

# **The Dutch corporate governance code**

Principles of good corporate governance  
and  
best practice provisions

Corporate Governance Committee

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## **CONTENTS**

### **THE DUTCH CORPORATE GOVERNANCE CODE**

**Preamble**

**Principles and best practice provisions**

**Explanation of and notes to certain terms used in the code**

**Account of the Committee's Work**

**Recommendations for the legislator and the accounting standards setters**

**Terms of reference of the Corporate Governance Committee**

**Composition of the Corporate Governance Committee**

The corporate governance code is drawn up in the Dutch language and this translation serves only to assist. References to legal terms and concepts are to be understood as references to Dutch legal terms and concepts. Where the text of this translation may deviate from the related Dutch wording, the Dutch wording prevails.

## THE DUTCH CORPORATE GOVERNANCE CODE

### Preamble

1. The Corporate Governance Committee has drawn up this corporate governance code 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) at the invitation of the Minister of Finance and the Minister for Economic Affairs. The code replaces the 1997 'Corporate Governance in the Netherlands Report; the Forty Recommendations' of the Peters Committee. The code applies to all companies whose registered office is in the Netherlands and whose shares or depositary receipts for shares are officially listed on a government-recognised stock exchange (referred to below as 'listed companies'). The code does not apply to investment funds that can be seen as mere financial products. An investment fund is therefore exempted in principle, unless the listed company is (also) the manager (*beheerder*) within the meaning of the Bill to change the Act on the Supervision of Collective Investment Schemes (*Wet toezicht beleggingsinstellingen*; Parliamentary Papers II 2002/03, 28 998, nos. 1-4). In this case, there is an organisation to which the principles and best practice provisions of this code are relevant.
2. In formulating the code, the Committee has based itself on the existing legislation governing the external and internal relations of listed companies, including the legislation governing the mandatory application of the two-tier board system (*structuurregime*), and on the case law on corporate governance.
3. The code is based on the principle accepted in the Netherlands that a company is a long-term form of collaboration between the various parties involved. The stakeholders are the groups and individuals who directly or indirectly influence (or are influenced by) the achievement of the aims of the company. In other words employees, shareholders and other providers of capital, suppliers and customers, but also government and civil society. The management board and the supervisory board have overall responsibility for weighing up the interests, generally with a view to ensuring the continuity of the enterprise. In doing so, the company endeavours to create long-term shareholder value. The management board and supervisory board should take account of the interests of the different stakeholders. The confidence of the stakeholders that their interests are represented is essential if they are to cooperate effectively within and with the company. Good entrepreneurship, including integrity and transparency of decision-making by the management board, and proper supervision thereof, including accountability for such supervision, are essential if the stakeholders are to have confidence in the management

board and the supervision. These are the two pillars on which good corporate governance rests and on which this code is based.

4. The code contains the principles and concrete provisions which the persons involved in a company (including management board members and supervisory board members) and stakeholders (including institutional investors) should observe in relation to one another. The principles may be regarded as reflecting the latest general views on good corporate governance, which now enjoy wide support. The company states each year in its annual report how it has applied the principles of the code in the past financial year. The Committee does not prescribe what form the relevant chapter in the annual report should take.
5. The principles have been elaborated in the form of specific best practice provisions. These provisions create a set of standards governing the conduct of management board and supervisory board members (also in relation to the external auditor) and shareholders. They reflect the national and international 'best practices' and may be regarded as an elaboration of the general principles of good corporate governance. Listed companies may depart from the best practice provisions. Non-application is not in itself objectionable and indeed may even be justified in certain circumstances. Whether all the provisions can be applied is in fact dependent on the specific circumstances of the company and its shareholders. Not all companies are the same: they operate in different markets, the (geographic) diversification of share ownership differs, their growth perspectives are different, and so forth. In addition, the circumstances in which a company finds itself change with some regularity. Shareholders, the media and businesses that specialise in rating the corporate governance structure of listed companies should not therefore automatically treat instances of non-application as negative, but should instead carefully assess the reason for each instance of non-application. Both shareholders and the management and supervisory boards should be prepared to enter into a dialogue on the reasons for the non-application. It is conducive to this dialogue if shareholders make known their objections prior to the general meeting of shareholders and both the company and the shareholders are willing to engage in dialogue even outside the framework of the general meeting.
6. Unconditional freedom to decide whether or not to apply the code is not desirable. In international legislation and codes, the flexibility is limited by the obligation of listed companies to explain in their annual report whether, and if so why and to what extent, they do not apply the best practice provisions of the corporate governance code (known as the 'comply or explain' principle). The government has announced that it will give the corporate governance code a statutory basis by including a provision in Book 2 of the Civil Code that a code of conduct can be designated by order in council to which the

comply or explain rule will apply (draft paragraph 4 of article 2:391 Civil Code; Parliamentary Papers I 2002/03, 28 179, no. 309). Before the order in council can be adopted, both Houses of Parliament must be given at least four weeks in which to comment on the draft order in council (draft paragraph 5 of article 2:391 Civil Code).

7. It is up to the shareholders of the company to call the management board and the supervisory board to account in respect of the application of the principles of the code and the statement on observance of the best practice provisions. The contents of this chapter of the annual report on the corporate governance structure and the corporate governance policy of the company and the statement on observance of the best practice provisions can be raised each year in the general meeting of shareholders at the initiative of the management board or of the shareholders or a group of shareholders. If desired, the chapter on the corporate governance structure, the corporate governance policy and the reason given for non-application of one or more best practice provisions may be put to the vote. If the general meeting approves the corporate governance structure and authorises the non-application of code provisions, the relevant company is deemed to comply with the code ('explanation constitutes compliance after approval by the general meeting of shareholders').
  
8. If the general meeting of shareholders (or part of the general meeting) objects to the corporate governance structure and/or the reason given for non-application of one or more best practice provisions, it may exert pressure, both in the general meeting of shareholders and otherwise, on the management board and the supervisory board to alter the corporate governance structure and/or observe the provisions of the code better. The management board and the supervisory board should render account in the general meeting of shareholders for the choices they have made, and should in any event be willing to consider adjustment of the corporate governance structure of the company if the general meeting of shareholders or a group of shareholders puts forward reasoned objections. If the discussion between the general meeting of shareholders or a group of shareholders on the one hand and the management board and supervisory board on the other with regard to an important question should nonetheless become deadlocked, the shareholders may exercise the rights available to them (both in the general meeting of shareholders and otherwise). In the general meeting, shareholders may exercise the right not to discharge the management board from liability for its conduct of business and the supervisory board from liability for its supervisory tasks, to alter the policy on remuneration, and to dismiss the supervisory board and/or the management board. Shareholders may also take various types of legal action, such as starting an inquiry or annual account procedure.

9. The code contains this preamble and the principles, the best practice provisions, as well as an explanation of and notes to certain terms used in the code. The code is divided into five chapters: (I) compliance with and enforcement of the code; (II) management board; (III) supervisory board; (IV) the shareholders and the general meeting of shareholders; (V) audit of the financial reporting and the position of the internal auditor function and of the external auditor. All these chapters contain principles and provisions for listed companies. Chapter IV contains a number of provisions for the trust office that administers shares of the companies for which depositary receipts have been issued and provisions for institutional investors. Chapter V contains some provisions for the external auditor.
  
10. The code is based on the system in which a separate supervisory board exists alongside the management board, whether under the statutory two-tier rules (*structuurregime*) or otherwise. In the Netherlands, companies which are not bound by law to apply the statutory two-tier rules may opt for the so-called one-tier management structure in which a single board contains both executive and supervisory (non-executive) directors. A few listed companies in the Netherlands have a one-tier structure. In view of the introduction in 2004 of a statutory scheme governing the European Company, under which it will be expressly possible to choose between a one-tier and a two-tier structure, the possibility is by no means excluded that other companies may follow suit in due course. In order to ensure that the code takes account of future developments and scenarios, the provisions regarding the supervisory board are also applicable to the non-executive directors of companies which have a one-tier structure, without prejudice to the management obligations of these non-executive directors. The provisions governing the management board are also applicable to the executive directors of such companies, with the exception of management duties that can not be delegated. The provisions regarding the chairman of the supervisory board also apply to the chairman of the board of companies which have a one-tier structure. Chapter III.8 contains a number of specific provisions for companies that have a one-tier structure.
  
11. For the purposes of the code, the holders of depositary receipts for shares issued with the cooperation of the company are equated with the holders of shares. Chapter IV.2 contains a number of specific provisions for companies which have issued depositary receipts for their shares and for the trust offices which administer the shares of these companies.
  
12. Companies are taking steps to be able to apply the provisions of this code as quickly as possible. Two problems can occur in this connection. First, existing contractual agreements between companies and management board members usually cannot be set aside at will. This can give rise to problems concerning application of best practice

provisions II.2.1, II.2.2, II.2.3 and II.2.7. Second, existing appointments and current terms of office can pose a problem in respect of the application of some provisions (II.1.1, II.1.7, III.3.2, III.3.4, III.3.5, III.4.2, III.8.1, IV.2.2 and IV.2.3). The Committee assumes in respect of this second problem that the provisions of the code will be applied with when new appointments or reappointments are made. As regards the provisions on the independence of supervisory directors (III.2.1, III.2.2 and III.2.3), the Committee would point out that these provisions should be applied as quickly as possible, but must be implemented at the latest by the time of the general meeting of shareholders in 2005. These points do not detract from the obligation to include an explanation in each annual report of the reasons for non-application of any of the above-mentioned provisions.

13. The corporate governance code will come into force with effect from the financial year starting on or after 1 January 2004. From the annual report for the 2004 financial year onwards, listed companies will therefore be expected to devote a chapter in the annual report to the broad outline of their corporate governance structure and to compliance with the corporate governance code, as well as the non-application of any best practice provisions. The Committee recommends to listed companies that this chapter should be discussed at the general meeting of shareholders in 2005 as a separate item on the agenda. In the view of the Committee, substantial changes to the company's corporate governance structure and substantial changes to compliance with the code should be submitted to the general meeting of shareholders for discussion from 2005 onwards. The Committee also recommends to listed companies that they include a separate chapter in their annual reports for the 2003 financial year specifically indicating how they expect to comply with this code and what problems they anticipate. It is desirable that this chapter of the annual report be put on the agenda of the general meeting of shareholders in 2004.

