is not performance-related: an explanation of why this is the case;

o) current pension schemes and the related financing costs;

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

II.2.11 Disclosure of main elements of contract

Best practice provision II.2.11 could be adapted as follows in accordance with the recommendation from the 2007 Compliance Report concerning the transparency of change-of-control clauses:

The main elements of the contract of a management board member with the company shall be made public immediately after it is concluded. These elements shall in any event include the amount of the fixed salary, the structure and amount of the variable remuneration component, any agreed redundancy scheme and/or severance pay, any conditions of a change-of-control clause in the contract with a management board member and any other remuneration the prospect of which has been held out to the management board member, pension arrangements and performance criteria.

II.2.12 Explanation of severance pay

Best practice provision II.2.12 requires that one-off payments be explained in the remuneration report. The Monitoring Committee recommended in its 2007 report that if a company makes one-off (short-term) payments to management board members (other than the annual bonus), this should be based on a scheme included to this effect in the remuneration policy previously adopted.

The proposal is to adapt best practice provision II.2.12 as follows.

If a management board member or former management board member is paid severance pay or other special remuneration during a given financial year, an account and an explanation of this remuneration shall be included in the remuneration report. ~~The remuneration report shall in any event account for and explain remuneration paid or promised in the year under review to a departed management board member by way of severance pay.~~

III.5.10 to III.5.12 Remuneration committee

Best practice provisions III.5.10 to III.5.12 relate to the remuneration committee. In its December report the Monitoring Committee made the following recommendation about the remuneration committee:

The remuneration committee itself (not the remuneration consultant) should adopt the principles for the remuneration policy (including the use and composition of the peer group, the ratio of fixed to variable and short-term to long-term remuneration and the ratio of the remuneration of the chairman to that of other members of the management board). The remuneration committee (not the remuneration consultant) should take the initiative in determining the performance criteria. These performance criteria are derived from the indicators that are periodically used in assessing corporate and management board performance. If the remuneration committee makes use of these services of a consultant who provides a benchmark for determining the level of management board remuneration, this consultant should be independent of the management board. It follows that the consultant concerned may accept other assignments from the company only in very exceptional circumstances and with the prior consent of the supervisory board (or the remuneration committee). When the occasion arises, this does not prevent another consultant working for the same organisation from accepting an assignment from the company, provided that there is sufficient assurance that the two consultants operate independently of each other. With the exception of an intake interview at the start of the process the remuneration consultant should not have any contact with the management board members, unless the remuneration committee explicitly requests this. The discussions and negotiations with the management board members should be conducted exclusively by the remuneration committee (or its chairman), possibly in the presence of the chairman of the supervisory board and the remuneration consultant.

It is proposed that this recommendation be implemented in the Code in abridged form as follows.

III.5.12a The remuneration committee shall determine the basic principles of the remuneration policy and take the initiative in determining the performance criteria;

III.5.12b The consultation with a management board member (or prospective member) about his remuneration shall be conducted by the remuneration committee (or its chairman), possibly in the presence of the chairman of the supervisory board and the remuneration consultant.

III.5.12c If the remuneration committee makes use of the services of a remuneration consultant in carrying out its duties, the consultant concerned shall not provide any advice to a management board member of the company.

III Presentation of management board remuneration in the remuneration report

1. Introduction

In its 2007 Compliance Report the Monitoring Committee wrote:

22. The Monitoring Committee notes that the clarity of the information about the remuneration policy and its results leaves something to be desired. There is no single clear practice regarding accounting for management board remuneration in the financial statements and annual report. To have good information about the actual remuneration of management board members it is necessary to know both:

- *the costs to the company of the remuneration (which are determined, among other things, by the manner in which conditionally awarded options and shares are hedged), and*
- *all unconditional remuneration actually received by the management board member.*

In its final report the Monitoring Committee will examine possible ways of accounting for management board remuneration in a clear and transparent manner.

Below is the Monitoring Committee's analysis of how management board remuneration is presented in the remuneration report, including proposals for amending the Code in this respect.

Remuneration components

Management board remuneration can be broken down into the following components:

- fixed salary;
- short-term variable remuneration (cash bonus);
- long-term variable remuneration in the form of shares or option rights;
- severance payments;
- pension rights.

Distinction between conditional and unconditional shares and options

A distinction can be made in respect of the long-term variable remuneration between conditional and unconditional shares or options. This distinction is also made in the Code. Best practice provision II.2.1 relates to conditional options: *Options to acquire shares are a conditional remuneration component, and become unconditional only when the management board members have fulfilled predetermined performance criteria after a period of at least three years from the grant date.* Best practice provision II.2.2 relates to unconditional options: *If the company, notwithstanding best practice provision II.2.1, grants unconditional options to management board members, it shall apply performance criteria when doing so and the options should, in any event, not be exercised in the first three years after they have been granted.* Best practice provision II.2.3 relates to shares: *Shares granted to management board members without financial consideration shall be retained for a period of at least five years or until at least the end of the employment, if this period is shorter. The number of*

shares to be granted shall be dependent on the achievement of clearly quantifiable and challenging targets specified beforehand.

Granting

The key concept of 'granting' is used in the Code to refer to two different situations. In best practice provision II.2.1 it relates to the time at which the prospect of the remuneration is held out and the performance criteria have not yet been fulfilled (conditional). In best practice provisions II.2.2 and II.2.3, second sentence, it relates to the time when the performance criteria have been fulfilled and the remuneration is a fact.

Vesting period and lock-up period

The number of shares (or options) to be granted in the case of a conditional scheme depends on the performance criteria to be fulfilled in the future. In such cases the schemes are described as performance share (or option) plans. Once the performance criteria have been met, the management board members have an unconditional right to receive the shares or options. The period between the conditional award of the performance shares/options and the fulfilment of the performance criteria as a result of which the right to receive the shares/options becomes unconditional is called the vesting period¹¹ (cf. II.2.1 prescribes a term of three years). Unconditionally awarded options and shares should be kept by the management board members for a number of years (three and five respectively) before the options may be exercised or the shares sold (cf. II.2.2 and II.2.3). Such 'lock-up' provisions do not detract from the right of ownership: this belongs to the recipient (i.e. the management board member) from the moment of vesting, but he is not yet able to freely dispose of the shares or options. In other words, during the lock-up period he cannot convert the shares into cash and cannot yet exchange the options for the (underlying) shares. In the case of conditionally awarded shares the vesting period and the lock-up period coincide (cf. II.2.3). As soon as the lock-up period has ended, the management board member may freely dispose of the shares or options.

Change-of-control clauses

It is increasingly common for companies to attach a condition to the award of shares that is intended to ensure that in the event of a change of control during the lock-up period the value of the awarded (vested) share is determined not by the current stock market price but by the price one month before the change of control or by an average historical price. Where such a condition exists, the value of the awarded share (or option) will, as a result of the lock-up, often be lower where a change of control takes place than that of freely marketable shares in the company.

Claw-back clauses

Finally, remuneration contracts increasingly contain claw-back clauses designed to ensure that remuneration (or part of it) can be 'clawed back' in cases where the supervisory board members have acted on the basis of incorrect information provided by the management board. This can be seen as a

particular example of the general duty to reimburse imputable damage and does not as such affect how the size of the remuneration package is determined.

Complexity in valuation and definition

Valuing the remuneration package has proved difficult in practice; above all, the long-term variable remuneration, especially conditional awards of shares and options and unconditional awards of options, tend to involve complex and varied valuation systems at the time of award. Besides, there are several definitions of remuneration that differ in terms of treatment of conditional shares or options and the inclusion of the impact of shares during the lock-up period.

2. Findings

No single clear practice

In its report of December 2007 the Monitoring Committee noted that there was no single clear practice regarding accounting for management board remuneration in the financial statements and annual report. The lack of a single clear practice adversely affects the transparency of management board remuneration (or the amount of this remuneration).

Aims of accounting for remuneration

Accounting for management board remuneration serves various purposes that are relevant to different parties:

- as company expenditure, the information is relevant above all to investors;
- as actual income of management board members the information is relevant to supervisory board members, investors, other stakeholders and management board members of other companies;
- as income of management board members as disclosed in tax returns, the information is relevant to the tax authorities.

These various purposes also mean that remuneration components are treated differently, particularly in relation to the valuation of (conditional) shares and options.

Statutory and IFRS requirements

Listed companies which are established within the European Union and have a duty of consolidation are obliged to report on the costs of management board remuneration in their annual report in accordance with the accounting principles laid down in IFRS 2 (in particular IAS 19 on employee benefits and IFRS 2 on share-based payments) and Book 2 of the Dutch Civil Code.

Under Article 2:383c of the Civil Code the notes to the financial statements of Dutch listed companies should provide an analysis of the remuneration of each management board member. The remuneration should be broken down as follows:

¹¹ The Monitoring Committee defines vesting as the time when it is established that all conditions for unconditional granting have been fulfilled (IFRS 2 uses the term unconditional commitment).

- remuneration paid periodically;
- remuneration to be paid in due course (particularly pension);
- severance payments;
- profit-sharing and bonus plans;

in so far as these amounts are charged to the company in the financial year.

Under IAS 19 and IFRS 2 the total remuneration is deemed to be the total of the following amounts charged to the financial statements of the company in a given year:¹²

- fixed salary in the financial year;
- bonus on performance in the financial year that is paid in the financial year or a subsequent financial year;
- expenses in connection with long-term benefits awarded in the financial year (where the vesting period is three years the expense for the relevant financial year is one third of the value of the shares and options awarded two years and a year earlier plus one third of the current year);
- pension expenses, including changes to the provision for pension obligations.

The main rationale of the IFRS basis is to show investors clearly what remuneration-related expense has been incurred by the company in the year under review. The costs to the company of the fixed salary and annual cash bonus are equal to the amounts received by the management board member. The costs in the reporting year for the long-term conditional shares or options are determined at the moment when they are granted. To this end the value per conditional share and conditional option awarded is determined using a valuation model, and the outcome is multiplied by the number of shares or options awarded. The number and value (current market price) are fixed for unconditional shares and options. In the case of conditional shares and options (i.e. performance shares and options) an estimate of the number of shares or options that will be obtained over a period of (usually) three years must be made by means of a valuation model. This number is dependent on the performance of the board members. In other words, the value of long-term shares or options is only an approximation of the actual long-term variable remuneration that will be obtained by the management board member at the end of the lock-up period. If performance is better or worse than expected, the remuneration actually obtained may differ from the estimate at the moment when the shares or options are awarded. The difference is between the value at the moment when the shares or options are granted and the value at the moment when they are actually obtained, for example because the price has risen or fallen more than expected. Under IFRS, the value of the shares and options actually obtained at the end of the vesting period is not shown fully in the financial statements, at least not as costs of the company.

¹² EU-based listed companies that have a duty of consolidation are obliged to report on the costs of management board remuneration in their annual report in accordance with the accounting principles laid down in IFRS 2 for the award of shares and options and IAS 19 for the other remuneration components.

Article 2:383d of the Dutch Civil Code provides that granting management board members rights to acquire shares in the company should disclose the following information in respect of each management board member:

- the number of rights not yet exercised at the start and end of the financial year;
- the number of options granted in the financial year and the exercise price;
- the number of options exercised in the financial year and the exercise price.

In the tax-based approach, the total remuneration comprises:

- fixed salary in the financial year;
- variable remuneration paid in cash in the financial year;
- benefits in kind on the basis of the value of the shares on the date of vesting, plus the taxable gain on the exercise of options.

In addition to accounting for management board remuneration as referred to above, the management board members and supervisory board members are required under section 5:48 of the Financial Supervision Act (*Wet op het financieel toezicht*) to report the shares (and options on shares) they hold in their 'own' company to the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten* / AFM). The idea behind this obligation is to allow third parties to find out what interest management board members have in the company and (in the case of substantial interests) the relative voting strengths at the general meeting of shareholders. This is of special importance in relation to change-of-control situations. In addition, a management board member or supervisory board member who has purchased or sold shares in his 'own' company (i.e. the company by which he is employed) is required to notify this transaction to AFM under the market abuse regulations (section 5:60, subsection 1, Financial Supervision Act). The measure is intended to prevent insider trading and market manipulation.

Standardised reporting on costs of the company and the income of management board members

The Monitoring Committee therefore notes that there are different, statutorily prescribed approaches to reporting on management board remuneration. Without prejudice to these different approaches and as a supplement to best practice provisions II.2.9 and II.2.10, the Monitoring Committee considers it desirable for the remuneration report to clearly show (on the basis of a single format) the costs incurred by the company in respect of the remuneration of each management board member in any given financial year. The Committee also considers it desirable for the company to report on the outstanding share-related rights of the management board member, so that the actual income of the management board member in the financial year can be determined.

As regards the reporting on the costs to the company, the Monitoring Committee endorses the IFRS approach. This produces the following overview:

Costs of the company in the financial year	
<i>Remuneration component</i>	<i>manner of valuation</i>
1. fixed salary;	in accordance with IAS 19 valuation and attribution
2. short-term annual bonus	in accordance with IAS 19 valuation and attribution
3. value of the shares awarded	in accordance with IFRS 2 valuation and attribution
4. value of the options awarded	in accordance with IFRS 2 valuation and attribution
5. pension rights awarded	in accordance with IAS 19 valuation and attribution

In this overview the valuation of the awarded shares and options is identical the valuation that the company applies on the basis of IFRS in the financial statements. The difference is that in the financial statements the value of the awarded shares and options is charged against the profits over a number of years, whereas in this overview the full value of the awarded shares and options is shown in the financial year concerned.

An important feature of this proposal is that the IFRS valuation is the determining factor in the reporting on remuneration. This implies that any discrepancies between the IFRS valuation and the valuation of the shares and options by the company or, as the case may be, the remuneration consultant, are not reflected in the financial statements.¹³ This makes matters simpler and obviates the need for complicated discussions and explanations in the financial statements. It also enhances the transparency of the costs of management board remuneration to the company.

In addition to the above overview of the costs of remuneration to the company, the Committee considers it desirable for the company to disclose outstanding share-related rights in a standardised manner in the remuneration report; first, on the shares and options conditionally awarded in previous years, in so far as these are already recognised as costs under IFRS (i.e. the vesting period is still running) and, second, on the shares and options that are still subject to a lock-up. The Monitoring Committee recommends that there should be a separate report for each year.

The Monitoring Committee notes that there are differing views on the extent to which shares or options awarded in previous years that are still subject to a lock-up should be counted as belonging to the actual remuneration of the management board member concerned. The Committee proposes for this reason (and in order to prevent double counting) that the remuneration report should include a table for shares and/or options that are not yet at the free disposal of the management board member at the start of the financial year. This table should be made up of the following columns for each year in which shares and/or options were awarded:

- (i) the value and number of conditional/unconditional shares and/or options on the date of grant;
- (ii) the present status of the shares and/or options awarded: conditional or unconditional and the year in which the vesting period and/or lock-up period ends;

- (iii) the number of shares and/or options granted conditionally under (i) at the time when the management board member obtains ownership of them (end of vesting period), and
- (iv) the value and number of shares and/or options granted conditionally or unconditionally under (i) at the time when the management board member obtains unrestricted control of them (end of lock-up period).

The table is included in amended best practice provision II.2.10, as proposed in the next section. The Monitoring Committee expects this new table to provide more information about the actual income of management board members from shares and options and to reduce the risk of double counts.

3. Proposals for amending the Code

As a result of the above the Committee proposes that the existing best practice provision II.2.10, which lists the minimum information to be disclosed in the remuneration report, should be amended as follows. The amendments to the other (renumbered) parts have already been dealt with in section II.

II.2.10 The overview referred to in II.2.9 shall, in any event, contain the following information:

- ~~a) a statement of the relative importance of the variable and non-variable remuneration components and an explanation of this ratio;~~
- ~~b) an explanation of any absolute change in the non-variable remuneration component;~~
- a) an overview of the costs incurred by the company in the financial year in relation to management board remuneration. The overview shall give a breakdown showing fixed salary, annual cash bonus, shares conditionally or unconditionally awarded, options conditionally or unconditionally awarded and pension rights granted. The costs shall be valued in accordance with IAS 19 and IFRS 2;
- b) see II.2.10 above
- c) see II.2.10 above
- d) a table showing the following information for each year in which shares or options have been awarded over which the management board member did not yet have unrestricted control at the start of the financial year:
 - the value and number of the conditional/unconditional shares and/or options on the date of grant;
 - the present status of the shares and/or options awarded: whether they are conditional or unconditional and the year in which the vesting period and/or lock-up period ends;
 - the value and number of the shares and/or options conditionally awarded under (i) at the time when the management board member obtains ownership of them (end of vesting period), and
 - the value and number of the shares and/or options conditionally awarded under (i) at the time when the management board member obtains unrestricted control of them (end of lock-up period);
- e through p) see II.2.10 above

¹³ The differences in valuation between IFRS and the calculations of external remuneration consultants are often attributable to the choice of model (e.g. Monte Carlo as opposed to own estimate of performance likelihood), assumptions per variable (e.g. maturity and volatility) and the exact moment of valuation.

CHAPTER 3

THE SUPERVISORY BOARD

1. Introduction

The supervisory board monitors the policy of the management board and advises the management board. The supervisory board, together with the management board, reports to the general meeting of shareholders as an organ of the company. The position of the supervisory board is described in more detail in chapter III of the Code. This chapter contains principles and best practice provisions concerning:

1. role and procedure
2. independence
3. expertise and composition
4. role of the chairman of the supervisory board and the company secretary
5. composition and role of the three key committees of the supervisory board
6. conflicts of interest
7. remuneration
8. one-tier management structure.

The Monitoring Committee considers that, in the light of its previous recommendations in the compliance reports and its advisory report published in May, it should propose certain amendments to this chapter. Moreover, the evaluation of the provisions that are most commonly explained and least complied with merits consideration of whether the Code should be amended.

2. Proposals for amending the Code

The Monitoring Committee proposes the following amendments to chapter III.

III.1.6 Definition of supervisory function

Existing best practice provision III.1.6 summarises the elements to which the supervision by the supervisory board relates.

In its advisory report on the role of shareholders of May 2007, the Monitoring Committee recommended that further rules be introduced to regulate the company-shareholder relationship in order to ensure that the processes involving the management board, supervisory board and shareholders (i.e. the general meeting of shareholders) pass off smoothly and that the best possible balance is struck between the various interests. The Monitoring Committee noted in this connection that good relations between the various stakeholders can be of great value in this connection,

particularly by allowing continuous and constructive dialogue between the company and its shareholders.

In the contacts with shareholders, the chairman of the supervisory board acts as chairman of the general meeting of shareholders. Even outside the context of the general meeting, shareholders (particularly those used to the one-tier system) tend to believe that the chairman of the supervisory board is their main contact. The Monitoring Committee recommended in its advisory report of May 2007 that the discussions with shareholders should in principle be conducted by the management board.

May 2007 advisory report

The chairman of the supervisory board should be cautious about conducting discussions with shareholders. Nonetheless, when the occasion arises, for example where shareholders get no response from the management board or where there is a dispute or potential dispute between the management board and one or more shareholders, the chairman of the supervisory board may hold discussions with shareholders in order to ascertain their positions, provided that he does so with the knowledge of the supervisory board and in the presence of another supervisory board member or a member of the management board. Such discussions may be held on the initiative of either a shareholder or the supervisory board.

As it is increasingly important for the management board to observe proper care in its dealings with shareholders, the question arises of whether the supervisory board, and in particular the chairman of the supervisory board, could or perhaps even should play the role of intermediary in the event of a dispute between the management board and one or more shareholders. The Monitoring Committee considers that the role of the supervisory board is to supervise the manner in which the management board of the company deals with its shareholders. Neither the supervisory board nor its chairman is under any obligation to play an intermediary role between the management board and one or more shareholders. Nonetheless, the supervisory board and/or its chairman could, in appropriate cases, play such a role if they consider this to be in the company's interests.

In view of the above, the Monitoring Committee considers that the following addition could be made to the list in III.1.6:

- | |
|---|
| <p>III.1.6 The supervision of the management board by the supervisory board shall include:</p> <ul style="list-style-type: none">a) achievement of the company's objectives;b) corporate strategy and the risks inherent in the business activities;c) the structure and operation of the internal risk management and control systems;d) the financial reporting process;e) compliance with the legislation and regulations.f) <u>the company-shareholder relationship.</u> |
|---|

III.1.7 Evaluation

Best practice provision III.1.7 concerns the evaluation of the supervisory board. The monitoring has shown that this provision has one of the lowest compliance rates.

The Monitoring Committee regards the evaluation by the supervisory board of its own functioning and that of its individual members as an exceptionally useful instrument. The quality of the supervision of the management board depends to a large extent on the functioning of the supervisory board. As the general meeting of shareholders can often assess the functioning of the supervisory board only from a distance, the supervisory board members themselves have primary responsibility for seriously assessing their own functioning and drawing conclusions from this. This can best be done by annual evaluation. How the evaluation takes place can differ: it may be either on a collective basis or an individual basis between the chairman and the members separately, and it may or may not involve the input of an external adviser. The aim of the evaluation is to reflect critically on the functioning of the supervisory board members. Each supervisory board member should be able to express his views confidentially during the evaluation. Periodic evaluation can boost the quality of the functioning of the supervisory board and help to ensure that when the time comes to appoint or reappoint a supervisory board member the right choices are made in terms of the board's composition. These ideas are also reflected in the British Combined Code.¹⁴

In view of the above, the Monitoring Committee proposes the following amendments in relation to evaluation:

III.1.7 The supervisory board shall discuss at least once a year on its own, i.e. without the management board being present and, if desired, with an external adviser, ~~both~~ its own functioning, the functioning of the separate committees and that of its individual members, and the conclusions that must be drawn on the basis thereof. The desired profile, composition and competence of the supervisory board shall also be discussed. Moreover, the supervisory board shall discuss at least once a year without the management board being present both the functioning of the management board as an organ of the company and the performance of its individual members, and the conclusions that must be drawn on the basis thereof. ~~Reference to these discussions shall be made in~~The report of the supervisory board shall state how the evaluation of the functioning of the supervisory board, the separate committees and the individual supervisory board members has been carried out.

III.1.9 Provision of information

Best practice provision III.1.9 concerns the provision of information to the supervisory board. The supervisory board members each have their own responsibility for obtaining from the management board and the external auditor all information needed to carry out their supervisory duties properly. The supervisory board may also obtain information from officers of the company and its external advisers.

¹⁴ See A.6 (Performance evaluation) van de Combined Code:

Main principle: 'The board should undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual directors.'

Supporting Principle: 'Individual evaluation should aim to show whether each director continues to contribute effectively and to demonstrate commitment to the role (including commitment of time for board and committee meetings and any other duties).

The chairman should act on the results of the performance evaluation by recognising the strengths and addressing the weaknesses of the board and, where appropriate, proposing new members be appointed to the board or seeking the resignation of directors.'

As the duties of the supervisory board have become more onerous, the Monitoring Committee considers it important for the supervisory board members to make use of the possibilities provided by the Code.

III.2 Independence

The composition of the supervisory board shall be such that the members are able to act critically and independently of one another and of the management board and any particular interests.

III.2.2 Criteria for independence

In addition to expertise, independence is a crucial requirement for a properly functioning supervisory board. The Monitoring Committee considers that the criteria for independence in III.2.2 are sufficiently clear and practicable. This is borne out by the compliance rate of 97% in 2007.

III.3 Expertise and composition

Each supervisory board member shall be capable of assessing the broad outline of the overall policy. Each supervisory board member shall have the specific expertise required for the fulfilment of the duties assigned to the role designated to him within the framework of the supervisory board profile. The composition of the supervisory board shall be such that it is able to carry out its duties properly. A supervisory board member shall be reappointed only after careful consideration. The profile criteria referred to above shall also be fulfilled in the case of a reappointment.

Diversity

The Code provides that the supervisory board should be composed in such a way that the members are able to operate independently of each other, the management board and any sectional interest. In addition to expertise and personal involvement, independence is a crucial requirement for a properly functioning supervisory board. A diverse composition contributes to the supervisory board's ability to act independently. The main dimensions of diversity are age, gender, expertise and, depending on the nature and activities of the business, social background and nationality.

A modern company can therefore be expected to develop, apply and report on a diversity policy. The diversity policy is reflected, among other things, in the job profile and appointment policy for the supervisory board. The Monitoring Committee considers it important for the supervisory board to have a varied composition, because this can enhance its independence and quality.

Greater diversity in the supervisory board's composition can be achieved either by increasing the supply of or widening the demand for members. The point is that supervisory boards should become aware of persons whose candidacy is not immediately obvious. People who are below management board level of large companies or other civic organisations can be suitable candidates for appointment to the supervisory board of (smaller) companies. A more open process of recruiting candidates for supervisory board membership would help to bring vacancies to the attention of potential candidates

Code provision A.6.1: 'The board should state in the annual report how performance evaluation of the board, its committees and its individual directors has been conducted. The non-executive directors, led by the senior independent director, should be responsible for performance evaluation of the chairman, taking into account the views of executive directors.'

and bring potential candidates to the attention of the board. Companies could also give management board members and employees more scope to accept supervisory board memberships with other companies, provided this does not conflict with their own interests. It would not seem worthwhile increasing the number of supervisory board members simply in order to enhance diversity.

Recently attention has focused specifically on women in top positions. The Monitoring Committee has noted that the percentage of women on the supervisory boards of listed companies in the Netherlands is relatively low, and emphasises that companies have a direct interest in encouraging women to take top positions. An important determinant of success for companies is their ability to attract and retain talent.

The Monitoring Committee considers it important for the company to pursue a structural policy aimed at attracting, retaining and developing female talent. The Code aims to promote the quality of management and supervision in listed companies. It is against this background that the Monitoring Committee makes proposals to amend the Code to promote diversity in the supervisory board. The Monitoring Committee welcomes initiatives aimed at encouraging companies generally to adopt a best practice policy on the subject.¹⁵

As regards corporate governance of Dutch listed companies, the Monitoring Committee proposes the following amendment to Principle III.3:

III.3 Each supervisory board member shall be capable of assessing the broad outline of the overall policy. Each supervisory board member shall have the specific expertise required for the fulfilment of the duties assigned to the role designated to him within the framework of the supervisory board profile. The composition of the supervisory board shall be such that it is able to carry out its duties properly. The supervisory board shall aim for a diverse composition in terms of such factors as gender and age. A supervisory board member shall be reappointed only after careful consideration. The profiles referred to above shall also be applied in the case of a reappointment.

The aim of achieving a diverse composition should be reflected in the supervisory board profile. The Monitoring Committee believes that the company itself is best able to determine how it wishes to implement this aim in the job profile. The company should account for whatever decisions it takes in this respect, and can also indicate how and within what period it expects to achieve this aim.

¹⁵ A topical example is the 'Talent to the Top' Charter of the TopBrainstorm Foundation, which was signed by over 40 companies on 28 May 2008.

The Monitoring Committee proposes the following amendment to best practice provision III.3.1:

III.3.1 The supervisory board shall prepare a profile of its size and composition, taking account of the nature of the business, its activities and the desired expertise and background of the supervisory board members. The profile shall deal with the aspects of diversity in the composition of the supervisory board that are relevant to the company. In so far as the existing situation differs from the intended situation, the supervisory board shall account for this in the annual report and shall indicate how and within what period it expects to achieve this aim. The profile shall be made generally available and shall, in any event, be posted on the company's website.

III.3.4 Limit on number of supervisory board memberships

Best practice provision III.3.4 provides that the maximum number of supervisory boards of Dutch listed companies of which an individual may be a member is five. For this purpose the chairmanship of a supervisory board counts double. This provision, which is intended to promote that companies attract expert people from outside the normal circle of candidates, came in for much criticism when the Code was introduced.¹⁶ Now, however, the standard of five supervisory board memberships appears to be regarded as a given. The Monitoring Committee considers that this provision has worked well and has helped to break up the old boy network. Another factor in this respect has been the internationalisation of trade and industry.

III.4 Role of the chairman of the supervisory board and the company secretary

The chairman of the supervisory board determines the agenda, chairs the supervisory board meetings, monitors the proper functioning of the supervisory board and its committees, arranges for the adequate provision of information to the supervisory board, ensures that there is sufficient time for making decisions, arranges for the induction and training programme for the members, acts on behalf of the supervisory board as the main contact for the management board, initiates the evaluation of the functioning of the supervisory board and the management board and ensures, as chairman, the orderly and efficient conduct of the general meeting of shareholders. The chairman of the supervisory board is assisted in his role by the company secretary.

III.4.2 Management board member (or ex-member) not to be chairman of the supervisory board

The recommendation of the European Commission referred to in section 1 is more detailed than the Code on one point: 'In cases where a company chooses to combine the roles of chairman and chief executive or to immediately appoint as chairman of the (supervisory) board the former chief executive, this should be accompanied with information on any safeguards put in place.' The Monitoring Committee sees no need to adopt this addition, given the best practice that (former) management board members should not immediately become chairman of the supervisory board. If a company provides an explanation of why this best practice is not applied, the explanation should include information about any precautionary measures.

Company secretary

Best practice provision III.4.3 states that the chairman of the supervisory board should be assisted by the company secretary. The monitoring shows that this is a provision for which an explanation of non-

application is given relatively often. The Monitoring Committee considers that it is not necessary to amend this provision.

Role of vice-chairman

As the chairman holds a prominent position, it is all the more important that he should function well. The functioning of all supervisory board members should be discussed at least once a year (best practice provision III.17) and supervisory board members who are frequently absent must be called to account for this (best practice provision III.1.5). It may be wondered whether these mechanisms are adequate to deal with the problem of a chairman who functions inadequately. In the United Kingdom, Italy and Spain provision is made for the possibility of approaching a senior independent director when a chairman does not function properly. The Monitoring Committee considers that a vice-chairman of the supervisory board could play such a role in the Netherlands (see best practice provision III.4.1f). The following new provision could be added for this purpose:

III.4.4 The vice-chairman of the supervisory board shall deputise for the chairman when the occasion arises. By way of addition to best practice provision III.1.7, the vice-chairman shall act as contact for individual supervisory board members and management board members concerning the functioning of the chairman of the supervisory board.

III.5 Composition and role of three key committees of the supervisory board

If the supervisory board consists of more than four members, it shall appoint from among its members an audit committee, a remuneration committee and a selection and appointment committee. The function of the committees is to prepare the decision-making of the supervisory board. If the supervisory board decides not to appoint an audit committee, remuneration committee or selection and appointment committee, best practice provisions (...) shall apply to the entire supervisory board. In its report, the supervisory board shall report on how the duties of the committees have been carried out in the financial year.

The Monitoring Committee considers that no amendments need be made to the provisions, with the exception of the proposals concerning the remuneration committee as set out above at II.2. Some companies have now adopted the practice of setting up by an ad hoc committee for specific situations, for example a possible takeover. The Committee considers it useful for companies to examine how the involvement of the supervisory board, for example in the case of takeovers, can be structured. This is dealt with in section VI on takeovers.

III.6 Conflicts of interest

Any conflict of interest or apparent conflict of interest between the company and supervisory board members shall be avoided. Decisions to enter into transactions under which supervisory board members would have conflicts of interest that are of material significance to the company and/or to the relevant supervisory board members require the approval of the supervisory board. The supervisory board is responsible for deciding on how to resolve conflicts of interest between management board

¹⁶ See the Tabaksblat Committee, The Dutch Corporate Governance Code, December 2003, p. 51.

members, supervisory board members, major shareholders and the external auditor on the one hand and the company on the other.

The draft Management and Supervision Bill, which was circulated for consultation on 13 March 2008, contains a new provision dealing with conflicts of interest. The representation scheme is to be replaced by a decision-making scheme, as also contained in the Code. The proposed section 129, subsection 6, reads: 'A management board member shall not take part in any decision-making on a subject if he has a direct or indirect personal interest that conflicts with the interest referred to in paragraph 5. If no management board decision can be taken as a result of this, the decision shall be taken by the supervisory board or, if there is no supervisory board, by the general meeting. The articles of association may provide differently in relation to the provisions of the last sentence.'

The Monitoring Committee does not consider that this draft bill is a reason for amending III.6. Principle III.6 and its best practice provisions are in keeping with the draft bill. The Monitoring Committee would note in this connection that where management board members have shares in the company they work for, they have a personal interest in the company's success. This is why they are rewarded in the form of shares. However, a personal interest need not conflict with the company's interests. In special cases the personal interests of management board members may conflict with the interests of the company, for example in the case of a takeover where a board member is offered a position in the acquiring company.