## **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 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.
- 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.2.6 The supervisory board shall draw up regulations concerning ownership of and transactions in securities by management board members, other than securities issued by their 'own' company. The regulations shall be posted on the company's website. A management board member shall give periodic notice, but in any event at least once a quarter, of any changes in his holding of securities in Dutch listed companies to the compliance officer or, if the company has not appointed a compliance officer, to the chairman of the supervisory board. A management board member who invests exclusively in listed investment funds or who has transferred the discretionary management of his securities portfolio to an independent third party by means of a written mandate agreement is exempted from compliance with this last provision.
- II.2.7 The maximum remuneration in the event of dismissal is 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 a 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. 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.

### **Best practice provisions**

- 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;
  - c) 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;
  - d) 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;

- e) a description of the performance criteria on which any right of the management board members to options, shares or other variable remuneration components is dependent;
- f) an explanation of the chosen performance criteria;
- 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;
- h) 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;
- i) 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;
- j) 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;
- k) current pension schemes and the related financing costs;
- l) 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 redundancy scheme, pension arrangements and performance criteria.
- II.2.12 If a management board member or former management board member is paid special remuneration during a given financial year, 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 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.1.5 Supervisory board members who are frequently absent shall be called to account for this. The report of the supervisory board shall state which supervisory board members have been frequently absent from meetings of the supervisory board.
- III.1.6 The supervision of the management board by the supervisory board shall include:
- (i) achievement of the company's objectives;
  - (ii) corporate strategy and the risks inherent in the business activities;
  - (iii) the structure and operation of the internal risk management and control systems;
  - (iv) the financial reporting process;
  - (v) compliance with the legislation and regulations.
- III.1.7 The supervisory board shall discuss at least once a year on its own, i.e. without the management board being present, both its own functioning 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.
- 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.
- 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.
- 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. 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.

#### **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 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.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.

#### *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.

- 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 supervisory board shall adopt a set of regulations containing rules governing ownership of and transactions in securities by supervisory board members, other than securities issued by their 'own' company. The regulations shall be posted on the company's website. A supervisory board member shall give periodic notice, but in any event at least once a quarter, of any changes in his holding of securities in Dutch listed companies to the compliance officer or, if the company has not appointed a compliance officer, to the chairman of the supervisory board. A supervisory board member who invests exclusively in listed investment funds or who has transferred the discretionary management of his securities portfolio to an independent third party by means of a written mandate agreement is exempted from compliance with this last provision.
- III.7.4 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 to in chapter III.5 shall consist only of non-executive management board member.
- III.8.4            The majority of the members of the management board shall be non-executive 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.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.
- IV.1.7 The company shall determine a registration date for the exercise of the voting rights and the rights relating to meetings.

## **IV.2 Depositary receipts for shares**

**Principle**      **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.**

### **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 depositary receipt holders who so request. Each depositary 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 it is required to publish or deposit pursuant to the provisions of company law and securities law applicable to it, on a separate part 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. The shareholders circular 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.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 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.**

#### **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.

**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.

## **Explanation of and notes to certain terms used in the code**

### **Preamble**

#### Section 1

The code is not applicable to all investment institutions. This is because some of the investment institutions can be designated as 'financial products', whereas the code should be applicable to investment institutions that in fact operate as businesses, for example property funds. From this perspective, however, the code is applicable to managers of investment institutions, unless the managers are member of a group with central management.

### **II. The management board**

#### II.1.1

Reappointment of management board members is the common situation if the management board members function adequately.

#### II.1.3

The internal risk management and control system should be geared to the company concerned. This gives smaller listed companies the possibility of using less extensive procedures.

#### II.1.4

It would be logical for the management board to indicate in the declaration on the internal risk management and control systems what framework or system of standards (for example the COSO framework for internal control) it has used in evaluating the internal risk management and control system.

#### II.1.5

This concerns a report on the sensitivity of results to external factors and variables in a general sense.

#### II.1.7

The term 'listed company' means a company which has its registered office in the Netherlands or abroad and whose shares or depositary receipts for shares are officially listed on a government-recognised stock exchange. Such a stock exchange may be based in the Netherlands or elsewhere.

'Other important positions' (i.e. positions that should be notified to the supervisory board) include membership of the supervisory board of a large, unlisted company.

## II.2.5

Examples of structural changes are the splitting and consolidation of shares, the consequences of a merger or acquisition in which options are 'rolled over' to the shares of the bidder, and the payment of a 'super dividend'.

## II.2.6/III.7.3

"Securities in Dutch listed companies" are securities issued by a Dutch listed company that come within the definition of securities in article 1 of the Act on the Supervision of the Securities Trade 1995 (*Wet toezicht effectenverkeer 1995*). Under this Act listed companies are already required to have a set of regulations governing ownership of and transactions in their securities by members of their management boards and supervisory boards. The regulations governing ownership of and transactions in securities by management or supervisory board members, other than securities issued by their 'own' company, as referred to in these best practice provisions, could be part of such set of regulations. It follows that the regulations should be posted in their entirety on the company's website.

## II.2.7

The 'fixed remuneration component' means periodic pay within the meaning of article 2:383c, paragraph 1 (a), Civil Code. A redundancy scheme providing for a maximum of one year's salary could be 'manifestly unreasonable' where a management board member is dismissed during his first term of office and has been in the service of the company for a long time prior to his appointment to the board. Unlike the entitlement of an 'ordinary' employee, severance pay of one year's salary could possibly be too low in such circumstances. This provision does not, incidentally, detract from the principle that failing policy (mismanagement or fraud) on the part of a management board member should not be rewarded.

## II.2.8/III.7.4

The words 'or the like' in any event include an acknowledgement of debt or an obligation to make payment in due course.

## II.2.9

'Account of the manner in which the remuneration policy has been implemented in the past financial year' includes the statement referred to in article 2:391 Civil Code. 'The remuneration policy planned by the supervisory board for the next financial year and subsequent years' means the remuneration policy referred to in draft article 2:135, paragraph 1, Civil Code.

## II.2.10

Parts e), i) and j)

'Other variable remuneration components' include in any event profit-sharing, bonuses, stock appreciation rights and phantom stock.

## **III. The supervisory board**

### III.1.2

The 'annual statements' are the entire annual report referred to in article 2:391 Civil Code, the annual accounts referred to in article 2:361 Civil Code, the other information referred to in article 2:392 Civil Code, and the report of the supervisory board, key figures, multi-year figures, shareholder information and so forth.

### III.1.4

This does not alter the fact that in the case of companies not having statutory two-tier status the general meeting of shareholders may suspend or dismiss supervisory board members at any time. Under the new provisions on companies having statutory two-tier status (Bill no. 28 179) the general meeting of shareholders of companies having statutory two-tier status may pass a resolution of no confidence in the entire supervisory board. Membership of the board is immediately terminated by such a resolution.

Under the present provisions on companies having statutory two-tier status, the Enterprise Section of the Court of Appeal in Amsterdam can dismiss a supervisory board member on request for dereliction of duty, for other important reasons or on account of a major change of circumstances. An application to this effect may be submitted by the company, represented in this case by the supervisory board, or by a duly designated representative of the general meeting of shareholders or of the works council.

### III.3.4

This refers to companies which have their registered office in the Netherlands and whose shares or depositary receipts for shares are officially listed on a government-recognised stock exchange. This stock exchange may be in the Netherlands or elsewhere.

### III.4.3

The activities of the company secretary need not be limited to the provision of support for the supervisory board. He may also work for the management board. The secretary need not necessarily be an employee of the company. The work may also be carried out by, say, a lawyer appointed for this purpose.

#### **IV. The shareholders and general meeting of shareholders**

##### IV.1.1

In practice, there are different procedures in the articles of association with regard to the binding nature of a nomination for the appointment of a management/supervisory board member and with regard to the dismissal of a management/supervisory board member. Regardless of the procedures in the articles of association, the rule applies that if an absolute majority of the votes cast supports the decision to cancel the binding nature of a nomination for the appointment or for the dismissal, but without the required representation of a proportion of the issued capital, this decision could however be taken in a second meeting with an absolute majority of the votes cast, without the quorum requirement.

##### IV.1.2

This provision is intended to apply to future issues of financing preference shares. However, the management board and supervisory board may still agree with the holders of the existing financing preference shares for adjustment of the present control of the financing preference shares.

##### IV.1.3

A private bid is not deemed to be 'serious' if it is clear that the bidder does not have sufficient financial resources to cover the bid or if no right-thinking and sensible shareholder would wish the management board to accept the bid, for example because the amount of the bid does not reflect the true value or the market value of the business unit or the participating interest.

##### IV.1.7

Under article 2:119 Civil Code, companies may provide that those persons who are shareholders on a given date prior to the general meeting of shareholders (the registration date) will retain their voting rights irrespective of whether they are still a shareholder on the date of the general meeting. The final day of registration may not precede the seventh day before the day on which the general meeting of shareholders is to be held.

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

##### V.1.2

The financial reports and press releases issued by the management board often have considerable influence on the financial markets, indeed sometimes even greater influence than the annual report and the annual accounts. However, the supervision exercised by the supervisory board, audit committee and external auditor at present often focuses to a large extent on the annual accounts rather than on other financial reports and press releases. The Committee has therefore included a provision to ensure that such reports and press releases are included in the supervision, without providing a rigid specification of the role of the

external auditor. This means among other things that the supervisory board / audit committee will receive such reports and press releases before they are issued, and be given the opportunity to ask questions and make comments. Furthermore, it is up to the audit committee to determine how and to what extent the external auditor should perform specific duties in relation to such reports and press releases.

#### V.2.1

The presence of the external auditor at the general meeting of shareholders does not detract from the general duty of the management board and the supervisory board to render account to the general meeting or their duty to provide all requested information to the general meeting (unless there is an important reason for not doing so). The external auditor can be questioned only in respect of his audit and audit opinion. Primary responsibility for the content of the annual accounts rests with the management board. It follows that the external auditor should participate in the preparation of the general meeting. The Committee has understood from the Royal Netherlands Institute of Registered Accountants (NIVRA) that it intends to submit further proposals regarding the manner in which external auditors should deal with questions in the general meeting of shareholders.

## ACCOUNT OF THE COMMITTEE'S WORK

### *Background and objective of committee*

1. The corporate governance committee was installed on 10 March 2003. In the course of its work the committee focused on the definition and adaptation of roles, tasks and responsibilities of the various corporate bodies and the external auditor. The term “checks and balances” was central in this endeavour. Good corporate governance essentially revolves around efficient supervision of the management board (the “checks”) and a balanced distribution of influence and power between the management board, the supervisory board and the general meeting of shareholders (the “balances”). The external auditor plays an important role in the supervision and assists the supervisory board which, in turn, operates on behalf of the shareholders and other stakeholders. The bankruptcies of several large corporations, a series of high-profile accounting scandals and significant increases in the remuneration packages of some management board members have created widespread public doubts concerning the accountability and supervision of corporate policy-makers. The position of the management board is said to be too dominant. Another claim is that the supervisory board is not sufficiently involved with the company and fails to exercise proper supervision over the management board. In addition, anti-takeover measures and statutory two-tier rules (*structuurregime*) prevent the general meeting of shareholders from acting as an effective correcting mechanism to correct mismanagement and failing supervision. Further question-marks were placed behind the independence and expertise of the external auditor. In this light, the central question for the committee was whether the checks and balances within the corporate governance structure of Dutch companies are well-functioning.
2. The first conclusions of the committee were laid down in the draft corporate governance code presented on 1 July 2003. In an effort to restore trust and confidence in corporate management and supervision and also to bring Dutch corporate governance rules and practices into line with the best in the Western world, the committee has strengthened the positions of both the supervisory board and the general meeting of shareholders in these rules and practices, thus avoiding an excessive concentration of power at the management board. The independence of the external auditor has been strengthened by requiring him to report directly to the supervisory board.
3. There was a broad support for this new balance. The new balance is reaffirmed in the definite version of the code. The code is one step towards restoring the public's trust and confidence in the honesty, integrity and transparency of the management and operation of Dutch listed companies. However, the code cannot bridge the trust gap entirely on its own. The legislator also has an important contribution to make. In some cases the legislation required to redress the balance between the corporate bodies is absent,

whereas in other cases existing legal rules actually obstruct this. In the committee's opinion, legislation in the field of i) anti-takeover measures, ii) facilitation of proxy voting and iii) cross-border voting are of the greatest importance to achieve more robust and rigorous "checks and balances" within Dutch companies. By contrast, the statutory two-tier laws that listed companies are obliged to apply actually impede the attainment of this objective. The committee suggests that the legislator consider scrapping the obligation to apply the statutory two-tier rules, particularly for listed companies. What is also necessary is a fundamental change in attitude among many institutional investors, who should make much more extensive use of their shareholder rights to take corrective action.

#### *The draft code*

4. The corporate governance committee presented the draft Dutch corporate governance code on 1 July 2003, and called upon all interested parties to give comments on this draft. Many responded to this request. Between 1 July 2003 and 5 September 2003, the closing date of the consultation period, the committee received a total of 257 reactions. These 257 reactions were received from various institutions, organisations, companies (both listed and unlisted) and private individuals, and varied from a single sentence to a 95-page long document. Alongside the comments, numerous meetings were organised with the draft code as the central theme. The draft code thus triggered a broad-based public debate about good corporate governance and adequate corporate supervision, with a specific focus on whether the draft code successfully put in place more robust and rigorous "checks and balances" within Dutch listed companies. This public debate is a positive point in itself. Moreover, the draft code played a role in decision-taking within a number of companies. The committee expresses its gratitude to everyone for their contributions to the debate and their interest and involvement in the subject. The comments have helped to improve the corporate governance code, thus leading to a broader and stronger base of support for application of the code. In addition, the comments prompted textual adjustments to the principles and best practice provisions of the code in order to clarify certain ambiguities in the original wording.
  
5. The committee forwarded the 257 received comments to the Netherlands Institute for Corporate Governance (NICG) in Amsterdam. This institute provided the committee a practical summary overview of the 257 comments so that, upon completion of the consultation period, the committee could immediately address the comments and discuss whether these should lead to changes to the draft code. Owing to the confidential nature of some of the comments, the committee does not feel free to publish the summary of these comments. The committee exclusively used the NICG's report to make an inventory of the comments. All public comments have been placed on the internet page of the committee ([www.commissiecorporategovernance.nl/Commentaren](http://www.commissiecorporategovernance.nl/Commentaren)). Below the committee has discussed the received comments in outline. In view of the large number and



diversity of the comments, it is not possible to deal with all reactions individually. Before looking at the comments in outline, we have first provided a sketch of the domestic and foreign corporate governance developments which influenced the committee's deliberations on the definite Dutch corporate governance code.

#### *Domestic developments*

6. The draft code is also a prevalent issue among politicians. Ahead of the government's reaction to the definite corporate governance code (early in 2004), several members of the government have already reacted positively to the committee's work. A number of political parties have also expressed their appreciation of the draft code. During the consultation period, the bill for the amendment of the statutory two-tier rules was discussed in a plenary parliamentary hearing (Parliamentary Papers II 2002/03, 28 179, nos. 1-52). By adding a Memorandum of Change (Parliamentary Papers II 2002/03, 28 179, no. 31) to this bill, the government has created a legal basis for the definite corporate governance code and the enforcement of compliance with the code by means of the "comply or explain" rule as proposed by the committee. The bill was adopted by Parliament on 9 September 2003. By means of an Order in Council, the corporate governance code can be designated as a code of conduct to which companies must make reference in their annual report, while indicating to what extent their organisation is in compliance with the principles and best practice provisions of the code. The committee expresses its gratitude to the legislator for the speed with which it acted on one of the most important recommendations to the legislator. The legislator has thus displayed its confidence in the committee's work and central premise, namely that corporate governance requires a tailor-made approach and provides standards that are easily adaptable to the changing needs of management boards, supervisory boards and shareholders.
  
7. The handling of the aforementioned bill in Parliament had consequences for the committee's work. Several best practice provisions have been enshrined in law: the power of the general meeting of shareholders to adopt the remuneration policy and the supervisory board's remuneration and the right of the general meeting of shareholders to approve share and option schemes for management board members. These points have been included in the definite code under the principles. The 'modernised' legal requirements concerning a decision of the general meeting of shareholders of companies with statutory two-tier status ("structuurvennootschappen") to cancel a nomination for the appointment of a new supervisory board member and to dismiss the entire supervisory board have had an effect on the text of the best practice provision concerning the same subjects at companies without statutory two-tier status ("niet-structuurvennootschappen"). The committee is of the opinion that shareholders of companies without statutory two-tier status must not be at a disadvantage compared to shareholders of companies with

statutory two-tier status. The legislator has only partly adopted the committee's recommendation in relation to draft article 2:107a of the Civil Code (approval of important management board resolutions) in that it has followed the qualitative comments but not the criteria. The committee accepts this and has scrapped the best practice provision on this subject; the qualitative wording has been included in the principle concerning the powers of the general meeting.

8. The legislator has not followed the committee's recommendation to oblige the trust office to issue voting proxies to depositary receipt holders in all circumstances and without limitation. On the grounds of the aforementioned bill, the trust office has the right in special circumstances ("in wartime") to limit, exclude or revoke voting proxies. During the plenary discussion of the bill on the amendment of the statutory two-tier rules, the government announced a further debate on the issuance of depositary receipts for shares in the light of the government's reaction to the definite code and the developments in the negotiations on the European Takeover Bids Directive. The committee maintains its viewpoint that it is not best practice to see the issuance of depositary receipts as an anti-takeover measure, and reiterates its suggestion that the legislator should consider permitting the issuance of voting proxies to depositary receipt holders in all circumstances and without limitation whenever they so request. The committee finds it strange to grant depositary receipt holders voting rights in non-takeover situations ("in peacetime") but to deny them a voice as soon as the company's independence is at stake ("in wartime"), which is precisely the time when depositary receipt holders can be expected to request voting rights. The distinction between peacetime and wartime represents an odd caesura in the draft article 2:118a of the Civil Code. In the committee's opinion, the issuance of depositary receipts should only be permitted to serve as a protective device against chance majorities in the general meeting of shareholders that are the result of a small turn-out. Another consideration in this context is that the management of the trust office should have the confidence of the depositary receipt holders and should primarily represent the interests of depositary receipt holders. To give the "principle of confidence" (more) tangible substance, the committee has supplemented the relevant provision in the definite code with a phrase stipulating that the trust conditions of the trust office must state in which cases and under which conditions the depositary receipt holders may request the trust office to convene a meeting of depositary receipt holders. At such a meeting depositary receipt holders are entitled to raise the confidence in the management as an item for discussion. Recent events have prompted the committee to formulate an extra provision on the issuance of depositary receipts. This provision states that the management of the trust office must attend the general meeting of shareholders and, if required, make a statement about the proposed voting behaviour. The principles and provisions from the code are not in conflict with draft article 2:118a of the Civil Code. This article, after all, does not forbid the trust office from issuing voting proxies to depositary

receipt holders in wartime but states that the trust office may decide to do this. The committee takes the view that the best practice is to grant the depositary receipt holders voting proxies in all circumstances and without limitation. For a further discussion on anti-takeover measures, reference is made to sections 56 to 59 of this account.