III.7 Remuneration

The general meeting of shareholders shall determine the remuneration of supervisory board members. The remuneration of a supervisory board member is not dependent on the results of the company. The notes to the annual accounts shall, in any event, contain the information prescribed by law on the level and structure of the remuneration of individual supervisory board members.

The Monitoring Committee notes that best practice provision III.7.3 on the ownership of securities by supervisory board members (other than securities in their 'own' company) is one of the provisions for which an explanation of non-application is frequently given (as is the case with best practice provision II.2.7 on the share ownership of management board members). For the same reason as given in relation to II.2.7, the Committee considers that it may be useful for the company to have information about the shares held by supervisory board members in order to identify potential conflicts of interest. This is why the Committee has proposed in chapter II that an addition be made to best practice provision III.6.5. The Committee therefore proposes that best practice provision III.7.3 be dropped.

III.8 One-tier management structure

The composition and functioning of a management board comprising both members having responsibility for the day-to-day running of the company (executive directors) and members not having such responsibility (non-executive directors) shall be such that proper and independent supervision by the latter category of members is assured.

The draft Management and Supervision Bill, which was circulated for consultation on 13 March 2008, provides for the possibility of dividing responsibilities within the management board between non-

executive and executive directors and regulates the liability of board members for mismanagement. For example, article 129a of the Civil Code provides:

- '1. It may be provided in the articles of association that management board responsibilities are to be divided between one or more non-executive members or one or more executive members of the management board. Among the duties of the management board that cannot be assigned to executive members are fixing the remuneration of executive members and supervising the performance of the duties by a member. Non-executive members shall be natural persons.
2. If paragraph 1, first sentence, has been applied, the executive members of the management board may not together cast more votes than the non-executive members together.
3. It may be provided by or pursuant to the articles of association that one or more management board members may validly pass resolutions on matters belonging to his or their field of responsibility. A provision made pursuant to the articles of association shall be in writing.'

The Monitoring Committee does not consider that this draft bill is a reason for amending III.8. Principle III.8 and its best practice provisions are in keeping with the draft bill.

CHAPTER 4

THE SHAREHOLDERS AND THE GENERAL MEETING OF SHAREHOLDERS

1. Introduction

Chapter 4 of the Code deals with the shareholders and general meeting of shareholders. The management board and supervisory board are accountable to the general meeting of shareholders. Chapter 4 contains principles and best practice provisions on the following subjects:

1. powers
2. issue of depositary receipts for shares
3. provision of information to and logistics of the general meeting of shareholders
4. responsibility of institutional investors.

The Code aims to allow shareholders to play a more active role within companies. To achieve this, the accountability of the management board and supervisory board to the general meeting is increased, the use of anti-takeover measures is restricted, the provision of information to shareholders is improved and institutional investors are encouraged to make more active use of their rights.

Since the introduction of the Code shareholders have taken a more active approach. In a few cases disputes about corporate strategy occurred between the company and its shareholders. This 'shareholder activism' was a factor that prompted the Monitoring Committee in December 2006 to publish a consultation document on the company-shareholder relationship in the Dutch corporate governance model. The Monitoring Committee also received a request for advice on this subject from the Minister of Economic Affairs, the Minister of Finance and the Minister of Justice.

In its consultation document of December 2006 and its advisory report of May 2007 the Monitoring Committee noted that shareholders, unlike the management board and the supervisory board, do not have to be guided in their actions by the interests of the company and its affiliated enterprise. The shareholders may, in principle, act in their own interests, having due regard to the principles of reasonableness and fairness. It is the role of the management board and supervisory board to weigh up the different interests in respect of the corporate strategy. The interests of all shareholders and other stakeholders should be involved in this assessment. The management board and the supervisory board are accountable to the general meeting of shareholders for this assessment of interests. In its advisory report of May 2007, the Monitoring Committee recommended a response time of 180 days to give the management board sufficient time to take an informed decision on how to respond to the wishes expressed by the shareholders while taking into account the interests of all stakeholders.

The role and the decision-making process of the general meeting are considered at length in the consultation document and the advisory report. The Monitoring Committee notes that general meetings can often no longer be seen as the forum in which resolutions are passed as the 'fruit of consultation'. The Committee believes that there is still sufficient need for a physical meeting of shareholders as a forum for accountability and reporting. It regards the physical general meeting of shareholders as an important final link in the decision-making process and considers that dialogue with shareholders, even outside the scope of the general meeting, can play a useful role. The Monitoring Committee has recommended that the company should formulate an outline policy on bilateral contacts with shareholders and publish this policy on its website. The Monitoring Committee has also recommended that in monitoring the proper order of business at the meeting the chairman of the general meeting should be able to limit speaking times in order to ensure that the meeting proceeds in an efficient manner and the discussion is worthwhile in terms of content, on condition that this power is exercised reasonably. Yet another recommendation was that the company should offer investors the opportunity to deposit their voting proxies with an independent third party prior to the general meeting. The Monitoring Committee considers that votes and/or voting proxies known to the company need not be disclosed prior to the general meeting. These recommendations are dealt with below in the context of the proposals to amend the Code.

The Monitoring Committee made recommendations to the legislator in its advisory report of May 2007, including lowering the threshold for disclosure of control, introduction of disclosure of intentions, identification of shareholders and raising of the threshold for the right to add items to the agenda of general meetings. The government has announced that it will adopt the broad thrust of the recommendations and circulated a draft bill for consultation in December 2007.

2. Proposals for amending the Code

IV.1 Powers

Good corporate governance requires the fully-fledged participation of shareholders in the decision-making in the general meeting of shareholders. It is in the interest of the company that as many shareholders as possible take part in the decision-making in the general meeting of shareholders. The company shall, in so far as possible, give shareholders the opportunity to vote by proxy and to communicate with all other shareholders.

The general meeting of shareholders should be able to exert such influence on the policy of the management board and the supervisory board of the company that it plays a fully-fledged role in the system of checks and balances in the company.

Any decisions of the management board on a major change in the identity or character of the company or the enterprise shall be subject to the approval of the general meeting of shareholders.

IV.1.1 Cancelling the binding nature of a nomination / resolution to dismiss

Best practice provision IV.1.1 introduces rules for resolutions to cancel a binding nomination or to dismiss management board members of companies not having statutory two-tier status: in principle an absolute majority is sufficient, possibly supplemented by a quorum requirement of not more than one third of the issued capital. The quorum requirement ceases to apply in the second meeting. The

content of this provision has been under discussion. In 2007, the Tabaksblat Committee recommended that the best practice provision should be tightened up by raising the quorum in principle tot 50% of the issued capital in order to prevent resolutions being passed by chance majorities at the general meeting of shareholders as a consequence of shareholder absenteeism.¹⁷ The reactions to the consultation show that some respondents feel a need for more stringent statutory requirements for resolutions of no confidence in the supervisory board in statutory two-tier companies. In its 2007 advisory report, the Monitoring Committee recommended that the freedom of companies under their articles of association to impose requirements for resolutions on the dismissal of management and/or supervisory board members be maintained. The Committee suggested to the legislator that it consider giving statutory two-tier companies the freedom to impose more stringent requirements for resolutions of no confidence in the supervisory board. The government indicated in its reply that it would take this into consideration.¹⁸ Against this background the Monitoring Committee sees no reason to amend best practice provision IV.1.1.

IV.1.4 and IV.1.5 Separate agenda items for policy on additions to reserves and dividends and for dividend payments

Best practice provisions IV.1.4 and IV.1.5 provide for the policy on additions to reserves and on dividends to be dealt with separately from the resolution to pay a dividend. These provisions were among those with the lowest rates of compliance in the 2005 financial year. The Monitoring Committee therefore sees no reason to propose an amendment to the provisions.

IV.1.6 Discharge of the management board and supervisory board from liability

Best practice provision IV.1.6 provides that the discharge of the management board and the discharge of the supervisory board from liability must be voted on separately. In its 2006 compliance report the Monitoring Committee recommended that in so far as corporate governance items are on the agenda, they should be placed before the item dealing with the 'discharge of the management board from liability for its conduct of policy'. The Monitoring Committee proposes to amend best practice provision IV.1.6. as follows:

IV.1.6 Resolutions to approve the policy of the management board (discharge of management board members from liability) and to approve the supervision exercised by the supervisory board (discharge of supervisory board members from liability) shall be voted on separately in the general meeting of shareholders. Compliance with the Code shall be reported on before the resolution to approve the policy of the management board and supervisory board is put to the vote.

Limiting speaking times at meetings

The Monitoring Committee considers that limiting the speaking times of individual shareholders could be helpful in ensuring that the meeting proceeds in an efficient manner and the discussion is worthwhile in terms of content. The chairman of the meeting is responsible for monitoring the proper

¹⁷ During the symposium of the Monitoring Committee in Amsterdam on 17 April 2007.

¹⁸ Letter from the Minister of Finance of 19 June 2007, Parliamentary Papers 31 083, no. 1, p. 1.

order of business at the meeting, and particularly for giving every shareholder the opportunity to exercise his right to address the meeting. For this purpose he can determine the order of business prior to or during the meeting and limit the speaking time (either per shareholder or per item), provided that he exercises these powers reasonably. It is recommended that when the occasion arises the chairman should make more use of these powers than hitherto. The Monitoring Committee therefore proposes that a new best practice provision IV.1.8 be added:

IV.1.8 The chairman of the general meeting is responsible for ensuring the smooth transaction of business at meetings and may for this purpose put reasonable limits on the speaking time.

Principle IV.2 Depositary receipts for shares

Depositary receipts for shares are a means of preventing a (chance) minority of shareholders from controlling the decision-making process as a result of absenteeism at a general meeting of shareholders. Depositary receipts for shares shall not be used as an anti-takeover measure. The management of the trust office shall issue proxies in all circumstances and without limitation to the holders of depositary receipts who so request. The holders of depositary receipts thus authorised can exercise the voting right at their discretion. The management of the trust office shall have the confidence of the holders of depositary receipts. Depositary receipt holders shall have the possibility of recommending candidates for the management of the trust office. The company shall not disclose to the trust office information which has not been made public.

Since the introduction of the Code various companies have abolished the system of issuing depositary receipts for shares. The annual monitoring reports show that compliance with section IV.2 by trust offices is improving.

Code best practice	Brief description	2007	2006	difference
IV 2.1	Trust conditions determine how depositary receipt holders (DRH) can call a DRH meeting	10	10	0
IV. 2.2.	Trust office board member appointed by trust office board	14	13	+1
IV 2.2	DRH meeting can recommend appointment of trust office board member	13	12	+ 1
IV. 2.2.	Dependent persons excluded from appointment	16	14	+ 2
IV. 2.3.	Maximum term of office (3 x 4 years)	15	14	+1
IV. 2.4	Trust office board attends AGM	12	12	-
IV. 2.5	Trust office acts primarily in the interests of DRH	11	11	-
IV. 2.6	Presence of trust office report	14	14	-
IV. 2.8	Trust office grants unrestricted voting proxies	13	11	+ 2
IV. 2.8	DRH can issue trust office with binding voting instruction	12	11	+1
	<i>Number of trust offices</i>	16	16	

The Monitoring Committee does not consider this to be a reason to amend these provisions.

IV.3 Provision of information to and logistics of the general meeting of shareholders

The management board or, where appropriate, the supervisory board shall provide all shareholders and other parties in the financial markets with equal and simultaneous information about matters that may influence the share price. The contacts between the management board on the one hand and press and analysts on the other shall be carefully handled and structured,

and the company shall not engage in any acts that compromise the independence of analysts in relation to the company and vice versa.

The management board and the supervisory board shall provide the general meeting of shareholders with all information that it requires for the exercise of its powers.

If price-sensitive information is provided during a general meeting of shareholders, or the answering of shareholders' questions has resulted in the disclosure of price-sensitive information, this information shall be made public without delay.

IV.3.1 Provision of information about presentations

Best practice provision IV.3.1 states that meetings with analysts, presentations to analysts, presentations to investors and institutional investors and press conferences should be announced in advance on the company's website and by means of press releases. Arrangements must be made to enable all shareholders to follow these meetings and presentations in real time, for example by means of webcasting or telephone lines. After the meetings, the presentations should be posted on the company's website. This best practice provision is among those that are most frequently explained and least complied with. The Monitoring Committee does not consider this to be a reason to amend the provision.

IV.3.6 Provision of information to shareholders on the website

Best practice provision IV.3.6 on the posting of all information which it is required to publish or deposit pursuant to the provisions of applicable company law and securities law, on a separate section of the company's website (i.e. separate from the commercial information of the company) is one of the provisions that has the lowest rate of compliance. Once the bill to implement the Transparency Directive has come into force, there will be a statutory obligation to publish price-sensitive information and information relating to the financial accounting (half-yearly and quarterly reports) on the website. The Monitoring Committee therefore considers it worthwhile limiting the information requested in the Code to information relating to the general meeting of shareholders. The Monitoring Committee therefore proposes the following amendment:

IV.3.6 The company shall place and update all information which is relevant to the general meeting of shareholders and which it is required to publish or deposit pursuant to the provisions of company law and securities law applicable to it, in a separate section of the company's website. ~~(i.e. separate from the commercial information of the company) that is recognisable as such). It is sufficient for the company to establish a hyperlink to the website of the institutions that publish the relevant information electronically pursuant to statutory provisions or the stock exchange regulations.~~

IV.3.7 Provision of information to shareholders in the event of approval or authorisation

Best practice provision IV.3.7 deals with the provision of information to shareholders for the exercise of the right of approval or the delegation of powers. The Monitoring Committee believes that this provision should be amended, first of all because it refers to draft article 2:107a of the Civil Code. This has now become law. Second, the Monitoring Committee considers that the reference to the 'shareholders circular' is too detailed and may cause confusion. The Monitoring Committee therefore proposes that the wording of this provision be amended as follows:

~~IV.3.7 If a right of approval is granted to the general meeting of shareholders by law or under the articles of association of the company (e.g. in the case of option schemes, far-reaching decisions as referred to in draft article 2:107a Civil Code), or the management board or the supervisory board requests a delegation of powers (e.g. issue of shares or authorisation for the repurchase of shares), the management board and the supervisory board shall inform the general meeting of shareholders by means of a 'shareholders circular' of all facts and circumstances relevant to the approval, delegation or authorisation to be granted. A resolution for approval or authorisation to be passed by the general meeting of shareholders shall be explained in writing. In its explanation the management board shall deal with all facts and circumstances relevant to the approval/~~delegation~~/or authorisation to be granted. The ~~shareholders' circular~~ explanation with the agenda shall, in any event, be posted on the company's website.~~

IV.3.9 Survey of anti-takeover measures

Best practice provision IV.3.9 states that the management board must provide a survey of all existing or potential anti-takeover measures in the annual report and also indicate in what circumstances it is envisaged that these measures may be used. This provision has one of the lowest rates of compliance. The Monitoring Committee does not consider this to be a reason to amend this provision. However, it could be moved to the chapter on takeovers.

Depositing of voting proxies with an independent third party

In its advisory report the Monitoring Committee noted that from the perspective of due care it would be advisable for the company to make it possible for investors to deposit their voting proxies with an independent third party prior to the general meeting. This would not affect the shareholders' right to inform the management board about how they vote or intend to vote. This could help in the proper preparation of the general meeting and in determining the proper order of business to be transacted at the meeting. The Monitoring Committee proposes to add a new best practice provision IV.3.10 that reads as follows:

IV.3.10 The company shall give shareholders and other persons entitled to vote the possibility of depositing their voting proxies with an independent third party prior to the general meeting.

Communication with shareholders other than at the general meeting

The Monitoring Committee stressed in its advisory report that a dialogue with the shareholders and other market participants outside the context of the general meeting can be useful. One-on-one discussions can enable shareholders to make their positions known to the company and engage in an exchange of views with the management board. Naturally, any such discussions are conditional in particular on full observance of the statutory rules on market abuse. The company continues to have the responsibility for determining whether or not certain information is price-sensitive.

In view of the duty of care which the company and shareholders should try to observe when engaging in the dialogue, any price-sensitive information should not be furnished until after the parties have

given each other the opportunity to take whatever measures are necessary to allow inside information to be handled responsibly. Naturally, a refusal to receive price-sensitive information should be respected. The willingness to enter into discussions with individual shareholders does not affect the duty of the management board and supervisory board to account to the general meeting.

Owing to the possible tension between promoting an active dialogue and countering market abuse, the Monitoring Committee has suggested that the company formulates a policy on bilateral contacts with the shareholders and publishes this policy on its website. In the opinion of the Monitoring Committee, this should be an outline policy aimed at clarifying the procedure applied by the company. Such transparency would enable the shareholders to adjust their behaviour accordingly.

The company could, among other things, clarify whether it has such contacts, whether it takes an active or a passive role in this respect (does the company approach the shareholders or does it allow itself to be approached?), on which shareholders it focuses and in what period of the year it is prepared to hold such discussions. In this context the Monitoring Committee proposes to add a new best practice provision IV.3.11 that reads as follows:

IV.3.11 The company shall formulate an outline policy on bilateral contacts with the shareholders and publish this policy on its website.

IV.4 Responsibility of institutional investors

Institutional investors shall act primarily in the interests of the ultimate beneficiaries or investors and have a responsibility to the ultimate beneficiaries or investors and the companies in which they invest, to decide, in a careful and transparent way, whether they wish to exercise their rights as shareholder of listed companies.

Institutional investors shall be prepared to enter into a dialogue with the company if they do not accept the company's explanation of non-application of a best practice provision of this code. The guiding principle in this connection is the recognition that corporate governance requires a tailor-made approach and that it is perfectly possible for a company to justify instances of non-application of individual provisions.

Section IV.4 deals with the responsibility of institutional investors. The first paragraph of the principle relates to the obligations of institutional investors to their ultimate beneficiaries. The second paragraph concerns the dialogue between institutional investors and the company. The Code does not state explicitly which categories of institutional investor it is intended to cover: i.e. Dutch institutional investors (regardless of whether they invest in Dutch or in foreign companies) or all institutional investors who invest in Dutch companies.

Over three quarters of the shareholders in Dutch listed companies come from abroad. Dutch institutional investors form only a limited part of the shareholder population of Dutch listed companies. Since 1 January 2007 certain Dutch institutional investors have had a statutory obligation to publish their voting policy in accordance with the 'apply or explain' principle.

The Monitoring Committee considers that part of the justification for best practice provisions IV.1 to IV.3 is the fiduciary relationship between institutional investors and their ultimate beneficiaries. As the Code is not intended to protect beneficiaries from other countries, the logical conclusion is that these provisions should be confined to Dutch institutional investors. However, this does not apply to the second paragraph of principle IV.4. This concerns the relationship between the (institutional) investor and the company. The Monitoring Committee considers that in this field the Code should apply to all investors who invest in Dutch companies, regardless of whether they are based or resident in the Netherlands or abroad.

This is why the Committee proposes that the second paragraph of principle IV.4 should be applicable to all shareholders.

The Committee also proposes that the principle should state that derogations from provisions of the Code must be properly explained.

~~Institutional investors~~ Shareholders shall be prepared to enter into a dialogue with the company if they do not accept the company's explanation of non-application of a best practice provision of this Code. The guiding principle in this connection is the recognition that corporate governance requires a tailor-made approach and that derogations from individual provisions by a company may be justified and should be properly reasoned.

Response time

In its advisory report of May 2007 the Monitoring Committee recommended that the management board be given the time (referred to as the 'response time') to take an informed decision on how to respond to the wishes expressed by shareholders and at the same time take account of the interests of all stakeholders. The management board will have to make effective use of the response time for further deliberation and constructive consultation, first of all (but not exclusively) with the shareholder who arranged for the issue to be put on the agenda. Naturally, the management board and the supervisory board continue to have full responsibility during the response time for the careful assessment of all company-related interests, generally with a view to ensuring the continuity of the business and to creating shareholder value in the long term. It follows that the management board and the supervisory board should not use the response time for safeguarding their own position. The Monitoring Committee assumes that the management board will use the response time in practice for dialogue and deliberation and for assessment of the alternatives and that the supervisory board will monitor this process and assist the management board by providing advice. In this context the Monitoring Committee proposes to add a new best practice provision IV.4.4 that reads as follows:

IV.4.4 A shareholder may exercise the right to add items to the agenda only after he has discussed this with the management board. If the aim of putting an item on the agenda is to change the strategy of the company or may result in the dismissal of management board members and/or supervisory board members, the item may be put on the agenda only after the management board has responded to this. The management board shall respond within a reasonable period, which may not in any event exceed 180 days from the date of submission of the proposal to add the item to the agenda. The same response time applies to a request for judicial authorisation to convene a general meeting. The management board shall use the response time for further deliberation and constructive consultation, in any event with the shareholder who has expressed the wish to add the item to the agenda, and shall consider the alternatives. The supervisory board shall monitor this.

Exercise of voting right

The Monitoring Committee considers that a shareholder has responsibility for exercising his voting right with due care. This means that a shareholder should preferably not blindly follow the voting advice provided by a voting adviser and should instead make his own decision. The Monitoring Committee proposes to add a new best practice provision IV.4.5 that reads as follows:

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

Disclosure

A shareholder who puts forward items for the agenda of the general meeting should be given sufficient opportunity to explain his proposals at the meeting and should take advantage of this opportunity so that other shareholders can understand the background to the proposals and ask questions about them. In this context the Monitoring Committee proposes to add a new best practice provision IV.2 that reads as follows:

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

CHAPTER 5

THE AUDIT OF THE FINANCIAL REPORTING AND THE POSITION OF THE INTERNAL AUDIT FUNCTION AND OF THE EXTERNAL AUDITOR

The management board is responsible for the quality and completeness of publicly disclosed financial reports. The supervisory board must ensure that the management board discharges this responsibility. The role of the internal and external auditors is elaborated in chapter 5 of the Code, which deals with the audit of the financial reporting and the position of the internal audit function and of the external auditor. Chapter 5 consists of the following parts:

1. Financial reporting
2. Role, appointment, remuneration and assessment of the functioning of the external auditor
3. Internal audit function
4. Relationship and communication of the external auditor with the organs of the company

The Code deals in this chapter with the financial reporting processes. After various accounting scandals, this was considered necessary in order to improve the quality of the financial reporting.

The survey shows that best practice provision V.3.1 concerning the involvement of the external auditor and the audit committee in the work schedule of the internal auditor is one of the provisions whose non-application is frequently explained.

The Accounting Organisations (Supervision) Act (*Wet toezicht accountantsorganisaties*) and the Financial Reporting (Supervision) Act (*Wet toezicht financiële verslaggeving*) entered into force on 1 January 2006 and 1 January 2007 respectively. Both acts designate the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten / AFM*) as supervisory authority. The Act to implement the IAS regulation, IAS 39 guideline and the modernisation directive entered into force on 1 January 2006. At European level, various directives including the Fourth and Seventh Directives and the Eighth Directive have been amended. These will shortly be transposed into Dutch law.

As the statutory framework has been tightened up, it may be wondered whether it is still necessary for the Code to contain provisions regulating the reporting process and, in particular, the role of the auditor. Principle V.2, which is elaborated in best practice provision V.2.1, has now been incorporated in section 117 (5) of the implementing Act, which provides that the external auditor is entitled to attend and address the general meeting that decides on the adoption of the annual accounts. In other respects the Code provisions do not appear to have replicated in the legislation.

The Monitoring Committee considers that the provisions of chapter 5 of the Code still fulfil a useful function and therefore sees no reason to alter them.

CHAPTER 6

THE POSITION OF THE MANAGEMENT BOARD AND THE SUPERVISORY BOARD IN THE CASE OF TAKEOVERS

1. Introduction

Market developments

Since the Code came into force in 2004, Dutch listed companies have increasingly come under the influence of the market for corporate control. This is illustrated by the fact that in 2007 more than twice as many offer documents were submitted to the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten / AFM*) for approval as in previous years. There have also been bidding wars and bids by consortiums. Various companies were delisted following acquisition. The position taken by active shareholders has also influenced the timing and nature of some acquisitions.

Regulatory framework

Since October 2007 takeovers have been regulated by the Act to implement the Takeover Directive (amendment of the Civil Code and the Financial Supervision Act (*Wet op het financieel toezicht*)) and the Public Bids Decree (*Besluit openbare biedingen*). AFM ensures that the bidding process takes place in an orderly fashion, and any disputes between the management board members and shareholders have to be brought before the Enterprise Division of the Amsterdam Court of Appeal (*Ondernemingskamer van het Gerechtshof Amsterdam*). Any disputes concerning actions of the management board in the run-up to the bidding process and the squeeze-out of minority shareholders who did not accept the bid were referred to the Enterprise Division and the Supreme Court (*Hoge Raad*).

Role of the Code

The Code does not contain any specific principles dealing with public bids. Nor is any mention made in the preamble to the Code of how takeover situations affect corporate governance. The Monitoring Committee considers that in view of recent developments involving the takeover of Dutch listed companies it should propose the inclusion in the Code of rules of conduct for the board of management and the supervisory board of the (potential) target company, partly because decisions involving assessment of all the different interests involved in a takeover process are highly charged.

The Monitoring Committee considers it important for the management board and the supervisory board to carefully weigh the interests of all the company's stakeholders, especially the shareholders, employees and creditors. Like the supervisory board, the management board should act solely in the interests of the company and its affiliated enterprise. The management board should involve the

supervisory board closely in the takeover process. How the supervisory board should be involved and how intensively depends on the circumstances.

The Monitoring Committee considers that the management board and the supervisory board could usefully consider the possibility of the company being faced with a takeover bid and could prepare for this, as far as possible, by drawing up a plan of action.

The Monitoring Committee has considered whether public-to-private transactions require extra safeguards on the part of the management board and the supervisory board. Companies that have been delisted are no longer covered by the operation of the Code. Nonetheless, the Monitoring Committee recognises that a gap may occur in the system for weighing up the interests of all the different stakeholders after public-to-private transaction.

The Public Bids Decree introduces obligations to provide information about, among other things, the (financial) interests of management board members and supervisory board members, how the takeover will affect employment, conditions of employment and the company's places of business,¹⁹ but the Monitoring Committee considers that there should be broader consideration of the competing interests and greater transparency. The Committee therefore considers it desirable for the management board, when it determines its position on the takeover bid (a process supervised by the supervisory board), to inform the company's stakeholders (including shareholders, employees and creditors) of the consequences of the bid, if it were to succeed.

2. Proposals for additions to the Code

In view of the above the Monitoring Committee proposes that a new part be added to the Code after part V (financial reporting). This new part should read as follows:

VI. The position of the management board and the supervisory board in the case of takeovers

Principle VI Takeover bid for shares in the company

In the event of any (proposed) takeover bid for shares in the company the management board and the supervisory board shall carefully weigh all the interests involved. The management board shall be guided in its actions exclusively by the interest of the company and its affiliated enterprise. The supervisory board shall be closely involved in the takeover process.

¹⁹ See schedules A and G to the Public Bids Decree.

- VI.1 The management board and the supervisory board shall discuss the possibility of a takeover bid being made for the shares of the company and shall consider how the supervisory board members should guide a takeover process.
- VI.2 If one or more management board members of the company conduct consultations about a takeover bid (proposed or otherwise) with a potential bidder, the supervisory board shall be immediately informed of this.
- VI.3 The supervisory board shall ensure that the negotiating process with a bidder or potential bidder proceeds properly. This applies in particular if one or more management board members have a considerable personal (financial) interest in the takeover or potential takeover.
- VI.4 If the company arranges for a fairness opinion to be produced in the context of a takeover bid, the person engaged to produce this opinion shall be an expert who has no (financial) interest in the success or failure of the takeover. The management board shall submit the expert's engagement to the supervisory board for approval.
- VI.5 In the position taken by the management board on the takeover bid, as referred to in the Public Bids Decree (*Besluit openbare biedingen*), the management board shall outline the consequences of the success of the bid for the company's stakeholders, including the shareholders, employees and creditors.
- VI.6 As soon as the management board of a company in respect of which a takeover bid has been announced or issued receives a request from a third party who is a competing bidder (or potentially competing bidder) to inspect the particulars of the company in the same way as the bidder, it shall immediately discuss the request with the supervisory board.

3. Suggestions for recommendations to the legislator

As already noted in the introduction, the Monitoring Committee endorses the principle that new regulations should be introduced only with restraint and that preference should be given to self-regulation. Nonetheless, the Committee is considering recommending to the legislator two amendments to the legislation in order to improve the takeover process both before a bid ('put up or shut up') and afterwards (squeeze-out procedures).

Put up or shut up

The Monitoring Committee has noted that in some cases a listed company has been the subject of fairly prolonged takeover speculation without any bid actually being announced or made by the

prospective bidder. This can distract the attention of the management board, the supervisory board and the employees from their normal duties over a long period. In addition, the stock market price can include an unnecessarily speculative element if a prospective bidder delays announcing a bid or fails to state no bid will be made.

The Monitoring Committee is considering recommending that the legislator examine whether it is possible to amend the Dutch bidding rules in such a way that the company is not subject to takeover speculation for longer than necessary. Consideration can be given in this connection to the possibility of making an addition to the Public Bids Decree (Besluit openbare biedingen) to the effect that a bidder (or prospective bidder) is given the choice in the case of takeover speculation of announcing within a given period either that it intends to make a bid or that it has decided against doing so. In the latter case the party concerned should be barred from making any further bid for the company during a fairly long period.

Squeeze-out procedures

Once a successful bid has been made for a company there is often a small minority of holders of shares and depositary receipts who have not accepted the offer. Sometimes these are shareholders who were unable to accept the public bid. Not infrequently these are shareholders who were not aware that a public bid had been made or were not in a position to offer their securities. In keeping with the European Takeover Directive, Dutch law gives the offeror the possibility of buying out these shareholders at a fair price if it has acquired at least 95% of the issued capital and voting rights (right of squeeze-out). Conversely, the law gives minority shareholders a right of sell-out in this situation.

Reports have reached the Monitoring Committee that in practice the squeeze-out procedures do not function as well as they could in all respects. Companies have indicated that squeeze-out procedures are often protracted and sometimes relatively expensive for the company. The shareholders doubt whether the existing squeeze-out procedures provide adequate protection for the remaining minority shareholders in all cases, taking into account the criteria of reasonableness and fairness.