9. During its work in the run-up to the adoption of the definite code, the committee also had to take account of the announcement in the Budget Documents (Parliamentary Papers II 2003/04, 29 200 IXB, nos. 1-2) that the government intends to take legal measures aimed at limiting the high costs of dismissal. This announcement resulted on 17 October 2003 in a concrete proposal, namely that the level of severance pay arising from the “subdistrict court formula” (“kantonrechttersformule”) will be maximised and made enforceable by law. The severance pay may be equal to the outcome of: the number of service years multiplied by half of the gross monthly salary (excluding bonuses and share and option schemes), subject to a maximum of one year’s salary. The court has a further multiplication factor at its disposal to take the culpability of either party into account. Given that this proposal must still pass through the entire legislative procedure and is by no means certain to emerge “unscathed” from the parliamentary procedure, the committee has decided to maintain its code provision concerning the severance pay. The committee has maintained its starting point that the severance pay may be a maximum of one year’s salary. The committee has however adopted the suggestion of several commentators to include a hardship clause. The stipulated amount of one year’s salary may be unfair in the case of e.g. a long-serving employee who has been appointed as management board member. The committee believes that in such cases the severance pay may amount to a maximum of two annual salaries, provided that the dismissal occurs during the management board member’s first term. In the case of mismanagement or fraud, there should be no severance pay. All this is ultimately subject to the decision of the supervisory board.

#### *Foreign developments*

10. Several foreign developments also influenced the committee’s deliberations on the definite code. One important development that took place in the middle of the draft code consultation period was the adoption of the new British Combined Code. Most of Mr Higgs’ proposals on non-executive directors have been incorporated into this code, including the rule that at least half of the board must consist of independent non-executives. Some of the Higgs proposals have been incorporated as “supporting principles” in the Combined Code in order to give companies greater flexibility of implementation. The committee has opted not to follow this example on account of the fact that the difference between “main principles” and “supporting principles” is not clear. However, the committee has accommodated several best practice provisions in the principles. Furthermore, following the UK’s example, the committee has opted to provide

explanatory notes on certain principles and best practice provisions as well as an explanation of certain terms.

11. In addition, the consultation on excessive remuneration and severance pay for management board members, which was conducted in the United Kingdom at the instigation of the British Trade Secretary Patricia Hewitt, ended on 30 September 2003. The British government is still considering its standpoint on the results of the consultation. In its reaction to the consultation, the British employers' organisation CBI has come out in favour of obliging listed companies to immediately publish the most important elements from the contract between the company and the board member instead of waiting until the publication of the new annual report. The committee has adopted this suggestion in the definite code.
12. The committee also devoted attention to the approval of the corporate governance rules in the listing requirements of the New York Stock Exchange and NASDAQ by the US Securities and Exchange Commission on 4 November 2003. The core element of the new corporate governance rules is that the majority of the board members must be independent and that the members of the remuneration and selection and appointment committees must all be independent. The corporate governance rules of the US stock exchanges provide a detailed list of circumstances leading to non-independence. This list largely corresponds with the rules on independence in the Dutch corporate governance code.
13. The Organisation for Economic Co-operation and Development (OECD) is currently reviewing its "Principles of Corporate Governance" that were drawn up in 1999. The new principles are to be adopted in May 2004. In view of the cross-border nature of the OECD principles on corporate governance, the committee took account of the latest draft of the new principles (DAFFE/CA/CG (2003)11) during its deliberations on the adoption of the definite code. The code is largely in agreement with the draft principles of the OECD. In the most recent draft, for instance, the notes to the principles include a passage stating that depositary receipt holders who request voting proxies must be granted these in all circumstances and without limitation.

*General purport of the comments*

14. The committee holds the view that the principles and best practice provisions of the draft code can be largely maintained. On the whole the commentators supported both the committee's objective and the majority of the principles included in the draft code. Particularly among the listed companies and their interest organisations, however, there are objections to the number and level of detail of certain best practice provisions – which are the elaborations of the principles. Their view, in brief, is that the committee should

formulate more principles and fewer code provisions. In addition, the code provisions should be of a less quantitative nature.

15. The committee is aware that the number of best practice provisions in the code is fairly high compared to the UK code (the Combined Code which was adopted on 23 July 2003 comprises 16 main principles, 26 supporting principles and 55 best practice provisions). One reason is that the United Kingdom introduced a corporate governance code as far back as 1992. The Netherlands has tried to tag onto this tradition since 1997 but with insufficient success, as was established by the evaluation of corporate governance in the Netherlands between 1997 and 2002 ("Corporate Governance in Nederland; de stand van zaken"). A further point of criticism that emerged from this evaluation was that the recommendations of the Peters Committee were not sufficiently tangible. In addition, the British code comprises more principles (main principles + supporting principles) than the Dutch code. In terms of substance, there is little difference between the two codes. The committee also notes that the United States, with its Sarbanes-Oxley Act and numerous SEC provisions, certainly does not have fewer corporate governance rules than the Netherlands with this code. Finally the committee observes that a "principle based" approach cannot do without a number of concrete rules. This is evident from e.g. the Dutch "principle based" accounting and reporting rules and the "principle based" International Financial Reporting Standards. A 'pure' "principle based" approach provides too little direction as to how the principles should be implemented. Shareholders would then lack the guidance required to gain a thorough understanding of the corporate governance structure and policy and to hold the corporate management accountable for certain parts of the selected structure and the design of the "checks and balances" within the company.

#### *Scope of the corporate governance code*

16. Some commentators stated that the committee had been unclear in formulating the scope of the code. The committee's use of the term "primary" in the preamble of the draft code raised some question marks. The first section of the preamble contained the following passage: "The code is primarily aimed at all companies whose registered office is in the Netherlands and whose shares or depositary receipts are officially listed on a government-recognised stock exchange (listed companies, for short)". In section 12 of the draft preamble the committee furthermore indicated that the majority of the principles and provisions from the code could also be applicable to the corporate governance of other large legal persons. This phrase, too, was unclear in the opinion of many commentators. Some commentators argued that investment institutions should be completely exempted from the code or that the code should exclusively be applicable to managers of investment funds and not to the funds themselves. There were also commentators who said that the code should not include best practice provisions for institutional investors.

The reasons they cited were that the code is aimed at listed companies and that institutional investors should not be treated differently from other shareholders.

17. The committee has eliminated this ambiguity in the definite code. "Good governance" is obviously important for all legal persons but, in view of its terms of reference, the committee has confined itself to listed companies. The code therefore applies exclusively to all companies whose registered seat is in the Netherlands and whose shares or depositary receipts are officially listed on a government-recognised stock exchange. This means that the scope of the code not only encompasses Dutch companies whose shares or depositary receipts are listed on a Dutch stock exchange (Euronext Amsterdam) but also Dutch companies whose shares or depositary receipts are exclusively listed on one or more foreign government-recognised stock exchanges. This scope of application was selected partly to avoid pressure on the competitive position of the Dutch stock exchange. Certainly given the current internationalisation of the stock exchanges, it is relatively easy for companies who are unwilling to apply the code to move to a different stock exchange. Another factor is that the corporate governance code is to be incorporated into Book 2 of the Civil Code, so that the scope of application "automatically" extends to the country of the registered seat.
18. The committee has exempted part of the investment institutions from compulsory compliance with the code. Given that six investment institutions currently belong to the Amsterdam Mid Cap Index and that most of these institutions are basically run as companies and cannot merely be regarded as "financial products", the committee takes the view that a blanket exemption of the investment institutions would not be appropriate. In line with the suggestion of some commentators, the committee has decided that the code shall not apply to the investment funds themselves but shall apply to the managers of investment funds.
19. The arguments for not including principles and best practice provisions for institutional investors are not convincing. In contrast with other shareholders, institutional investors have a fiduciary responsibility towards their underlying beneficiaries or investors. They have also a responsibility, in view of the size of their shareholdings, towards the companies in which they invest. These responsibilities are emphasised in other countries too. The British Combined Code and the draft OECD code, for instance, devote a separate section to institutional investors. The provisions with regard to the institutional investors are in line with the proposals of the European Commission. In its communication on 'Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward', the European Commission announced its intention to put forward, in the medium term (2006-2008), a proposal for a directive to oblige institutional investors to disclose their investment policy and their policy with respect to

the exercise of voting rights in companies in which they invest, and to disclose to their beneficial holders at their request how these rights have been used in a particular case. In other words, by including a separate part on institutional investors in the code, the Netherlands is acting in line with international developments. As stated in the preamble (section 9) of the code, the code is not exclusively applicable to listed companies but also includes a number of principles and best practice provisions that are aimed at institutional investors, the trust office and the external auditor.

*Comply or explain?*

20. During the consultation period there were some questions as to what the committee meant exactly by the “comply or explain” rule. The companies which (also) have a listing in the United States pointed out that the proposed listing rules of the New York Stock Exchange require foreign companies with a listing on this stock exchange to comply with the national code and practice of their country of registration. Another concern among many companies was that the “comply or explain” rule might lead to a “box-ticking approach” among corporate governance rating agencies and (institutional) investors. These agencies and investors might be inclined to routinely check a company’s compliance on a provision-by-provision basis rather than judging the governance structure of the company as a whole, including the reasons for non-application of specific provisions. Other commentators pointed out that the code was inadequate as a deterrent and lacked sufficient “teeth”, so that the management board and supervisory board still retained too much freedom to shape the company’s corporate governance structure according to their own insights.
21. The term “comply or explain” that was taken from the British Combined Code has proved confusing. It is better to speak of “apply or explain”, as in fact was already done in certain parts of the draft code. This term is now consistently used in the definite code. Any instances of non-application of the code provisions must be properly explained and motivated. The preamble explains that once the general meeting of shareholders has explicitly approved the corporate governance structure and corporate governance policy and has also approved the motivated explanation of the non-application of one or more best practice provisions, the company is in compliance with the code (“explanation constitutes compliance after approval by the general meeting of shareholders”). The committee sees no need for the corporate governance structure and reasons for any non-application of code provisions to be annually submitted for approval to the general meeting of shareholders. Such an annual approval procedure is, however, obviously permitted if the management board or shareholders so wish. The committee does recommend that the reporting on the corporate governance structure and the reasons for non-application of one or more code provisions be put on the agenda for discussion during the general meeting of shareholders in the 2005 meeting season, which is when

listed companies will be obliged to report on compliance with the code for the first time. After the meeting season of 2005, major changes in the corporate governance structure and in the compliance with the code must be put to the general meeting for discussion.