The Monitoring Committee requests stakeholders to indicate whether they consider it desirable for a recommendation to be made to the legislator that it consider amending the existing squeeze-out procedures and, if so, what aspects should be amended.

disclosure would not harm the competitive position of the company.	
<i>Remuneration:</i> It is advisable not to depart from the previously established measurable quantitative performance criteria and targets when determining the variable part of the remuneration and to allow for any special circumstances only within the discretionary component of the variable remuneration. The supervisory board should account in retrospect for the policy it has pursued.	best practice provision II. 2.10
<i>Remuneration:</i> As regards long-term incentives the Committee notes that more and more listed companies are switching, in keeping with the Code, to conditional option and share plans. One condition for granting or exercising such rights is the attainment of clearly quantifiable and challenging targets specified beforehand. In the Committee's view, these targets should be directly related to the creation of long-term value for shareholders.	best practice provision II. 2.10
Second compliance report (December 2006)	
<i>AGM:</i> The Committee considers that it follows from the Code that in so far as corporate governance items are on the agenda, they should be placed before the item dealing with the discharge of the management board from liability for its policy.	best practice provision IV.1.6
<i>Internal risk management:</i> Sarbanes-Oxley applies to Dutch companies that also have a listing in the United States. Where the SOX provision on internal control and reporting on this is applied in full, the Committee considers that this meets the Dutch requirements in respect of the internal control objective and financial reporting.	-
<i>Internal risk management:</i> The Committee considers that if the report of the external auditor were to be disclosed, this would alter the nature of the relationship between the management board and the external auditor. Disclosure of a report on the quality of internal control would be possible only if there is a generally accepted framework for internal control. The standard for approval would then inevitably shift in the direction of SOX 404. The Committee regards this as undesirable. The Committee is therefore not in favour of disclosure of the external auditor's report to the supervisory board and the management board. This does not alter the fact that the external auditor does have a role in identifying risks.	-
<i>Remuneration:</i> The remuneration policy and its impact must be presented to the general meeting of shareholders in transparent and understandable terms. This responsibility falls to the supervisory board; in practice, this requires the supervisory board to monitor the complexity of remuneration contracts.	principle II.2
<i>Remuneration:</i> The Committee recommends that the remuneration policy be covered in a separate section of the annual report, in a manner that is both transparent and uniform.	principle II.2
<i>Remuneration:</i> The Committee also believes that the supervisory board should explicitly report on the effectiveness of the company's remuneration policy. In particular, the relationship between remuneration and performance should be made clear, not only before but also after the event. Performance should be interpreted in this connection as the contribution to long-term value creation by the enterprise.	principle II.2 and best practice provision II.2.10

Advice on role of the shareholder (May 2007)	
<p><i>Management board/shareholders:</i> The Monitoring Committee recommends that the discussions with shareholders should in principle be conducted by the management board. The chairman of the supervisory board should be cautious about conducting discussions with shareholders. Nonetheless, when the occasion arises, for example where shareholders get no response from the management board or where there is a dispute or potential dispute between the management board and one or more shareholders, the chairman of the supervisory board may hold discussions with shareholders in order to ascertain their positions, provided he does so with the knowledge of the supervisory board and in the presence of another supervisory board member or a member of the management board. Such discussions may be held on the initiative of either a shareholder or the supervisory board.</p>	<p>best practice provision III.1.6</p>
<p><i>Diversity:</i> The Monitoring Committee recommends that the supervisory board should aim to have a mixed composition.</p>	<p>principle III.3</p>
<p><i>Communication with shareholders:</i> The Monitoring Committee recommends that the company should formulate an outline policy on bilateral contacts with the shareholders and publish this policy on its website.</p>	<p>best practice provision IV.3.11</p>
<p><i>Response time:</i> The Monitoring Committee considers that it is good practice for shareholders to exercise the right to put a corporate governance issue on the agenda only after they have raised it with the management board of the company. If putting an item on the agenda is expected to result in a change of company strategy, including the resignation of current members of the management board and/or supervisory board and the appointment of other management board members and/or supervisory board members, the Monitoring Committee assumes as a rule of thumb that a period of 180 days (the response time) will be sufficient for the management board to form an opinion on the view of the shareholder and to identify and assess any alternatives. The management board will have to make effective use of the response time for further deliberation and constructive consultation, first of all (but not exclusively) with the shareholder who arranged for the item to be put on the agenda. Naturally, the management board and the supervisory board continue to have full responsibility during the response time for the careful assessment of all company-related interests, generally with a view to ensuring the continuity of the business and to creating shareholder value in the long term. It follows that the management board and the supervisory board should not use the response time for safeguarding their own position. The Monitoring Committee assumes that the management board will use the response time in practice for dialogue and deliberation and for assessment of the alternatives and that the supervisory board will monitor this process and assist the management board by providing advice. The same response time applies by analogy to a request to convene a general meeting.</p>	<p>best practice provision IV.4.4</p>
<p><i>Depositing of voting proxy:</i> The Monitoring Committee recommends that the company offers investors the opportunity to deposit their voting proxies with an independent third party prior to the general meeting.</p>	<p>best practice provision IV.3.10</p>
<p><i>Limitation of speaking time:</i> The Monitoring Committee recommends that in monitoring the proper order of business at the meeting the chairman of the general meeting should be able to limit speaking times in order to ensure that the meeting proceeds in an efficient manner and the discussion is worthwhile in terms of content, on condition that this power is exercised reasonably.</p>	<p>best practice provision IV.1.8</p>
<p><i>Remuneration:</i> The Monitoring Committee recommends that the conditions for change-of-control clauses in contracts with management board members and for other prospective payments to management board members (whether in securities or otherwise) should be made public immediately (see best practice provision II.2.11 of the Code). In addition, such</p>	<p>best practice provisions II.2.11 and II.2.12</p>

information should be provided in the event of a resolution or motion of the management board in respect of a takeover or other important change in the character of the company which is presented to the general meeting of shareholders and may result in the clause becoming applicable or in the payment being made.	
Third compliance report (December 2007)	
<p><i>Internal risk management:</i> The description of its risk profile outlines the risks the company encounters in implementing its strategy. The company also states what risks it is prepared to take in order to achieve its objective and quantifies them, if possible by means of a sensitivity analysis.</p> <p>The description should in any event:</p> <ul style="list-style-type: none"> • explain the main risks related to the company's strategic objectives and its appetite for risks; • describe the main strategic, operational, financial, legislative/regulatory and financial reporting risks of the company, including in any event the qualitative impact of these risks; • contain a sensitivity analysis of the identified risks if it is reasonable to expect such an analysis in the light of the best practices in the sector concerned.. 	best practice provision II.1.4
<p><i>Internal risk management:</i> The description of the internal risk management and control system should indicate what measures the company has taken to control the identified risks. It should deal not only with the system itself but also how it is embedded in the organisation. It is recommended that the following points be discussed:</p> <ul style="list-style-type: none"> • the risks which are managed by the internal risk management and control system and, if necessary, the reference model used to configure the system; • the organisation of the internal risk management and control system and how it is embedded in the organisation; • the results of a periodic evaluation of the internal risk management and control system and, in so far as applicable, the improvement measures taken as a result. 	best practice provision II.1.4
<p><i>Remuneration:</i> The remuneration committee should determine the basic principles of the remuneration policy and take the initiative in determining the performance criteria. If the remuneration committee makes use of the services of a consultant who provides a benchmark for determining the amount of management board remuneration, this consultant should be independent of the management board.</p>	best practice provisions III.5.12a and III.5.12c
<p><i>Remuneration:</i> The supervisory board should arrange for scenario analyses to be carried out periodically in order to identify any undesirable effects of the remuneration instruments that are employed.</p>	best practice provision II.2.8a
<p><i>Remuneration:</i> The supervisory board should apply internal guidelines for a remuneration ceiling.</p>	best practice provision II.2.10
<p><i>Remuneration:</i> The supervisory board should be able to adjust the variable remuneration if it has been granted on the basis of incorrect (financial) data (a so-called clawback clause).</p>	best practice provision II.2.8b
<p><i>Remuneration:</i> The supervisory board should have the power to alter the variable remuneration in relation to the level of previous years if payment in full would, in its opinion, produce unreasonable results.</p>	best practice provision II.2.8b
<p><i>Remuneration:</i> The supervisory board should ensure that when short-term and/or long-term variable remuneration is conditionally granted (i.e. when the prospect is held out), each of the variable components cannot exceed a given maximum percentage of the fixed gross salary at the time when the award becomes unconditional (i.e. when payment is made). The <i>maximum</i> ratio between fixed and variable remuneration as applied by the supervisory board should be disclosed by the company.</p>	best practice provision II.2.10
<p><i>Remuneration:</i> The principle contained in the Code to the effect that severance pay in the</p>	best practice provision

event of redundancy is one year's salary should be extended to cover all reasons for termination of contract.	II.2.7
<i>Remuneration:</i> Clauses about severance pay in contracts with management board members should be immediately disclosed.	best practice provision II.2.11
<i>Remuneration:</i> The remuneration committee should provide specific information about the severance pay of a management board member in the remuneration report.	best practice provision II.2.12
<i>Remuneration:</i> The Monitoring Committee recommends that the conditions for change-of-control clauses in contracts with management board members and for other prospective payments to management board members (whether in the form of securities or otherwise) should be immediately disclosed. Compensation for a change of control, whether or not granted under the employment contract, should be based on a scheme included to this effect in the remuneration policy adopted. If a motion whose adoption results in a change-of-control clause becoming applicable is submitted by the management board to the general meeting for approval, the specific consequences of the application of the clause, should the motion be adopted, must be stated in the explanatory notes.	best practice provision II.2.11 - -
<i>Remuneration:</i> The Monitoring Committee considers that the relationship between the performance criteria and the strategic aims of the company should be disclosed in the remuneration report. The performance criteria should be sufficiently definite, quantified and specific for the extent of the true ambition to be apparent from them.	best practice provision II.2.10
<i>Remuneration:</i> The Monitoring Committee recommends that if the company makes one-off (short-term) payments to management board members (other than the annual bonus), this should be based on a scheme included to this effect in the remuneration policy adopted.	-
At least once a year the supervisory board should discuss the corporate strategy and the <u>main</u> risks of the business, and the result of the assessment by the management board of the structure and operation of the internal risk management and control systems, as well as any significant changes thereto. Reference to these discussions should be made in the report of the supervisory board.	best practice provision III.1.8
<i>Diversity:</i> The Monitoring Committee recommends that the supervisory board (at the suggestion of the selection and appointment committee) should expressly deal in its profile with the diversity aspects relevant to the company and explain how they are applied in practice.	best practice provision III.3.1
<i>Diversity:</i> The Monitoring Committee recommends that candidates for new vacancies on the supervisory board should also be recruited from outside the existing networks.	-
<i>Diversity:</i> The Monitoring Committee recommends that the supervisory board should aim to have a mixed composition. The diversity of its composition could be increased above all in terms of gender and age.	principle III.3

Table of proposals for amending the Code that are not based on previous compliance reports

Text of Code proposals	Designation of Code proposals
<i>Dropped</i>	best practice provision II.2.6
<p>The overview referred to in II.2.9 should, in any event, contain the following information:</p> <p><u>a) an overview of the costs incurred by the company in the financial year in relation to management board remuneration. The overview shall give a breakdown showing fixed salary, annual cash bonus, shares granted, options granted and pension rights granted. The costs should be valued in accordance with IAS 19 and IFRS 2.</u></p> <p><u>b) a summary of the results of the scenario analyses referred to in II.2.8a:</u></p> <p>....</p> <p><u>d) a table showing the following information for each year in which shares or options have been awarded over which the management board member did not yet have unrestricted control at the start of the financial year:</u></p> <ul style="list-style-type: none"> - <u>the value and number of the conditional/unconditional shares and/or options on the date of grant;</u> - <u>the present status of the shares and/or options awarded: conditionally or unconditionally and the year in which vesting period and/or lock-up period ends;</u> - <u>the value and number of the shares and/or options conditionally awarded under (i) at the time when the management board member obtains ownership of them (end of vesting period), and</u> - <u>the value and number of the shares and/or options conditionally awarded under (i) at the time when the management board member obtains unrestricted control of them (end of lock-up period);</u> 	best practice provision II.2.10
<p>The supervisory board shall discuss at least once a year on its own, i.e. without the management board being present and, <u>if desired, with an external adviser</u>, both its own functioning, <u>the functioning of the separate committees</u> and that of its individual members, and the conclusions that must be drawn on the basis thereof. The desired profile, composition and competence of the supervisory board should also be discussed. Moreover, the supervisory board shall discuss at least once a year, without the management board being present, both the functioning of the management board as an organ of the company and the performance of its individual members, and the conclusions that must be drawn on the basis thereof. Reference to these discussions shall be made in <u>The report of the supervisory board shall state how the evaluation of the functioning of the supervisory board, the separate committees and the individual supervisory board members has been carried out.</u></p>	best practice provision III.1.7
<p>The vice-chairman of the supervisory board shall deputise for the chairman when the occasion arises. By way of addition to best practice provision III.1.7, the vice-chairman shall act as liaison officer for individual supervisory board members and management board members concerning the functioning of the chairman of the supervisory board.</p>	best practice provision III.4.4
<p>The regulations of the supervisory board shall contain rules on dealing with conflicts of interest and potential conflicts of interest between management board members, supervisory board members and the external auditor on the one hand and the company on the other. The regulations shall also stipulate which transactions require the approval of the supervisory board. <u>The company shall also draw up regulations governing ownership of and transactions in securities by management or supervisory board members, other than securities issued by their 'own' company.</u></p>	best practice provision III.6.5
<i>Dropped</i>	best practice provision III.7.3

<p>Institutional investors shall act primarily in the interests of their ultimate beneficiaries or investors and have a responsibility to their ultimate beneficiaries or investors and the companies in which they invest, to decide, in a careful and transparent way, whether they wish to exercise their rights as shareholder of listed companies.</p> <p><u>Institutional investors-Shareholders</u> shall be prepared to enter into a dialogue with the company if they do not accept the company's explanation of non-application of a best practice provision of this Code. The guiding principle in this connection is the recognition that corporate governance requires a tailor-made approach and that derogations from individual provisions by a company may be justified <u>and should be properly reasoned.</u></p>	<p>principle IV.4</p>
<p>The company shall place and update <u>all information which is relevant to the general meeting of shareholders</u> and which it is required to publish or deposit pursuant to the provisions of company law and securities law applicable to it, in a separate section of the company's website. (i.e. separate from the commercial information of the company) that is recognisable as such). It is sufficient for the company to establish a hyperlink to the website of the institutions that publish the relevant information electronically pursuant to statutory provisions or the stock exchange regulations.</p>	<p>best practice provision IV.3.6</p>
<p>If a right of approval is granted to the general meeting of shareholders by law or under the articles of association of the company (e.g. in the case of option schemes, far-reaching decisions as referred to in draft article 2:107a Civil Code), or the management board or the supervisory board requests a delegation of powers (e.g. issue of shares or authorisation for the repurchase of shares), the management board and the supervisory board shall inform the general meeting of shareholders by means of a 'shareholders circular' of all facts and circumstances relevant to the approval, delegation or authorisation to be granted. A resolution for approval or authorisation to be passed by the general meeting of shareholders shall be explained in writing. The management board shall deal in the explanation with all facts and circumstances relevant to the approval/delegation or authorisation to be granted. The shareholders' circular explanation with the agenda shall, in any event, be posted on the company's website.</p>	<p>best practice provision IV.3.7</p>
<p>A shareholder shall vote as he sees fit. A shareholder who makes use of the voting advice of a third party is expected to form his own judgment on the voting policy of this voting adviser and the voting advice provided by it.</p>	<p>best practice provision IV.4.5 (new)</p>
<p>If a shareholder has put an item on the agenda, he shall explain this at the meeting and, if necessary, answer questions about it.</p>	<p>best practice provision IV.4.6 (new)</p>
<p>In the event of any (proposed) takeover bid for shares in the company the management board and the supervisory board shall carefully weigh all the interests involved. The management board shall be guided in its actions exclusively by the interest of the company and its affiliated enterprise. The supervisory board shall be closely involved in the takeover process.</p>	<p>principle VI (new)</p>
<p>The management board and the supervisory board shall discuss the possibility of a takeover bid being made for the shares of the company and shall consider how the supervisory board members should guide a takeover process.</p> <p>If one or more management board members of the company conduct consultations about a takeover bid (proposed or otherwise) with a potential bidder, the supervisory board shall be immediately informed of this.</p> <p>The supervisory board shall ensure that the negotiating process with a bidder or potential bidder proceeds properly. This applies in particular if one or more management board members have a considerable personal (financial) interest in the takeover or potential takeover.</p>	<p>best practice provisions IV.1 to IV.6 (new)</p>

If the company arranges for a fairness opinion to be produced in the context of a takeover bid, the person engaged to produce this opinion shall be an expert who has no (financial) interest in the success or failure of the takeover.

The management board shall submit the expert's engagement to the supervisory board for approval.

In the position taken by the management board on the takeover bid, as referred to in the Public Bids Decree (*Besluit openbare biedingen*), the management board shall outline the consequences of the success of the bid for the company's stakeholders, including the shareholders, employees and creditors.

As soon as the management board of a company in respect of which a takeover bid has been announced or issued receives a request from a third party who is a competing bidder (or potentially competing bidder) to inspect the particulars of the company in the same way as the bidder, it shall immediately discuss the request with the supervisory board.

Composition of Corporate Governance Code Monitoring Committee

Chairman

Professor Jean Frijs

Professor of Investments at the Vrije University of Amsterdam

Former asset management director and member of the board of the ABP Pension Fund

Members

Professor Kees Cools

Professor of corporate financing and strategy at the University of Groningen

Partner in The Boston Consulting Group

Gert-Jan Kramer

Chairman of the Supervisory Board of Koninklijke BAM Groep N.V.

Former president of Fugro NV

Professor Jaap van Manen

Professor of Auditing at the University of Groningen

Partner PricewaterhouseCoopers Accountants NV

Roderick Munsters

Director of Asset Management at APG N.V.

Board Chairman of Eumedion

Ms Kitty Roozmond

Director of the Association of Provincial Authorities

Former vice-chair of the Federation of Netherlands Trade Unions (FNV)

Jos Streppel

Member of the Management Board and Chief Financial Officer, Aegon NV

Member of the Supervisory Board of KPN NV

Member of the Supervisory Board of Van Lanschot NV

Chairman of the Shareholders Communication Channel Foundation

Professor Albert Verdam

Professor of company law at the Vrije University of Amsterdam

Legal adviser to Royal Philips Electronics NV

Advisor

Sven Dumoulin

Group Secretary to Unilever

Secretariat

Wouter Kuijpers

Financial Markets Directorate, Ministry of Finance

Ms Martha Meinema

Enterprise Directorate, Ministry of Economic Affairs

The Dutch corporate governance code

Principles of good corporate governance
and
best practice provisions

(full text: including changes proposed in the evaluation report of June 2008; changes have been marked)

PRINCIPLES AND BEST PRACTICE PROVISIONS

I. Compliance with and enforcement of the code

Principle The management board and the supervisory board are responsible for the corporate governance structure of the company and compliance with this code. They are accountable for this to the general meeting of shareholders. Shareholders take careful note and make a thorough assessment of the reasons for any non-application of best practice provisions of this code by the company. They should avoid adopting a 'box-ticking approach' when assessing the corporate governance structure of the company.

Best practice provisions

- I.1 The broad outline of the corporate governance structure of the company shall be explained in a separate chapter of the annual report, partly by reference to the principles mentioned in this code. In this chapter the company shall indicate expressly to what extent it applies the best practice provisions in this corporate governance code and, if it does not do so, why and to what extent it does not apply them.
- I.2 Each substantial change in the corporate governance structure of the company and in the compliance of the company with the code shall be submitted to the general meeting of shareholders for discussion under a separate agenda item.

II. Management board

II.1 Role and procedure

Principle The role of the management board is to manage the company, which means, among other things, that it is responsible for achieving the company's aims, strategy and policy, and results. The management board is accountable for this to the supervisory board and to the general meeting of shareholders. In discharging its role, the management board shall be guided by the interests of the company and its affiliated enterprise, taking into consideration the interests of the company's stakeholders. The management board shall provide the supervisory board in good time with all information necessary for the exercise of the duties of the supervisory board.

The management board is responsible for complying with all relevant legislation and regulations, for managing the risks associated with the company activities and for financing the company. The management board shall report related developments to and shall discuss the internal risk management and control systems with the supervisory board and its audit committee.

Best practice provisions

- II.1.1 A management board member is appointed for a maximum period of four years. A member may be reappointed for a term of not more than four years at a time.
- II.1.2 The management board shall submit to the supervisory board for approval:
- a) the operational and financial objectives of the company;
 - b) the strategy designed to achieve the objectives;
 - c) the parameters to be applied in relation to the strategy, for example in respect of the financial ratios.
- The main elements shall be mentioned in the annual report.
- II.1.3 The company shall have an internal risk management and control system that is suitable for the company. It shall, in any event, employ as instruments of the internal risk management and control system: (a) risk analyses of the operational and financial objectives of the company; (b) a code of conduct which should, in any event, be published on the company's website; (c) guides for the layout of the financial reports and the procedures to be followed in drawing up the reports; and (d) a system of monitoring and reporting.
- II.1.4 In the annual report the management board shall provide:
- a) a description of the design and operation of the internal risk management and control systems for the main risks that could have occurred in the financial year;
 - b) a description of any major failings in the internal risk management and control systems which have been discovered in the financial year, any significant changes that may have been made to these systems and any important improvements to the systems that are planned, and shall confirm that they have been discussed with the audit committee and the supervisory board.
The management board shall provide clear substantiation of this.
- II.1.4a As regards financial reporting risks the management board states in the annual report:
- a) that the internal risk management and control systems ~~are adequate and effective~~ provide a reasonable assurance that the financial reporting does not contain any errors of material importance;
 - b) that the risk management and control systems worked properly in the year under review;
 - c) that there are no indications that the risk management and control systems will not work properly in the current year.
The management board shall provide clear substantiation of this.
- II.1.5 The management board shall, in the annual report, set out the sensitivity of the results of the company to external factors and variables.
- II.1.6 The management board shall ensure that employees have the possibility of

reporting alleged irregularities of a general, operational and financial nature in the company to the chairman of the management board or to an official designated by him, without jeopardising their legal position. Alleged irregularities concerning the functioning of management board members shall be reported to the chairman of the supervisory board. The arrangements for whistleblowers shall in any event be posted on the company's website.

II.1.7 A management board member may not be a member of the supervisory board of more than two listed companies. Nor may a management board member be the chairman of the supervisory board of a listed company. Membership of the supervisory board of other companies within the group to which the company belongs does not count for this purpose. The acceptance by a management board member of membership of the supervisory board of a listed company requires the approval of the supervisory board. Other important positions held by a management board member shall be notified to the supervisory board.

II.2 Remuneration

Amount and composition of the remuneration

Principle **The amount and structure of the remuneration which the management board members receive from the company for their work shall be such that qualified and expert managers can be recruited and retained. If the remuneration consists of a fixed and a variable part, the variable part shall be linked to previously-determined, measurable and influenceable targets, which must be achieved partly in the short term and partly in the long term. The variable part of the remuneration is designed to strengthen the board members' commitment to the company and its objectives.**

The remuneration structure, including severance pay, is such that it promotes the interests of the company in the medium and long term, does not encourage management board members to act in their own interests and neglect the interests of the company and does not 'reward' failing board members upon termination of their employment. The level and structure of remuneration shall be determined in the light of, among other things, the results, the share price performance and other developments relevant to the company.

The shares held by a management board member in the company on whose board he sits are long-term investments. The amount of compensation which a management board member may receive on termination of his employment may not exceed one year's salary, unless this would be manifestly unreasonable in the circumstances.

Best practice provisions

- II.2.1 Options to acquire shares are a conditional remuneration component, and become unconditional only when the management board members have fulfilled predetermined performance criteria after a period of at least three years from the grant date.
- II.2.2 If the company, notwithstanding best practice provision II.2.1, grants unconditional options to management board members, it shall apply performance criteria when doing so and the options should, in any event, not be exercised in the first three years after they have been granted.
- II.2.3 Shares granted to management board members without financial consideration shall be retained for a period of at least five years or until at least the end of the employment, if this period is shorter. The number of shares to be granted shall be dependent on the achievement of clearly quantifiable and challenging targets specified beforehand.
- II.2.4 The option exercise price shall not be fixed at a level lower than a verifiable price or a verifiable price average in accordance with the official listing on one or more predetermined days during a period of not more than five trading days prior to and including the day on which the option is granted.
- II.2.5 Neither the exercise price nor the other conditions regarding the granted options shall be modified during the term of the options, except in so far as prompted by structural changes relating to the shares or the company in accordance with established market practice.
- II.2.7 The ~~maximum~~ remuneration in the event of ~~dismissal~~ early termination of the contract shall not exceed one year's salary (the 'fixed' remuneration component). If the maximum of one year's salary would be manifestly unreasonable for a management board member who is dismissed during his first term of office, such board member shall be eligible for severance pay not exceeding twice the annual salary.
- II.2.8 The company shall not grant its management board members any personal loans, guarantees or the like unless in the normal course of business and on terms applicable to the personnel as a whole, and after approval of the supervisory board. No remission of loans shall be granted.

Determination and disclosure of remuneration

- Principle** The report of the supervisory board shall include the principal points of the remuneration report of the supervisory board concerning the remuneration policy of the company, as drawn up by the remuneration committee. This shall describe transparently and in clear and understandable terms the remuneration policy that has been pursued and give an overview of the remuneration policy to be pursued. The notes to the annual accounts shall, in any event, contain the

information prescribed by law on the level and structure of the remuneration of the individual members of the management board, and the full remuneration broken down into its various components shall be clearly presented in the remuneration report. The remuneration policy proposed for the next financial year and subsequent years as specified in the remuneration report shall be submitted to the general meeting of shareholders for adoption. Every material change in the remuneration policy shall also be submitted to the general meeting of shareholders for adoption. Schemes whereby management board members are remunerated in the form of shares or rights to subscribe for shares, and major changes to such schemes, shall be submitted to the general meeting of shareholders for approval.

The supervisory board shall determine the remuneration of the individual members of the management board, on a proposal by the remuneration committee, within the scope of the remuneration policy adopted by the general meeting of shareholders.

Best practice provisions

- II.2.8a Before the remuneration policy is drawn up and before the remuneration of individual board members is adopted, the remuneration committee shall analyse the possible results of the variable remuneration components and how this affects the remuneration of the management board member(s).
- II.2.8b If a variable remuneration component (shares, options or a bonus) conditionally awarded in a previous financial year would, in the opinion of the supervisory board, produce an unfair result on account of incorrect financial data or special circumstances in the period in which the predetermined performance criteria have been or should have been achieved, the supervisory board may adjust the value downwards or upwards. This power of the supervisory board shall in any event be included in new remuneration contracts with management board members.
- II.2.9 The remuneration report of the supervisory board shall contain an account of the manner in which the remuneration policy has been implemented in the past financial year, as well as an overview of the remuneration policy planned by the supervisory board for the next financial year and subsequent years.
- II.2.10 The overview referred to in II.2.9 shall, in any event, contain the following information:
- ~~a) a statement of the relative importance of the variable and non-variable remuneration components and an explanation of this ratio;~~
 - ~~b) an explanation of any absolute change in the non-variable remuneration component;~~
 - a) an overview of the costs incurred by the company in the financial year in relation to management board remuneration. The overview shall give a breakdown showing fixed

salary, annual cash bonus, shares conditionally or unconditionally awarded, options conditionally or unconditionally awarded and pension rights granted. The costs shall be valued in accordance with IAS 19 and IFRS 2;

b) a summary of the results of the scenario analyses referred to in II.2.8a;

c) for each management board member the bandwidth within which the number of shares and/or options conditionally granted in the financial year may be set at the time the management board acquires them after achieving the set performance criteria;

d) a table showing the following information for each year in which shares or options have been awarded over which the management board member did not yet have unrestricted control at the start of the financial year:

- the value and number of the conditional/unconditional shares and/or options on the date of grant;

- the present status of the shares and/or options awarded: whether they are conditional or unconditional and the year in which vesting period and/or lock-up period ends;

- the value and number of the shares and/or options conditionally awarded under (i) at the time when the management board member obtains ownership of them (end of vesting period), and

- the value and number of the shares and/or options conditionally awarded under (i) at the time when the management board member obtains unrestricted control of them (end of lock-up period);

e) if applicable: the composition of the group of companies (peer group) whose remuneration policy determines in part the level and composition of the remuneration of the management board members;

f) a summary and explanation of the company's policy with regard to the term of the contracts with management board members, the applicable periods of notice and redundancy schemes and an explanation of the extent to which best practice provision II.2.7 is endorsed;

g) a description of the specified and objectively quantifiable performance criteria on which the performance-related part of the variable remuneration is dependent;

h) an account of the relationship between the chosen performance criteria and the strategic objectives applied;

i) a description and account of the discretionary part of the variable remuneration that can be fixed by the supervisory board as it sees fit;

j) a summary of the methods that will be applied in order to determine whether the performance criteria have been fulfilled and an explanation of the choice of these methods;

k) if performance criteria are based on a comparison with external factors: a summary should be given of the factors that will be used to make the comparison; if one of the factors relates to the performance of one or more companies (peer group) or of an

index, it should be stated which companies or which index has been chosen as the yardstick for comparison;

l) an account of the relationship between remuneration and performance not only beforehand but also afterwards;

m) a description and explanation of each proposed change to the conditions on which a management board member can acquire rights to options, shares or other variable remuneration components;

n) if any right of a management board member to options, shares or other variable remuneration components is not performance-related: an explanation of why this is the case;

o) current pension schemes and the related financing costs;

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

II.2.11 The main elements of the contract of a management board member with the company shall be made public immediately after it is concluded. These elements shall in any event include the amount of the fixed salary, the structure and amount of the variable remuneration component, any agreed redundancy scheme and/or severance pay, any conditions of a change-of-control clause in the contract with a management board member and any other remuneration the prospect of which has been held out to the management board member, pension arrangements and performance criteria.

II.2.12 If a management board member or former management board member is paid severance pay or other special remuneration during a given financial year, an account and an explanation of this remuneration shall be included in the remuneration report. ~~The remuneration report shall in any event account for and explain remuneration paid or promised in the year under review to a departed management board member by way of severance pay.~~

II.2.13 The remuneration report of the supervisory board shall, in any event, be posted on the company's website.

II.2.14 The company shall state in the notes to the annual accounts, in addition to the information to be included pursuant to article 2:383d of the Civil Code, the value of any options granted to the management board and the personnel and shall indicate how this value is determined.

II.3 Conflicts of interest

Principle Any conflict of interest or apparent conflict of interest between the company and management board members shall be avoided. Decisions to enter into transactions under which management board members would have conflicts of interest that are of material significance to the company and/or to the relevant management board member require the approval of the supervisory board.

Best practice provisions

- II.3.1 A management board member shall:
- (a) not enter into competition with the company;
 - (b) not demand or accept (substantial) gifts from the company for himself or for his wife, registered partner or other life companion, foster child or relative by blood or marriage up to the second degree;
 - (c) not provide unjustified advantages to third parties to the detriment of the company;
 - (d) not take advantage of business opportunities to which the company is entitled for himself or for his wife, registered partner or other life companion, foster child or relative by blood or marriage up to the second degree.
- II.3.2 A management board member shall immediately report any conflict of interest or potential conflict of interest that is of material significance to the company and/or to him, to the chairman of the supervisory board and to the other members of the management board and shall provide all relevant information, including information concerning his wife, registered partner or other life companion, foster child and relatives by blood or marriage up to the second degree. The supervisory board shall decide, without the management board member concerned being present, whether there is a conflict of interest. A conflict of interests exists, in any event, if the company intends to enter into a transaction with a legal entity (i) in which a management board member personally has a material financial interest; (ii) which has a management board member who has a relationship under family law with a management board member of the company, or (iii) in which a management board member of the company has a management or supervisory position.
- II.3.3 A management board member shall not take part in any discussion or decision-making that involves a subject or transaction in relation to which he has a conflict of interest with the company.
- II.3.4 All transactions in which there are conflicts of interest with management board members shall be agreed on terms that are customary in the sector concerned. Decisions to enter into transactions in which there are conflicts of interest with management board members that are of material significance to the company and/or to the relevant board members require the approval of the supervisory board. Such transactions shall be published in the annual report, together with a statement of the conflict of interest and a declaration that best practice provisions II.3.2 to II.3.4 inclusive have been complied with.

III. Supervisory Board

III.1 Role and procedure

Principle **The role of the supervisory board is to supervise the policies of the management board and the general affairs of the company and its affiliated enterprise, as well as to assist the management board by providing advice. In discharging its role, the supervisory board shall be guided by the interests of the company and its affiliated enterprise, and shall take into account the relevant interests of the company's stakeholders. The supervisory board is responsible for the quality of its own performance.**

Best practice provisions

- III.1.1 The division of duties within the supervisory board and the procedure of the supervisory board shall be laid down in a set of regulations. The supervisory board shall include in the regulations a paragraph dealing with its relations with the management board, the general meeting of shareholders and the works council, where relevant. The regulations shall, in any event, be posted on the company's website.
- III.1.2 The annual financial report of the company shall include a report of the supervisory board in which the supervisory board describes its activities in the financial year and which includes the specific statements and information required by the provisions of this code.
- III.1.3 The following information about each supervisory board member shall be included in the report of the supervisory board:
- (a) gender;
 - (b) age;
 - (c) profession;
 - (d) principal position;
 - (e) nationality;
 - (f) other positions, in so far as they are relevant to the performance of the duties of the supervisory board member;
 - (g) date of initial appointment;
 - (h) the current term of office.
- III.1.4 A supervisory board member shall retire early in the event of inadequate performance, structural incompatibility of interests, and in other instances in which this is deemed necessary by the supervisory board.
- III.1.6 The supervision of the management board by the supervisory board shall include:
- a) achievement of the company's objectives;
 - b) corporate strategy and the risks inherent in the business activities;

- c) the structure and operation of the internal risk management and control systems;
- d) the financial reporting process;
- e) compliance with the legislation and regulations.
- f) the company-shareholder relationship.