22. The committee has given due consideration to whether the legally enshrined “apply or explain” rule has given the code sufficient “teeth”. Should it be made easier for shareholders to initiate court proceedings in the event of a dispute between the company’s management board/supervisory board and the shareholders about the corporate governance structure and the degree of compliance with the code? The committee ultimately answered this question in the negative. The committee fears that a “lighter” procedure for resorting to the courts would promote excessive litigation on corporate governance issues. Shareholders should in the first place make use of their rights to ultimately bring the management board into line or to make them accept the corporate governance structure and degree of code compliance considered desirable by the shareholders. The general meeting of shareholders could, for instance, refuse to discharge the management and supervisory boards for their management and supervisory activities, adjust the remuneration policy or even dismiss the supervisory and/or management board. Moreover, it is obviously in the company’s own interests to resolve any objections that have been expressed by a substantial minority of the shareholders.
23. The committee points out in this context that the corporate governance chapter in the annual report will be scrutinised by the external auditor in the same manner as the rest of the annual report. In addition, as part of the introduction of the supervision of the financial reporting of listed companies, the AFM (the Netherlands Authority for the Financial Markets) will in the foreseeable future start to check annual reports to verify that a chapter outlining the corporate governance structure and a code compliance statement are included and that the description of the corporate governance structure and the explanation of the code are mutually consistent. The AFM will not perform a substantive check of the selected corporate governance structure or the reasons stated for any non-application of code provisions. It is up to the shareholders to check the corporate governance structure and compliance with the code in substantive terms and, where necessary, to attach consequences or take actions under company law as a result of their findings. Apart from the ultimate legal check in the annual accounts procedure with respect to the obligation to devote a chapter in the annual report to the broad outline of the corporate governance structure of the company and to compliance with the code, shareholders could submit to the court whether the company should be in compliance with some principles and best practice provisions (for example by starting an inquiry procedure, a liability procedure and reversal of a decision).



24. In the preamble and in the principle for institutional investors, the definite code emphasises that corporate governance rating agencies, the media and institutional investors have a responsibility to form a careful opinion on the reasons for any non-application of the best practice provisions. In conformity with the British Combined Code, institutional investors are called upon, on the grounds of their responsibility to their underlying beneficiaries or investors and the companies in which they invest, to enter into a dialogue with the company if the motivation for the non-application of any code provisions is not convincing. The starting point in that dialogue must be that the corporate governance structure must be tailor-made to the company's needs. As the committee already made clear in its presentation letter with the draft code, good corporate governance cannot be captured in a one-size-fits-all model. In certain cases, there may be good grounds (such as a specific shareholder structure or the historical development or complexity of the activities) for the company to follow an alternative approach to that outlined in the corporate governance code. Non-application must therefore not be mechanically assessed. On the other hand, the management and supervisory boards must be receptive to changes to the corporate governance structure of the company if the general meeting of shareholders or a group of shareholders put forward well-motivated objections. The committee trusts that anyone assessing the corporate governance structure of the company (e.g. shareholders, institutional investors, the media and corporate governance rating agencies) shall base their assessment on the quality of the selected corporate governance structure.

*Effective date*

25. The commission received criticism on the passage in the preamble that the corporate governance code will take effect on 1 January 2004 and that, from that date onwards, listed companies must report annually on their compliance with the code. The code could thus be applicable with retroactive force to financial 2003, even though it was still "under construction" in 2003. In addition, some urge that existing contracts, including permanent contracts of employment for management board members and existing contractual agreements concerning severance schemes and share and option packages, be respected.

26. The commission regrets the confusion over the effective date. The intention has always been for the code to take effect from the financial year starting on or after 1 January 2004. The code will also only be legally enshrined as from the beginning of 2004. However, the committee does envisage that the listed companies will include in their annual reports for financial 2003 a concrete indication as to how they intend to apply the corporate governance code and the areas where they foresee problems. The committee assumes that the management board and the supervisory board will raise the reporting issue at the general meeting of shareholders in 2004. The management and supervisory

boards will undoubtedly incorporate the results of this discussion in the first official report on the company's corporate governance structure and compliance with the code in 2005.

27. In the preamble of the definite code, the committee has included a passage about transitional provisions (section 12). The committee assumes that listed companies are doing whatever may be necessary to apply the code provisions as soon as possible. Application of the code can result in at least two bottlenecks at certain companies. First of all, there may be contractual arrangements between the company and the management board member (in the field of remuneration) which cannot be dissolved just like that. Secondly, immediate application of a number of code provisions about the appointment of management board members, the (re)appointment of supervisory board members and the number of supervisory board memberships at some companies could jeopardise the continuity of the decision-making process. The committee assumes that in such cases the code provisions in the relevant fields are complied with no later than at the time of new appointments or reappointments. As for the provisions concerning the independence of supervisory board memberships, the committee indicates that these must be applied as soon as possible, though no later than the general meeting of shareholders in 2005. Note, incidentally, that the aforementioned bottlenecks do not discharge listed companies from the obligation to annually state the reasons for any non-application of the code provisions in this field in the annual report.

#### *Installation of panel*

28. Various commentators have asked the committee to elaborate the recommendation to the responsible Ministers (section 7 of the draft preamble) to set up a small panel that continuously reviews whether certain principles or best practice provisions need to be adjusted or interpreted in greater detail. Amongst other things, they asked themselves how the permanent evaluation of the code should be organised, whether and how the panel should be placed within a legal framework and what the composition of the panel should be. Some commentators find a panel unnecessary and add that it would lack democratic legitimacy. They tend to favour a periodic rather than a permanent evaluation of the code.
29. The committee maintains its recommendation to the responsible Ministers to set up a permanent panel which decides, when appropriate, on adjustments to the code. This would bring the Netherlands into line with the United Kingdom and Germany. What the committee has in mind is a panel consisting of a limited number of persons (seven at maximum) with expertise and experience in the field of corporate governance. The panel should be compiled of people from the business community, shareholder circles and other relevant groups, together with a civil servant to act as secretary. Given their network of people and subject expertise, it would seem logical to involve the initiators of the

corporate governance committee in the selection of the panel members. As with the work of this corporate governance committee, self-regulation in the field of corporate governance must be the starting point of the panel's activities.

### ***Comments on some specific provisions of the draft code***

#### ***Maximising the number of supervisory board memberships***

30. The committee received many comments on the draft provision that an individual may hold a maximum of five supervisory board memberships. The comments revealed a split between, broadly, the general public and investors on the one hand and companies, their supervisory board members, their interest organisations and lawyers on the other. The general public and the investors supported the draft provision, while the responding supervisory board members and companies mostly voiced sharp criticism: the number of five, they said, was arbitrary and too rigid.
  
31. The nature and origin of the comments testify to the wide gap between how the general public and investors in the Netherlands perceive supervisory board members and how most supervisory board members see themselves. Recent controversial issues have helped to create the perception among the general public and investors of an “old boys network”, a group of people operating within what is, particularly by international standards, a small circle of listed companies where everyone knows each other, where management board members are protectively cocooned, and where the supervisory board members are not necessarily in touch with the key issues in society at large. At the other extreme, the supervisory board members see themselves as dedicated experts who give the company the benefit of their vast experience and feel perfectly capable of deciding for themselves how many supervisory board memberships they can handle. Closing this perception gap is vital in order to restore faith in corporate management and supervision. The prevailing view among the general public and investors of “a closed caste” must be erased. Alongside the code principles and provisions in relation to the expertise of the supervisory board members, the committee thinks it is necessary to recruit expert supervisory board members from outside the existing limited circle of people. To give companies an added “incentive” in this respect, the committee maintains the set maximum of five supervisory board memberships per person. However, the committee has determined that this maximum number will only apply to Dutch listed companies and has scrapped the addition “or other large legal persons” – partly because the term “large legal persons” is not sufficiently clear but mainly not to reduce the circle of persons from which e.g. cultural institutions, care institutions and universities can recruit supervisory board members.
  
32. Another reason for maximising the number of supervisory board memberships at five is the increased burden of responsibility that the code places on the supervisory board

members (particularly as a result of participation in one of the supervisory board committees). In addition, recent examples have shown that the services of supervisory board members are particularly necessary in times of emergency. These situations demand a supervisory board member's full attention. Moreover, restrictions on the number of supervisory board memberships are also becoming the norm in international practice, as is evident from the developments in France, the United Kingdom and the United States.

#### *Management board members' remuneration packages*

33. The committee received the most reactions to the principles and best practice provisions on management board members' remuneration packages. This is not wholly incomprehensible given that the committee took a clear stance on this issue in the draft code and that this issue is very much at the centre of the public debate. Many commentators were highly critical of the draft provision which stipulates that the economic value of the variable remuneration components may not exceed 50 per cent of the total remuneration. The criticism came from many quarters, including investors, businesses and politicians. Other commentators, such as the trade unions and some shareholders, were positive about the provision. The critics argue that such a provision is in conflict with foreign corporate governance codes. The British Combined Code and the German Kodex actually prescribe a significant variable component and, so it is claimed, the general meeting of shareholders is increasingly insisting on this in order to create parallel interests between management board members and shareholders. It is also pointed out that the "checks and balances" on the determination of the remuneration has already been strengthened through the general meeting's proposed right of approval in relation to management board members' option and share schemes and its right of adoption in relation to the company's remuneration policy. The critical commentators add that the aforementioned draft provision may provide an incentive for increasing the fixed component of the remuneration and make it more difficult for companies to recruit competent management board members.
34. The fixed remuneration of a management board member is an adequate reward for the efforts and responsibilities of a board member and the severity of the position on the board. The variable remuneration components, which can be awarded in addition to the fixed remuneration, should reward a board member for above-average or exceptional performances or efforts, to align the interests of a board member with the interests of a shareholder and to take advantage of the possible success of a company. Setting quantified provisions in the field of management board members' remuneration packages is problematic, however. This is also evident from the comments on the draft provision concerning the variable remuneration component. Given the many critical comments, the committee has decided to scrap this draft provision. In its place the definite code contains

a provision stipulating that the remuneration report must provide a motivated statement of the relative significance of the variable and non-variable remuneration components. In addition, the committee has maintained in the definite code the provision requiring that the award of variable remuneration components must be dependent on the attainment of specified performance criteria.

35. Many objections were also raised against the proposed investment restrictions of management board members and supervisory board members. Both investors and companies criticised this point and received support from the stock exchange supervisor on this matter. They pointed to the existence of stringent laws and regulations on inside information and the fact that foreign codes contain no such restrictions. The code provision would allegedly make it more difficult for companies to engage management board members and supervisory board members, particularly from abroad.
  
36. Though the committee still believes that it is better, in order to avoid “appearances against you”, for management board members or supervisory board members not to trade actively in securities, an overly restrictive provision in this connection does not seem useful, particularly not if there is no need for extra regulation. The committee has therefore relaxed the code provision to a certain extent. Some commentators suggested that the committee add a provision requiring companies to draw up a set of rules governing the ownership of and transactions in securities by management and supervisory board members other than those issued by their “own” company. Under the Act on the Supervision of the Securities Trade 1995 (*Wet toezicht effectenverkeer 1995*), listed companies are already required to have regulations governing the ownership of and transactions by management and supervisory board members in securities relating to their “own company”. The committee has followed this suggestion, while adding that such regulations must be adopted by the supervisory board and placed on the company’s website. Furthermore, the committee has followed the suggestion to stipulate that management board members and supervisory board members must report changes in their shareholdings in Dutch listed companies to the compliance officer, or, if the company does not have a compliance officer, to the chairman of the supervisory board. To avoid this requirement being unnecessarily burdensome, the committee has determined that management board members and supervisory board members who exclusively invest in listed investment funds or who have transferred the discretionary management of their securities portfolio to an independent third party by means of a written mandate need not report their securities transactions other than those in their “own” company.
  
37. The committee also received many comments on the provision that management board members must retain shares obtained from a share scheme until at least the end of their

employment at the company. Most commentators found this provision too restrictive and/or too far-reaching.

38. The committee has adapted this provision in response to the comments. The committee holds the view that every series of shares, awarded to management board members at no financial charge, must be held for a period of at least five years. If a management board member resigns his post within that five-year period, he will be entitled to sell the shares from that moment onwards.
39. The code provision to appoint management board members for a maximum of four years linked to the legislator's recommendation that management board members of listed companies should no longer be treated as an employee has raised a lot of dust. Many respondents argued that contracts with a definite term would give management board members an incentive to pursue short-term objectives, particularly towards the end of their appointed term. In addition, it could put upward pressure on the remuneration of management board members as management board members would insist on compensation for the risk of non-reappointment. Certain commentators also believe that denying management board members employee status would make it more difficult and possibly also more expensive to recruit management board members from the management layers below the board.
40. The objections to an appointment term of four years for management board members are not convincing. The provision is in agreement with international best practices. In neighbouring countries, such as the United Kingdom and Germany, management board members are not appointed for an unlimited term but must be reappointed after a certain period. There is no evidence that management board members of British and German listed companies pursue (too much) short-term objectives, not even towards the end of their appointed term. Very often a resignation schedule is drawn up to avoid too many reappointments coming up for simultaneous review, thus safeguarding the continuity of decision-making. The argument that an appointment for a definite period tends to inflate management board members' remuneration packages is not convincing. This has not been the case at British and German companies. What's more, the general meeting's future right of adoption in relation to the remuneration policy gives the shareholders the power to block any proposals to increase management board members' remuneration packages.
41. There was a great deal of concern about the consequences of totally abolishing the employee status of management board members. This was claimed to be a disproportionate measure for achieving a limited term of appointment and a limited severance pay. Some commentators said that a more specific, tailor-made amendment to

labour law would be sufficient for this purpose. The committee has adopted this suggestion. The committee's aim is not necessarily to deny management board members employee status, but to ensure that labour law does not prevent management board members of listed companies being appointed for a definite period of time and their severance pay being limited to a set maximum.

#### *Independence of the supervisory board*

42. Many companies have criticised the provision that only one person within the supervisory board need not be independent as well as the criteria applied to determine whether a person qualifies as independent. It is alleged that the independence criteria and the rule that only one supervisory board member need not be independent would place the Netherlands out of line with international practice. In addition, the independence criteria are said to be arbitrary and too rigid. The provision of one 'dependent' supervisory board member at maximum could cause the loss of a lot of experience if supervisory board members who are closely involved with the company are denied membership of the supervisory board. The small listed companies asked the committee to relax the requirements in relation to their supervisory boards.

43. The independence criteria were selected with reference to the British Combined Code and the criteria named in the report entitled 'A Modern Regulatory Framework for Company Law in Europe' of the EU High Level Group of Company Law Experts. In its communication published on 21 May 2003 entitled 'Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward', the European Commission announced its intention to apply these criteria in a soon-to-be-published recommendation on the independence of supervisory board members and non-executive directors. These independence criteria would, at the very least, have to be incorporated into the national corporate governance codes. The committee is thus acting in anticipation of this European obligation. The argument that the provision of at maximum one dependent supervisory board member is too stringent cuts no ice. In discharging its role, supervisory board members shall be guided by the interests of the company and its affiliated enterprise. These interests should outweigh any sectional or individual interest. In discharging its role, supervisory board members should not serve particular interests. When a company is dominated by a major shareholder, the supervisory board members should for example also take the interests of the minority shareholders into account. The presence of more than one "dependent" person in the supervisory board will probably harm the legal role of the supervisory board. The committee sees no need to relax this provision for small listed companies who generally have a supervisory board with a limited number of members. After all, the risks of an (apparent) conflict of interests also exists with a small supervisory board. Nor does the committee see any good reason why there is less need for an independent supervisory

board at small listed companies than at large listed companies. In the definite code the commission has added the provision that a former management board member of the company may not be appointed as the chairman of the supervisory board. The reason for this is that the supervisory board might be impeded in the performance of its duties if its chairman is required to supervise the policy which he formerly helped to initiate and/or implement.

#### *Creation of three core committees of the supervisory board*

44. Small listed companies in particular commented on the provision that the supervisory board must form three core committees (audit, remuneration and selection and appointment committee) from its midst. The small listed companies point out that their supervisory boards are generally limited in size and that the creation of three separate committees would therefore not be feasible and/or would lead to unnecessary cost increases.
45. When drawing up the draft code, the committee was aware of the aforementioned problem. This is why the committee added a provision to the effect that if the supervisory board does not create separate committees, then the provisions for the audit, remuneration and selection and appointment committees apply to the supervisory board as a whole (best practice provision II.4.5). This provision, however, was not expressed in the principle under II.4. The committee has clarified this point in the definite code. Only a large supervisory board (more than four supervisory board members) is required to form separate audit, remuneration and selection and appointment committees. Listed companies with a small supervisory board are therefore exempt from the obligation to create separate audit, remuneration and selection and appointment committees, but are encouraged to do so. If they choose not to set up these committees, then the tasks of the audit, remuneration and selection and appointment committees are applicable to the full supervisory board. In the report of the supervisory board, the supervisory board also reports on the manner in which the committees have performed their respective tasks, even if no separate committees have been set up.

#### *Chairman of the supervisory board is not the chairman of the audit and remuneration committees*

46. The provisions that the chairman of the supervisory board may not be the chairman of the audit and remuneration committees elicited many questions. Some commentators pointed out that, given the weighty nature of the tasks of both committees, the supervisory board chairman is actually the best man for the chairmanship. From a hierarchical perspective, so other commentators assert, it is actually necessary for the supervisory board chairman to chair the remuneration committee.



47. The committee continues to maintain that the chairmanship of the audit and remuneration committees should not be fulfilled by the chairman of the supervisory board. The purpose of these provisions is to promote a balanced decision-making by the supervisory board in the fields of corporate financial reporting and management board members' remuneration packages. It will be difficult in practice for a supervisory board to adjust a proposal of the audit or remuneration committee if the chairmanship of these committees is fulfilled by the supervisory board chairman. Additionally, in view of the weighty nature of the tasks of, notably, the audit committee, the chairmanship of this committee in particular is difficult to combine with the chairmanship of the supervisory board.

*Questioning of the external auditor by the general meeting of shareholders*

48. The code provision that the general meeting of shareholders is entitled to question the external auditor about the fairness of the financial statements has raised questions. Some commentators argue that the purpose is unclear. They also doubt the added value as the financial statements are the responsibility of the management board and the supervisory board. In addition, they point out that the external auditor's duty of confidentiality leaves little scope for answering questions in the general meeting of shareholders.

49. The committee continues to maintain that the external auditor, as in the United Kingdom, must attend the general meeting and must be authorised to speak there, particularly as it is the general meeting of shareholders that appoints the external auditor. The external auditor has the right to speak when the management board and/or supervisory board make(s) statements during the meeting which, in the opinion of the external auditor and on the basis of his knowledge of the company, constitute "a material misrepresentation of the state of affairs". As far as answering shareholder questions is concerned, the external auditor is exclusively obliged to respond to questions about his audit work and his opinion on the financial statements. The actual content of the financial statements remains, after all, the primary responsibility of the management board. On this issue, the committee received an interesting reaction to the draft code from the accountancy organisation Royal NIVRA. In its reaction the NIVRA stated that it "intended to come up with further proposals on this matter". The committee welcomes this initiative. It is not the committee's task to issue detailed professional rules.

*Proxy voting*

50. It has been pointed out that the best practice provisions on proxy voting are difficult if not impossible for listed companies to follow until the legislator has facilitated proxy voting and the necessary European regulations have been given legal force. In this light, the commentators pointed out that there is little point in including provisions in this field.