III.1.7 The supervisory board shall discuss at least once a year on its own, i.e. without the management board being present and, if desired, with an external adviser, both its own functioning, the functioning of the separate committees and that of its individual members, and the conclusions that must be drawn on the basis thereof. The desired profile, composition and competence of the supervisory board shall also be discussed. Moreover, the supervisory board shall discuss at least once a year without the management board being present both the functioning of the management board as an organ of the company and the performance of its individual members, and the conclusions that must be drawn on the basis thereof. ~~Reference to these discussions shall be made in~~ The report of the supervisory board shall state how the evaluation of the functioning of the supervisory board, the separate committees and the individual supervisory board members has been carried out.

III.1.8 The supervisory board shall discuss at least once a year the corporate strategy and the main risks of the business, and the result of the assessment by the management board of the structure and operation of the internal risk management and control systems, as well as any significant changes thereto. Reference to these discussions shall be made in the report of the supervisory board.

III.1.9 The supervisory board and its individual members each have their own responsibility for obtaining all information from the management board and the external auditor that the supervisory board needs in order to be able to carry out its duties properly as a supervisory organ. If the supervisory board considers it necessary, it may obtain information from officers and external advisers of the company. The company shall provide the necessary means for this purpose. The supervisory board may require that certain officers and external advisers attend its meetings.

III.2 Independence

Principle **The composition of the supervisory board shall be such that the members are able to act critically and independently of one another and of the management board and any particular interests.**

Best practice provisions

III.2.1 All supervisory board members, with the exception of not more than one person, shall be independent within the meaning of best practice provision

III.2.2 A supervisory board member shall be deemed to be independent if the following criteria of dependence do not apply to him. The said criteria are that the supervisory

board member concerned or his wife, registered partner or other life companion, foster child or relative by blood or marriage up to the second degree:

- a) has been an employee or member of the management board of the company (including associated companies as referred to in section 1 of the Disclosure of Major Holdings in Listed Companies Act (WMZ) 1996) in the five years prior to the appointment;
- b) receives personal financial compensation from the company, or a company associated with it, other than the compensation received for the work performed as a supervisory board member and in so far as this is not in keeping with the normal course of business;
- c) has had an important business relationship with the company, or a company associated with it, in the year prior to the appointment. This includes the case where the supervisory board member, or the firm of which he is a shareholder, partner, associate or adviser, has acted as adviser to the company (consultant, external auditor, civil notary and lawyer) and the case where the supervisory board member is a management board member or an employee of any bank with which the company has a lasting and significant relationship;
- d) is a member of the management board of a company in which a member of the management board of the company which he supervises is a supervisory board member;
- e) holds at least ten percent of the shares in the company (including the shares held by natural persons or legal entities which cooperate with him under an express or tacit, oral or written agreement);
- f) is a member of the management board or supervisory board - or is a representative in some other way - of a legal entity which holds at least ten percent of the shares in the company, unless such entity is a member of the same group as the company;
- g) has temporarily managed the company during the previous twelve months where management board members have been absent or unable to discharge their duties.

III.2.3 The report of the supervisory board shall state that, in the view of the supervisory board members, best practice provision III.2.1 has been fulfilled, and shall also state which supervisory board member is not considered to be independent, if any.

III.3 Expertise and composition

Principle Each supervisory board member shall be capable of assessing the broad outline of the overall policy. Each supervisory board member shall have the specific expertise required for the fulfilment of the duties assigned to the role designated to him within the framework of the supervisory board profile. The

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

Best practice provisions

- III.3.1 The supervisory board shall prepare a profile of its size and composition, taking account of the nature of the business, its activities and the desired expertise and background of the supervisory board members. The profile shall deal with the aspects of diversity in the composition of the supervisory board that are relevant to the company. In so far as the existing situation differs from the intended situation, the supervisory board shall account for this in the annual report and shall indicate how and within what period it expects to achieve this aim. The profile shall be made generally available and shall, in any event, be posted on the company's website.
- III.3.2 At least one member of the supervisory board shall be a financial expert, in the sense that he has relevant knowledge and experience of financial administration and accounting for listed companies or other large legal entities.
- III.3.3 After their appointment, all supervisory board members shall follow an induction programme, which, in any event, covers general financial and legal affairs, financial reporting by the company, any specific aspects that are unique to the company and its business activities, and the responsibilities of a supervisory board member. The supervisory board shall conduct an annual review to identify any aspects with regard to which the supervisory board members require further training or education during their period of appointment. The company shall play a facilitating role in this respect.
- III.3.4 The number of supervisory boards of Dutch listed companies of which an individual may be a member shall be limited to such an extent that the proper performance of his duties is assured; the maximum number is five, for which purpose the chairmanship of a supervisory board counts double.
- III.3.5 A person may be appointed to the supervisory board for a maximum of three 4-year terms.
- III.3.6 The supervisory board shall draw up a retirement schedule in order to avoid, as far as possible, a situation in which many supervisory board members retire at the same time. The retirement schedule shall be made generally available and shall, in any event, be put on the company's website.

III.4 Role of the chairman of the supervisory board and the company secretary

Principle The chairman of the supervisory board determines the agenda, chairs the supervisory board meetings, monitors the proper functioning of the supervisory

board and its committees, arranges for the adequate provision of information to the members, ensures that there is sufficient time for making decisions, arranges for the induction and training programme for the members, acts on behalf of the supervisory board as the main contact for the management board, initiates the evaluation of the functioning of the supervisory board and the management board and ensures, as chairman, the orderly and efficient conduct of the general meeting of shareholders. The chairman of the supervisory board is assisted in his role by the company secretary.

Best practice provisions

- III.4.1 The chairman of the supervisory board shall see to it that:
- a) the supervisory board members follow their induction and education or training programme;
 - b) the supervisory board members receive in good time all information which is necessary for the proper performance of their duties;
 - c) there is sufficient time for consultation and decision-making by the supervisory board;
 - d) the committees of the supervisory board function properly;
 - e) the performance of the management board members and supervisory board members is assessed at least once a year;
 - f) the supervisory board elects a vice-chairman;
 - g) the supervisory board has proper contact with the management board and the works council (or central works council).
- III.4.2 The chairman of the supervisory board shall not be a former member of the management board of the company.
- III.4.3 The supervisory board shall be assisted by the company secretary. The company secretary shall see to it that correct procedures are followed and that the supervisory board acts in accordance with its statutory obligations and its obligations under the articles of association. He shall assist the chairman of the supervisory board in the actual organisation of the affairs of the supervisory board (information, agenda, evaluation, training programme, etc.). The company secretary shall, either on the recommendation of the supervisory board or otherwise, be appointed and dismissed by the management board, after the approval of the supervisory board has been obtained.
- III.4.4 The vice-chairman of the supervisory board shall deputise for the chairman when the occasion arises. By way of addition to best practice provision III.1.7, the vice-chairman shall act as contact for individual supervisory board members and management board members concerning the functioning of the chairman of the

supervisory board.

III.5 Composition and role of three key committees of the supervisory board

Principle If the supervisory board consists of more than four members, it shall appoint from among its members an audit committee, a remuneration committee and a selection and appointment committee. The function of the committees is to prepare the decision-making of the supervisory board. If the supervisory board decides not to appoint an audit committee, remuneration committee or selection and appointment committee, best practice provisions III.5.4, III.5.5, III.5.8, III.5.9, III.5.10, III.5.13, V.1.2, V.2.3 and V.3.1 shall apply to the entire supervisory board. In its report, the supervisory board shall report on how the duties of the committees have been carried out in the financial year.

Best practice provisions

- III.5.1 The supervisory board shall draw up a set of regulations for each committee. The regulations shall indicate the role and responsibility of the committee concerned, its composition and the manner in which it discharges its duties. The regulations shall in any event contain a provision that a maximum of one member of each committee need not be independent within the meaning of best practice provision III.2.2. The regulations and the composition of the committees shall, in any event, be posted on the company's website.
- III.5.2 The report of the supervisory board shall state the composition of the individual committees, the number of committee meetings and the main items discussed.
- III.5.3 The supervisory board shall receive from each of the committees a report of its deliberations and findings.

Audit committee

- III.5.4 The audit committee shall in any event focus on supervising the activities of the management board with respect to:
- a) the operation of the internal risk management and control systems, including supervision of the enforcement of the relevant legislation and regulations, and supervising the operation of codes of conduct;
 - b) the provision of financial information by the company (choice of accounting policies, application and assessment of the effects of new rules, information about the handling of estimated items in the annual accounts, forecasts, work of internal and external auditors, etc.);
 - c) compliance with recommendations and observations of internal and external auditors;
 - d) the role and functioning of the internal audit department; e) the policy of the

company on tax planning;

f) relations with the external auditor, including, in particular, his independence, remuneration and any non-audit services for the company;

g) the financing of the company;

h) the applications of information and communication technology (ICT).

III.5.5 The audit committee shall act as the principal contact for the external auditor if he discovers irregularities in the content of the financial reports.

III.5.6 The audit committee shall not be chaired by the chairman of the supervisory board or by a former member of the management board of the company.

III.5.7 At least one member of the audit committee shall be a financial expert within the meaning of best practice provision III.3.2.

III.5.8 The audit committee shall decide whether and, if so, when the chairman of the management board (chief executive officer), the chief financial officer, the external auditor and the internal auditor, should attend its meetings.

III.5.9 The audit committee shall meet with the external auditor as often as it considers necessary, but at least once a year, without management board members being present.

Remuneration committee

III.5.10 The remuneration committee shall in any event have the following duties:

a) drafting a proposal to the supervisory board for the remuneration policy to be pursued;

b) drafting a proposal for the remuneration of the individual members of the management board, for adoption by the supervisory board; such proposal shall, in any event, deal with: (i) the remuneration structure and (ii) the amount of the fixed remuneration, the shares and/or options to be granted and/or other variable remuneration components, pension rights, redundancy pay and other forms of compensation to be awarded, as well as the performance criteria and their application; c) preparing the remuneration report as referred to in best practice provision II.2.9.

III.5.11 The remuneration committee shall not be chaired by the chairman of the supervisory board or by a former member of the management board of the company, or by a supervisory board member who is a member of the management board of another listed company.

III.5.12 No more than one member of the remuneration committee shall be a member of the management board of another Dutch listed company.

III.5.12a The remuneration committee shall determine the basic principles of the remuneration policy and take the initiative in determining the performance criteria

III.5.12b The consultation with a management board member (or prospective member) about his remuneration shall be conducted by the remuneration committee (or its chairman), possibly in the presence of the chairman of the supervisory board and the remuneration consultant.

III.5.12c If the remuneration committee makes use of the services of a remuneration consultant in carrying out its duties, the consultant concerned shall not provide any advice to a management board member of the company

Selection and appointment committee

III.5.13 The selection and appointment committee shall in any event focus on:

- a) drawing up selection criteria and appointment procedures for supervisory board members and management board members;
- b) periodically assessing the size and composition of the supervisory board and the management board, and making a proposal for a composition profile of the supervisory board;
- c) periodically assessing the functioning of individual supervisory board members and management board members, and reporting on this to the supervisory board;
- d) making proposals for appointments and reappointments;

e) supervising the policy of the management board on the selection criteria and appointment procedures for senior management.

III.6 Conflicts of interest

Principle **Any conflict of interest or apparent conflict of interest between the company and supervisory board members shall be avoided. Decisions to enter into transactions under which supervisory board members would have conflicts of interest that are of material significance to the company and/or to the relevant supervisory board members require the approval of the supervisory board. The supervisory board is responsible for deciding on how to resolve conflicts of interest between management board members, supervisory board members, major shareholders and the external auditor on the one hand and the company on the other.**

Best practice provisions

III.6.1 A supervisory board member shall immediately report any conflict of interest or potential conflict of interest that is of material significance to the company and/or to him, to the chairman of the supervisory board and shall provide all relevant information, including information concerning his wife, registered partner or other life companion, foster child and relatives by blood or marriage up to the second degree.

If the chairman of the supervisory board has a conflict of interest or potential conflict of interest that is of material significance to the company and/or to him, he shall report this immediately to the vice chairman of the supervisory board and shall provide all relevant information, including information concerning his wife, registered partner or other life companion, foster child and relatives by blood or marriage up to the second degree. The supervisory board member concerned shall not take part in the assessment by the supervisory board of whether a conflict of interest exists. A conflict of interest exists in any event if the company intends to enter into a transaction with a legal entity (i) in which a supervisory board member personally has a material financial interest; (ii) which has a management board member who has a relationship under family law with a member of the supervisory board of the company, or (iii) in which a member of the supervisory board of the company has a management or supervisory position.

- III.6.2 A supervisory board member shall not take part in a discussion and/or decision-making on a subject or transaction in relation to which he has a conflict of interest with the company.
- III.6.3 All transactions in which there are conflicts of interest with supervisory board members shall be agreed on terms that are customary in the sector concerned. Decisions to enter into transactions in which there are conflicts of interest with supervisory board members that are of material significance to the company and/or to the relevant supervisory board members require the approval of the supervisory board. Such transactions shall be published in the annual report, together with a statement of the conflict of interest and a declaration that best practice provisions III.6.1 to III.6.3 inclusive have been complied with.
- III.6.4 All transactions between the company and legal or natural persons who hold at least ten percent of the shares in the company shall be agreed on terms that are customary in the sector concerned. Decisions to enter into transactions in which there are conflicts of interest with such persons that are of material significance to the company and/or to such persons require the approval of the supervisory board. Such transactions shall be published in the annual report, together with a declaration that best practice provision III.6.4 has been observed.
- III.6.5 The regulations of the supervisory board shall contain rules on dealing with conflicts of interest and potential conflicts of interest between management board members, supervisory board members and the external auditor on the one hand and the company on the other. The regulations shall also stipulate which transactions require the approval of the supervisory board. The company shall draw up regulations governing ownership of and transactions in securities by management or supervisory board members, other than securities issued by their 'own' company.
- III.6.6 A delegated supervisory board member is a supervisory board member who has a special duty. The delegation may not extend beyond the duties of the

supervisory board itself and may not include the management of the company. It may entail more intensive supervision and advice and more regular consultation with the management board. The delegation shall be of a temporary nature only. The delegation may not detract from the role and power of the supervisory board. The delegated supervisory board member remains a member of the supervisory board.

- III.6.7 A supervisory board member who temporarily takes on the management of the company, where the management board members are absent or unable to fulfil their duties, shall resign from the supervisory board.

III.7 Remuneration

Principle The general meeting of shareholders shall determine the remuneration of supervisory board members. The remuneration of a supervisory board member is not dependent on the results of the company. The notes to the annual accounts shall, in any event, contain the information prescribed by law on the level and structure of the remuneration of individual supervisory board members.

Best practice provisions

- III.7.1 A supervisory board member shall not be granted any shares and/or rights to shares by way of remuneration.
- III.7.2 Any shares held by a supervisory board member in the company on whose board he sits are long-term investments.
- III.7.3 The company shall not grant its supervisory board members any personal loans, guarantees or the like unless in the normal course of business and after approval of the supervisory board. No remission of loans shall be granted.

III.8 One-tier management structure

Principle The composition and functioning of a management board comprising both members having responsibility for the day-to-day running of the company (executive directors) and members not having such responsibility (non-executive directors) shall be such that proper and independent supervision by the latter category of members is assured.

Best practice provisions

- III.8.1 The chairman of the management board shall not also be and shall not have been an executive director.
- III.8.2 The chairman of the management board shall check the proper composition and functioning of the entire board.
- III.8.3 The management board shall apply chapter III.5 of this code. The committees referred

- III.8.4 to in chapter III.5 shall consist only of non-executive management board member. The majority of the members of the management board shall be nonexecutive directors and are independent within the meaning of best practice provision III.2.2.

IV. The shareholders and general meeting of shareholders

IV.1 Powers

Principle Good corporate governance requires the fully-fledged participation of shareholders in the decision-making in the general meeting of shareholders. It is in the interest of the company that as many shareholders as possible take part in the decision-making in the general meeting of shareholders. The company shall, in so far as possible, give shareholders the opportunity to vote by proxy and to communicate with all other shareholders.

The general meeting of shareholders should be able to exert such influence on the policy of the management board and the supervisory board of the company that it plays a fully-fledged role in the system of checks and balances in the company.

Any decisions of the management board on a major change in the identity or character of the company or the enterprise shall be subject to the approval of the general meeting of shareholders.

Best practice provisions IV.2 Depositary receipts for shares

- IV.1.1 The general meeting of shareholders of a company not having statutory two tier status (structuurregime) may pass a resolution to cancel the binding nature of a nomination for the appointment of a member of the management board or of the supervisory board and/or a resolution to dismiss a member of the management board or of the supervisory board by an absolute majority of the votes cast. It may be provided that this majority should represent a given proportion of the issued capital, which proportion may not exceed one third. If this proportion of the capital is not represented at the meeting, but an absolute majority of the votes cast is in favour of a resolution to cancel the binding nature of a nomination, or to dismiss a board member, a new meeting may be convened at which the resolution may be passed by an absolute majority of the votes cast, regardless of the proportion of the capital represented at the meeting.
- IV.1.2 The voting right on financing preference shares shall be based on the fair value of the capital contribution. This shall in any event apply to the issue of

financing preference shares.

- IV.1.3 If a serious private bid is made for a business unit or a participating interest and the value of the bid exceeds the threshold referred to in draft article 2:107a paragraph 1 (c), Civil Code, and such bid is made public, the management board of the company shall, at its earliest convenience, make public its position on the bid and the reasons for this position.
- IV.1.4 The policy of the company on additions to reserves and on dividends (the level and purpose of the addition to reserves, the amount of the dividend and the type of dividend) shall be dealt with and explained as a separate agenda item at the general meeting of shareholders.
- IV.1.5 A resolution to pay a dividend shall be dealt with as a separate agenda item at the general meeting of shareholders.
- IV.1.6 Resolutions to approve the policy of the management board (discharge of management board members from liability) and to approve the supervision exercised by the supervisory board (discharge of supervisory board members from liability) shall be voted on separately in the general meeting of shareholders. Compliance with Code shall be reported on before the resolution to approve the policy of the management board and supervisory board is put to the vote.
- IV.1.7 The company shall determine a registration date for the exercise of the voting rights and the rights relating to meetings.
- IV.1.8 The chairman of the general meeting is responsible for ensuring the smooth transaction of business at meetings and may for this purpose put reasonable limits on the speaking time.

IV.2 Depository receipts for shares

Principle **Depository receipts for shares are a means of preventing a (chance) minority of shareholders from controlling the decision-making process as a result of absenteeism at a general meeting of shareholders. Depository receipts for shares shall not be used as an anti-takeover measure. The management of the trust office shall issue proxies in all circumstances and without limitation to the holders of depository receipts who so request. The holders of depository receipts thus authorised can exercise the voting right at their discretion. The management of the trust office shall have the confidence of the holders of depository receipts. Depository receipt holders shall have the possibility of recommending candidates for the management of the trust office. The company shall not disclose to the trust office information which has not been made public.**

Best practice provisions

- IV.2.1 The management of the trust office shall enjoy the confidence of the depositary receipt holders and operate independently of the company which has issued the depositary receipts. These matters shall be discussed explicitly during a meeting of holders of depositary receipts after this code enters into effect. The trust conditions shall specify in what cases and subject to what conditions holders of depositary receipts may request the trust office to call a meeting of holders of depositary receipts.
- IV.2.2 The managers of the trust office shall be appointed by the management of the trust office. The meeting of holders of depositary receipts may make recommendations to the management of the trust office for the appointment of persons to the position of manager. No management board members or former management board members, supervisory board members or former supervisory board members, employees or permanent advisers of the company should be part of the management of the trust office.
- IV.2.3 A person may be appointed to the management of the trust office for a maximum of three 4-year terms.
- IV.2.4 The management of the trust office shall be present at the general meeting of shareholders and shall, if desired, make a statement about how it proposes to vote at the meeting.
- IV.2.5 In exercising its voting rights, the trust office shall be guided primarily by the interests of the depositary receipt holders, taking the interests of the company and its affiliated enterprise into account.
- IV.2.6 The trust office shall report periodically, but at least once a year, on its activities. The report shall, in any event, be posted on the company's website.
- IV.2.7 The report referred to in best practice provision IV.2.6 shall, in any event, set out:
- a) the number of shares for which depositary receipts have been issued and an explanation of changes in this number;
 - b) the work carried out in the year under review;
 - c) the voting behaviour in the general meetings of shareholders held in the year under review;
 - d) the percentage of votes represented by the trust office during the meetings referred to at (c);
 - e) the remuneration of the members of the management of the trust office;
 - f) the number of meetings held by the management and the main items dealt with in them;
 - g) the costs of the activities of the trust office;
 - h) any external advice obtained by the trust office;
 - i) the positions of the managers of the trust office;
 - j) the contact details of the trust office.
- IV.2.8 The trust office shall, without limitation and in all circumstances, issue proxies to

depository receipt holders who so request. Each depository receipt holder may also issue binding voting instructions to the trust office in respect of the shares which the trust office holds on his behalf.

IV.3 Provision of information to and logistics of the general meeting of shareholders

Principle **The management board or, where appropriate, the supervisory board shall provide all shareholders and other parties in the financial markets with equal and simultaneous information about matters that may influence the share price. The contacts between the management board on the one hand and press and analysts on the other shall be carefully handled and structured, and the company shall not engage in any acts that compromise the independence of analysts in relation to the company and vice versa.**

The management board and the supervisory board shall provide the general meeting of shareholders with all information that it requires for the exercise of its powers.

If price-sensitive information is provided during a general meeting of shareholders, or the answering of shareholders' questions has resulted in the disclosure of price-sensitive information, this information shall be made public without delay.

Best practice provisions

- IV.3.1 Meetings with analysts, presentations to analysts, presentations to investors and institutional investors and press conferences shall be announced in advance on the company's website and by means of press releases. Provision shall be made for all shareholders to follow these meetings and presentations in real time, for example by means of webcasting or telephone lines. After the meetings, the presentations shall be posted on the company's website.
- IV.3.2 Analysts' reports and valuations shall not be assessed, commented upon or corrected, other than factually, by the company in advance.
- IV.3.3 The company shall not pay any fee(s) to parties for the carrying out of research for analysts' reports or for the production or publication of analysts' reports, with the exception of credit rating agencies.
- IV.3.4 Analysts meetings, presentations to institutional or other investors and direct discussions with the investors shall not take place shortly before the publication of the regular financial information (quarterly, half-yearly or annual reports).
- IV.3.5 The management board and the supervisory board shall provide the general meeting of shareholders with all requested information, unless this would be contrary to an

overriding interest of the company. If the management board and the supervisory board invoke an overriding interest, they must give reasons.

- IV.3.6 The company shall place and update ~~all~~ information which is relevant to the general meeting of shareholders and which it is required to publish or deposit pursuant to the provisions of company law and securities law applicable to it, in a separate section of the company's website. ~~(i.e. separate from the commercial information of the company) that is recognisable as such). It is sufficient for the company to establish a hyperlink to the website of the institutions that publish the relevant information electronically pursuant to statutory provisions or the stock exchange regulations.~~
- IV.3.7 ~~If a right of approval is granted to the general meeting of shareholders by law or under the articles of association of the company (e.g. in the case of option schemes, far-reaching decisions as referred to in draft article 2:107a Civil Code), or the management board or the supervisory board requests a delegation of powers (e.g. issue of shares or authorisation for the repurchase of shares), the management board and the supervisory board shall inform the general meeting of shareholders by means of a 'shareholders circular' of all facts and circumstances relevant to the approval, delegation or authorisation to be granted. A resolution for approval or authorisation to be passed by the general meeting of shareholders shall be explained in writing. In its explanation the management board shall deal with all facts and circumstances relevant to the approval/delegation/ or authorisation to be granted. The shareholders' circular explanation with the agenda shall, in any event, be posted on the company's website.~~
- IV.3.8 The report of the general meeting of shareholders shall be made available, on request, to shareholders no later than three months after the end of the meeting, after which the shareholders shall have the opportunity to react to the report in the following three months. The report shall then be adopted in the manner provided for in the articles of association.
- IV.3.9 The management board shall provide a survey of all existing or potential anti takeover measures in the annual report and shall also indicate in what circumstances it is expected that these measures may be used.
- IV.3.10 The company shall give shareholders and other persons entitled to vote the possibility of depositing their voting proxies with an independent third party prior to the general meeting.
- IV.3.11 The company shall formulate an outline policy on bilateral contacts with the shareholders and publish this policy on its website.

IV.4 Responsibility of institutional investors

Principle Institutional investors shall act primarily in the interests of the ultimate beneficiaries or investors and have a responsibility to the ultimate beneficiaries or investors and the companies in which they invest, to decide, in a careful and

transparent way, whether they wish to exercise their rights as shareholder of listed companies.

~~Institutional investors~~ Shareholders shall be prepared to enter into a dialogue with the company if they do not accept the company's explanation of non-application of a best practice provision of this Code. The guiding principle in this connection is the recognition that corporate governance requires a tailor-made approach and that derogations from individual provisions by a company may be justified and should be properly reasoned.

Best practice provisions

- IV.4.1 Institutional investors (pension funds, insurers, investment institutions and asset managers) shall publish annually, in any event on their website, their policy on the exercise of the voting rights for shares they hold in listed companies.
- IV.4.2 Institutional investors shall report annually, on their website and/or in their annual report, on how they have implemented their policy on the exercise of the voting rights in the year under review.
- IV.4.3 Institutional investors shall report at least once a quarter, on their website, on whether and, if so, how they have voted as shareholders in the general meeting of shareholders.
- IV.4.4 A shareholder may exercise the right to add items to the agenda only after he has discussed this with the management board. If the aim of putting an item on the agenda is to change the strategy of the company or may result in the dismissal of management board members and/or supervisory board members, the item may be put on the agenda only after the management board has responded to this. The management board shall respond within a reasonable period, which may not in any event exceed 180 days from the date of submission of the proposal to add the item to the agenda. The same response time applies to a request for judicial authorisation to convene a general meeting. The management board shall use the response time for further deliberation and constructive consultation, in any event with the shareholder who has expressed the wish to add the item to the agenda, and shall consider the alternatives. The supervisory board shall monitor this.
- IV.4.5 A shareholder shall vote as he sees fit. A shareholder who makes use of the voting advice of a third party is expected to form his own judgment on the voting policy of this voting adviser and the voting advice provided by him.
- IV.4.6 If a shareholder has put an item on the agenda, he shall explain this at the meeting and, if necessary, answer questions about it.

V. The audit of the financial reporting and the position of the internal auditor function and of the external auditor

V.1 Financial reporting

Principle **The management board is responsible for the quality and completeness of publicly disclosed financial reports. The supervisory board shall see to it that the management board fulfils this responsibility.**

Best practice provisions

- V.1.1 The preparation and publication of the annual report, the annual accounts, the quarterly and/or half-yearly figures and ad hoc financial information require careful internal procedures. The supervisory board shall supervise compliance with these procedures.
- V.1.2 The audit committee shall determine how the external auditor should be involved in the content and publication of financial reports other than the annual accounts.
- V.1.3 The management board is responsible for establishing and maintaining internal procedures which ensure that all major financial information is known to the management board, so that the timeliness, completeness and correctness of the external financial reporting are assured. For this purpose, the management board ensures that the financial information from business divisions and/or subsidiaries is reported directly to it and that the integrity of the information is not compromised. The supervisory board shall see to it that the internal procedures are established and maintained.

V.2 Role, appointment, remuneration and assessment of the functioning of the external auditor

Principle **The external auditor is appointed by the general meeting of shareholders. The supervisory board shall nominate a candidate for this appointment, for which purpose both the audit committee and the management board advise the supervisory board. The remuneration of the external auditor, and instructions to the external auditor to provide non-audit services, shall be approved by the supervisory board on the recommendation of the audit committee and after consultation with the management board.**

Best practice provisions

- V.2.1 The external auditor may be questioned by the general meeting of shareholders in relation to his statement on the fairness of the annual accounts. The external auditor shall therefore attend and be entitled to address this meeting.
- V.2.2 The management board and the audit committee shall report their dealings with the

external auditor to the supervisory board on an annual basis, including his independence in particular (for example, the desirability of rotating the responsible partners of an external audit firm that provides audit services, and the desirability of the same audit firm providing non-audit services to the company). The supervisory board shall take this into account when deciding its nomination for the appointment of an external auditor, which nomination shall be submitted to the general meeting of shareholders.

- V.2.3 At least once every four years, the supervisory board and the audit committee shall conduct a thorough assessment of the functioning of the external auditor within the various entities and in the different capacities in which the external auditor acts. The main conclusions of this assessment shall be communicated to the general meeting of shareholders for the purposes of assessing the nomination for the appointment of the external auditor.

V.3 Internal auditor function

Principle **The internal auditor, who can play an important role in assessing and testing the internal risk management and control systems, shall operate under the responsibility of the management board .**

Best practice provision

- V.3.1 The external auditor and the audit committee shall be involved in drawing up the work schedule of the internal auditor. They shall also take cognizance of the findings of the internal auditor.

V.4 Relationship and communication of the external auditor with the organs of the company

Principle **The external auditor shall, in any event, attend the meeting of the supervisory board, at which the annual accounts are to be adopted or approved. The external auditor shall report his findings in relation to the audit of the annual accounts to the management board and the supervisory board simultaneously.**

Best practice provisions

- V.4.1 The external auditor shall in any event attend the meeting of the supervisory board, at which the report of the external auditor with respect to the audit of the annual accounts is discussed, and at which annual accounts are to approved or adopted. The external auditor shall receive the financial information underlying the adoption of the quarterly and/or half-yearly figures and other interim financial reports and shall be given the opportunity to respond to all information.
- V.4.2 When the need arises, the external auditor may request the chairman of the audit committee for leave to attend the meeting of the audit committee.

V.4.3

The report of the external auditor pursuant to article 2:393, paragraph 4, Civil Code shall contain the matters which the external auditor wishes to bring to the attention of the management board and the supervisory board in relation to his audit of the annual accounts and the related audits. The following examples can be given:

A. With regard to the audit:

- information about matters of importance to the assessment of the independence of the external auditor;
- information about the course of events during the audit and cooperation with internal auditors and/or any other external auditors, matters for discussion with the management board, a list of corrections that have not been made, etc.

B. With regard to the financial figures:

- analyses of changes in shareholders' equity and results, which do not appear in the information to be published, and which, in the view of the external auditor, contribute to an understanding of the financial position and results of the company;
- comments regarding the processing of one-off items, the effects of estimates and the manner in which they have been arrived at, the choice of accounting policies, when other choices were possible, and special effects of such policies;
- comments on the quality of forecasts and budgets.

C. With regard to the operation of the internal risk management and control systems (including the reliability and continuity of automated data processing) and the quality of the internal provision of information:

- points for improvement, gaps and quality assessments;
- comments about threats and risks to the company and the manner in which they should be reported in the particulars to be published;
- compliance with articles of association, instructions, regulations, loan covenants, requirements of external supervisors, etc.

VI. Takeovers

Principle VI Takeover bid for shares in the company

In the event of any (proposed) takeover bid for shares in the company the management board and the supervisory board shall carefully weigh all the interests involved. The management board shall be guided in its actions solely by the interest of the company and its affiliated enterprise. The supervisory board shall be closely involved in the takeover process.

Best practice provisions

- VI.1 The management board and the supervisory board shall discuss the possibility of a takeover bid being made for the shares of the company and shall consider how the supervisory board members should guide a takeover process.
- VI.2 If one or more management board members of the company conduct consultations about a takeover bid (proposed or otherwise) with a potential bidder, the supervisory board shall be immediately informed of this.
- VI.3 The supervisory board shall ensure that the negotiating process with a bidder or potential bidder proceeds properly. This applies in particular if one or more management board members have a considerable personal (financial) interest in the takeover or potential takeover.
- VI.4 If the company arranges for a fairness opinion to be produced in the context of a takeover bid, the person engaged to produce this opinion shall be an expert who has no (financial) interest in the success or failure of the takeover. The management board shall submit the expert's engagement to the supervisory board for approval.
- VI.5 In the position it takes on the takeover bid as referred to in the Public Bids Decree (*Besluit openbare biedingen*), the management board shall outline the consequences of the success of the bid for the company's stakeholders, including the shareholders, employees and creditors.
- VI.6 As soon as the management board of a company in respect of which a takeover bid has been announced or issued receives a request from a third party who is a competing bidder (or potentially competing bidder) to inspect the particulars of the company in the same way as the bidder, the management board shall immediately discuss the request with the supervisory board.