51. The committee is concerned about the low level of shareholder participation in the decision-making at the general meeting of shareholders. The survey entitled “Aandeelhoudersvergaderingen in Nederland 1998 – 2002” (Shareholder Meetings in the Netherlands 1998-2002) commissioned by the Ministry of Finance showed that the average number of votes cast during the general meeting of shareholders of a Dutch listed company without depositary receipts averages 33% (with a large spread). The committee considers it a matter of great importance that the level of shareholder participation in the decision-making at the general meeting of shareholders be considerably increased in the coming years if the general meeting is to fulfil a credible role as a correcting mechanism for mismanagement and failing supervision. Proxy voting, so experience in the United Kingdom also shows, is an important instrument for achieving this. However, the committee has scrapped the best practice provisions on proxy voting in the definite code as it is for companies not possible to apply the provisions as long as national and European legislators have not legally facilitated proxy voting by shareholders.
52. As was evident from the aforementioned survey, the Stichting Communicatiekanaal Aandeelhouders plays only a limited role in the general meeting of shareholders. The average number of remote votes represents only 1.6 per cent of the total number of votes cast at the general meeting. The limited use so far of the proxy voting option – via the Stichting Communicatiekanaal Aandeelhouders – has partly to do with legal barriers, the stand-offish stance of many banks and the difficulties that Dutch listed companies have in determining who is entitled to cast a vote when the shares are held through a chain of intermediaries. The committee therefore calls upon the national and European legislators to prioritise the finalisation of the bill on proxy voting and electronic participation in the general meeting of shareholders as well as the finalisation of a European directive on cross-border shareholder voting. The committee appeals in particular to the banks and the listed companies to play a constructive part in moving this legislative process forward.
53. Under the current legislation, companies are already able to facilitate proxy voting themselves by introducing a registration date for the exercise of voting and meeting rights. On the grounds of article 2:119 of the Civil Code, those who were shareholders on a certain date prior to the general meeting of shareholders (registration date) can retain their voting rights, irrespective of whether they are still shareholders on the date of the general meeting. The last registration day may not be set earlier than the seventh day before the day of the general meeting of shareholders. The advantage of the registration date is that shareholders who wish to exercise their rights at the general meeting of shareholders are no longer obliged to deposit their shares in safe custody several days prior to the general meeting. The shareholders thus retain the freedom to act. In view of the aim to increase the level of participation in the decision-making at the general

meeting, the committee has included in the definite code a provision stipulating that every company is required to introduce a registration date.

*Statutory two-tier rules (structuurregime)*

54. The committee has not expressed an opinion in the draft code on the operation and future of the statutory two-tier rules. As noted in the preamble (section 2), the committee based the formulation of the code on the existing legislation on the external and internal relations of listed companies, including the legislation on the obligatory application of the statutory two-tier rules. The committee's terms of reference stated that it would be the logical course for the committee to assume the legislation currently under development as a given. This also referred to the bill pending in Parliament concerning the amendment of the statutory two-tier rules. The concluding deliberations on this bill took place in Parliament during the consultation phase of the draft code. This was partly instrumental in prompting a wider debate on the desirability or undesirability of the two-tier rules during the consultation phase of the draft code. In dealing with the aforementioned bill, the government has indicated that, even after the effective date of the bill, the debate on this issue is not yet over. The government has promised Parliament to produce a memorandum dealing with the fundamental principles of the statutory two-tier rules in the course of 2004.

55. Some commentators have urged the committee to take a standpoint on the two-tier rules. The committee has not done this in the definite code. The committee's terms of reference were to put the relationship between listed companies and providers of capital under the microscope. The statutory two-tier rules were (partly) introduced to give the labour factor – the works council – a say in the composition of the supervisory board of large corporations. Moreover, the composition of the committee was not suited to making recommendations to the legislator on the future of the statutory two-tier rules. The trade union was not one of the initiating organisations of the committee. In view of these facts it would have been extremely presumptuous of the committee to use the code for proposing amendments to the renewed appointment and dismissal system for supervisory board members of companies with statutory two-tier rules. Having said this, the committee does take the view that the renewed two-tier rules remain complicated, hamper the committee's objective to strengthen the "checks and balances" within listed companies, are difficult to explain to the international community, have a mandatory character that fits ill with the trend towards flexibilisation of company law, constitutes a risk for the important principle in the code that the supervisory board and its members must be able to operate critically and independently, and merely assigns "pseudo-rights of participation" to the works council. In the committee's opinion the legislator should give very serious consideration to the question as to whether the statutory application of the two-tier rules should be maintained, particularly in the case of listed companies.

### *Anti-takeover measures*

56. Some commentators regretted the committee's decision not to include any code provisions or detailed recommendations on anti-takeover measures for the legislator. These commentators assert that the lower valuation of the average Dutch listed company is partly attributable to the frequent use of anti-takeover measures by Dutch listed companies (alongside the statutory two-tier rules).
57. The definite code, like the draft code, contains no best practice provisions on the permissible use of anti-takeover measures in (hostile) takeover situations. Given that in such situations the company's future is at stake and that take-over battles are often fierce and ferocious, the committee takes the view that these situations must be regulated by law. Self-regulation through a corporate governance code is too weak an instrument for this purpose and therefore not suitable. Moreover, the Western world has no "best practice" in the field of anti-takeover measures: practically every country has its own types of legal and economic anti-takeover measures for the protection of its listed companies. Creating a level playing field for international takeovers will be an uphill struggle. Even so, the committee believes that the use of anti-takeover measures, particularly in non-takeover situations, is detrimental to the objective of enabling the general meeting of shareholders to be an effective correcting mechanism in the case of mismanagement and failing supervision. In this light the committee has included provisions on depositary receipts, the issuance of preferred financing shares and cancellation of the binding nature of a nomination for appointment. Furthermore, the recommendation to the legislator to regulate by law the use of anti-takeover measures in takeover situations has been further detailed in the definite code.
58. As regards a legal arrangement on anti-takeover measures, the committee takes the view that anti-takeover measures can be useful when these are used in the company's interests. Anti-takeover measures can enable the targeted company to:
- a) determine its position in relation to the bidder and its plans;
  - b) seek alternatives.
- While accepting that anti-takeover measures and the option of using anti-takeover measures can be justified in some cases, this must still be subject to conditions. It is undesirable for the management board of a company to continue ignoring a shift in the balance of power in the general meeting of shareholders over an extended period of time. It is furthermore undesirable that the management board should (be able to) use anti-takeover measures to protect its own position.
59. On the grounds of these principles the committee recommends that the legislator take the following into consideration when drafting a law on anti-takeover measures:

- a) Anti-takeover measures must be withdrawn within a limited period of being activated. A period of e.g. six months could be considered.
- b) Anti-takeover measures are not used to obtain (financial) gain for management board members and/or supervisory board members.

### *Conclusion*

60. The committee is of the opinion that the changes have resulted in a well-balanced corporate governance code. The relationships between the various corporate bodies and with the external auditor have been carefully and thoroughly realigned in order to ensure efficient and effective “checks and balances” within listed companies.
61. The committee recommends that the government and Parliament designate this corporate governance code with a minimum of delay – by Order in Council – as the code to which the listed companies must refer in their annual report, indicating to what extent they comply with the best practice provisions. The earlier-mentioned bill concerning the adjustment of the statutory two-tier rules (Parliamentary Papers II 2002/03, 28 179, nos. 1-52) contains the legal basis for the designation of the codes of conduct and their compliance. The committee emphasises that the principles and the best practice provisions of the code constitute a coherent whole and underlines that the principles and the best practice provisions must be assessed as such in the decision-making of the government and Parliament.
62. The committee has fulfilled its brief with the publication of the code. It is now the task of the listed companies to implement the code within their organisations and the task of the legislator to place the code within a legal framework. The committee proposes that the Ministers of Finance and Economic Affairs, in consultation with 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) set up a panel in the short term that will be entrusted with the task of continuously monitoring and reviewing whether certain principles or best practice provisions need to be adjusted or re-interpreted in response to the rapid changes within the economy and society at large. These changes, after all, also have consequences for corporate governance and the best practice provisions in this field.
63. The committee once again expresses its thanks to everyone for the many reactions that it received to the draft code, the many debates and congresses organised on the subject of the draft code and the tangible actions that have taken place in the past months in response to the draft code. The debate can now be continued in the coming months in

the most appropriate forum of all: the general meeting of shareholders. The committee therefore calls upon all shareholders, and particularly the institutional investors, to let their voices be heard there. There is a lot at stake.

Yours sincerely,

On behalf of the corporate governance committee

Mr M. Tabaksblat

Chairman

## **Recommendations for the legislator and the accounting standards setters**

1. To facilitate compliance with this code the Committee recommends that the legislator should, pursuant to draft article 2:391, paragraph 4, of the Civil Code and by order in council, designate this code in its entirety and without change as a code of conduct to which companies should refer in their annual report, in which they should indicate to what extent they have complied with the best practice provisions.
2. In order to update the code in the future to take account of developments in society, the Committee recommends that the Ministers of Finance and Economic Affairs establish a panel to decide, where necessary, on amendment of the code. The Committee would suggest a panel consisting of a limited number of people (maximum of seven) having expertise and experience in the field of corporate governance. The panel should be composed of representatives from the business community, shareholders and other relevant groups, together with a civil servant to act as secretary. Just as in the case of the work of the Corporate Governance Committee, self-regulation in the field of corporate governance should be the basic premise for the panel.
3. To facilitate best practice provisions II.1.1 and II.2.7 the Committee recommends that the legislator amend employment law in such a way that members of the management boards of listed companies can be appointed for a fixed term and that the statutory employee safeguards against dismissal under employment law should not apply to them.
4. To facilitate best practice provision II.2.14 the Committee supports the International Financial Reporting Standard Share-based Payment currently being prepared by the International Accounting Standards Board concerning the recognition of the costs of option schemes in the annual accounts of the company. The Committee endorses the proposal to include the costs of option schemes in the annual accounts of the company and to establish a single uniform reporting standard for the recognition of option costs. The Committee urges the 'accounting standards setter' to develop a reporting standard which provides for a uniform manner of reporting on the remuneration of management board members and a uniform system for calculating the different remuneration components.
5. To facilitate best practice provision III.4.3 the Committee recommends that the legislator regulate by law the position of the company secretary, namely in Book 2 of the Civil Code.

6. To facilitate the principle under IV.1 the Committee recommends that the Securities Giro Transfer Act (*Wet giraal effectenverkeer*) and Book 2 of the Civil Code be amended in such a way that:

- (a) stockbrokers who administer securities accounts for shareholders are obliged to inform the company of the names and addresses of such shareholders, with the exception of particulars for which shareholders have expressly stipulated that they should not be made available to the company;
- (b) shareholders have the possibility of communicating with one another before the general meeting of shareholders. The names and addresses should therefore also be made available to shareholders who wish to communicate with other shareholders.

The Committee therefore supports the proposal of the Ministers of Finance and Justice to make provision by law for proxy voting and proxy solicitation in the near future.

7. To facilitate the principle under IV.1 the Committee considers that the cross-border legal barriers to the exercise by shareholders of the rights should be resolved as quickly as possible at a European level, on the basis of a number of concrete recommendations made by a sub-group of the High Level Group of Company Law Experts. The European Commission announced in its communication published on 21 May 2003, entitled 'Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward', that it would produce a proposal for a directive on this subject in the near future. The Committee fully endorses this proposal and recommends that the Dutch government do everything in its power to finalise negotiations on such a draft directive during the term of its presidency at the latest (i.e. in the second half of 2004).

8. To facilitate the principle under IV.1 the Committee recommends that Book 2 of the Civil Code should be amended in such a way that:

- a) shareholders can take part in a general meeting of shareholders and cast their vote at such a meeting by means of webcasting, videoconferencing or other means of telecommunication;
- b) shareholders have the possibility of casting their vote on resolutions at a general meeting of shareholders by means of e-voting;
- c) votes that are cast electronically at a general meeting of shareholders are treated as votes cast at the meeting;
- d) companies have the possibility of calling a general meeting of shareholders electronically (by e-mail or announcements on websites);

Within this context, the Committee has noted with interest the consultative document entitled 'Modern means of communication and the general meeting of shareholders' of the Ministry of Justice. The Committee endorses the proposal formulated in this



document, which stipulates that the use of electronic facilities for participation in the general meeting of shareholders should be regulated by law in the near future.

9. To facilitate best practice provision IV.1.1, the Committee recommends that the legislator amend article 2:133, paragraph 1, of the Civil Code in such a way that when a management board member or supervisory board member is appointed, no more than one person need be nominated. If the general meeting of shareholders resolves that this nomination is not binding (article 2:133, paragraph 2, Civil Code), it may request the person having the right of nomination to make a new nomination. Within this context, the general meeting may itself recommend a person for appointment.
10. To facilitate best practice provision IV.1.2, the Committee recommends that the legislator amend Book 2 of the Civil Code in such a way the voting rights attaching to financing preference shares need no longer be linked to the nominal value, but may be linked (in any event in the case of the issue of such shares) to the fair value of the capital contribution.
11. To facilitate best practice provision IV.2.8, the Committee recommends that the legislator drop paragraphs 2, 3 and 4 of draft article 2:118a of the Civil Code (Bill to amend the statutory two-tier scheme, Parliamentary Papers 28 179).
12. To facilitate best practice provisions IV.4.1, IV.4.2 and IV.4.3, the Committee recommends that the legislator lay down these provisions by law.
13. To facilitate best practice provision V.2.1 the Committee recommends that the legislator amend Book 2 of the Civil Code in order to confirm that the external auditor has the authority to attend and address the general meeting of shareholders on his own initiative.
14. If the general meeting of shareholders is to play a fully-fledged role in the system of checks and balances in the company, the issue of the permissibility of anti-takeover measures must be dealt with. The Committee considers that this subject should be regulated by law. In its opinion, the basis for a statutory system should be that anti-takeover arrangements can be useful and acceptable provided that they are of a temporary nature and are not used to protect the position of the current management board. In elaborating this principle the legislator should also stipulate that anti-takeover measures may not be used to provide (financial) benefits for members of the management board and/or the supervisory board and should instead be used only in takeover situations in order to create a level playing field in the negotiations with the bidder. Moreover, the anti-takeover measures should be retracted after a limited period (for example six months).

15. The EU High Level Group of Company Law Experts recommended in its report entitled 'A Modern Regulatory Framework for Company Law in Europe', published on 4 November 2002, that management board and supervisory board members who publish misleading financial information should be barred from holding positions with European enterprises. In its communication entitled 'Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward', which was published on 21 May 2003, the European Commission expressed the intention of implementing this recommendation in a European directive in the medium term (2006-2008). The Committee recommends that the Dutch legislator investigate whether such a provision can be included in the bill already being prepared for the supervision of external financial reporting of institutions that issue securities. One possibility would be for the Enterprise Section of the Court of Appeal in Amsterdam to have the power – where misleading financial reporting has been encountered within the context of an annual account procedure – to dismiss the responsible management board and supervisory board members, and to bar them from holding office as a management board or supervisory board member for a given period of time.

## **TERMS OF REFERENCE OF THE CORPORATE GOVERNANCE COMMITTEE**

### **Aim**

A good system of corporate governance contributes to a well-functioning economy. Since the Corporate Governance Committee (the Peters Committee) issued its 40 recommendations, there have been national and international developments which necessitate a review of this code of best practice. For example, the Dutch Corporate Governance Foundation evaluated compliance with the 40 recommendations in 2002. In essence, the Foundation found that progress had been made in the field of corporate governance in the Netherlands in the last five years, but that further improvement was still possible and desirable. In addition, a High Level Group of Company Law Experts recommended to the European Commission in its report entitled 'A Modern Regulatory Framework for Company Law in Europe' that each Member State should draw up a national code of corporate governance with which listed companies should comply. The group also recommended that such companies should be transparent about the parts of this code with which they do not comply. Furthermore, there have recently been scandals, particularly accounting scandals, involving companies in both the United States and Europe. These scandals have, to some extent, undermined confidence in the management and supervision of companies that operate in the financial markets. A sound and transparent system of checks and balances in companies would be an important means of boosting confidence in companies that operate in the capital markets.

Following the developments described above, the Confederation of Netherlands Industry and Employers (VNO-NCW), the Netherlands Centre of Executive and Supervisory Directors (NCD), the Association of Securities-Issuing Companies (VEUO), the Association of Stockholders (VEB), Euronext and the Foundation for Corporate Governance Research for Pension Funds (SCGOP) requested a number of people to sit on a new Corporate Governance Committee, at the invitation of the Minister of Finance and the Minister for Economic Affairs. This Committee was asked to draw up a revised code of best practice for corporate governance.

The purpose of this code is to provide a guide for listed companies in improving their governance. Compliance is intended to boost confidence in the good and responsible management of companies. The perspective of the capital markets is therefore central; in other words, the relationship between listed companies and providers of capital, without detracting from the position of other stakeholders such as employees. This perspective also means that the subject of socially-responsible entrepreneurship does not form part of the renewed code. After all, this subject is not tied to a national corporate structure and extends way beyond the development of a new code for the functioning of Dutch companies in the capital market.

The new code should contain principles, rules of conduct and recommendations which can be

applied in the private domain by means of self-regulation.

It is logical that in developing the new code, the Committee should take account of the existing statutory framework of Dutch company law and treat the legislation currently under development as a given. This is subject to the proviso that the Committee may encounter specific problems, for example involving facilitation of parts of the code, which can be solved only by legislation. The Committee is free to make recommendations in this respect.

### ***Parameters for a renewed code of best practice for corporate governance***

The organisations referred to above have identified the following parameters that a code of best practice for corporate governance must fulfil:

- a new code should be principle-based and not rule-based: it is the spirit and not the letter of a code which is important; compliance with the code should improve the access of companies to the capital markets; the effectiveness of companies can be enhanced in this way;
- the code must be in keeping with international developments;
- the code should focus primarily on listed companies, in particular on management board members, supervisory board members, shareholders and the general meeting of shareholders, and on the conduct of these groups;
- when drafting the code, one should nevertheless be acutely aware of its effect on non-listed companies and possible impact on case law;
- the code should not include rules specifically intended for the practice of a particular profession (merchant bankers, analysts and auditors) or other codes and recommendations intended for companies. Separate internal or external codes have been or are being developed for the accountancy profession, and for the conduct of the business of bankers and investment institutions. It would not be logical to include rules intended for these professional groups in a code of conduct that applies to management boards, supervisory boards, shareholders and the general meeting of shareholders. As regards socially-responsible entrepreneurship various codes of conduct have been or are being developed internationally for this purpose (Global Reporting Initiative (GRI), OECD, etc);
- for the purposes of compliance, the code should be designed in such a way that adequate supervision of compliance is possible.

### ***Subjects covered by the new committee's terms of reference***

The 40 recommendations of the Peters Committee, as contained in the 'Corporate Governance in the Netherlands Report; the Forty Recommendations' report, form the point of departure for the activities of the Committee. These recommendations will be updated,

clarified, tightened up and possibly supplemented, partly in the light of the present practice - and the legislation and regulations already in existence or shortly to be introduced - and partly in the light of international developments.

The following subjects must in any event be covered:

- the position of the individual supervisory board member and the functioning of the supervisory board (independence, expertise, procedure, recruitment, term of office, multiple supervisory board memberships, remuneration, committees, and the provision of internal and external information);
- the actual exercise of the rights of shareholders and the functioning of the general meeting of shareholders (provision of information, rules governing the general meeting of shareholders, treatment of minority and majority shareholders, conflicts of interest, role and functioning of institutional investors, the manner and frequency of the provision of information to investors, remote voting and electronic voting);
- the functioning of the management board (relationship with the supervisory board, transparency and remuneration);
- the relationship of the company and its organs (management board, supervisory board, audit committee, appointment of auditor) with the auditor, as well as the role of the auditor;
- transparency about corporate governance rules in practice;
- monitoring the functioning of a code in practice (e.g. transparency in terms of compliance and reasons for non-compliance, organisation of the monitoring).

### **Timing**

The Committee is obliged to complete its work by the end of 2003. Moreover, the Committee should allow time for public consultation on the basis of its draft code.

The Hague, 10 March 2003

## **COMPOSITION OF THE CORPORATE GOVERNANCE COMMITTEE**

### **Chairman**

Morris Tabaksblat

*Chairman of the Board of Reed Elsevier*

*Chairman of the Supervisory Board of Aegon NV*

*Chairman of the Supervisory Board of TPG NV*

*Former chairman of the Executive Committee of Unilever NV*

### **Secretary**

Rients Abma

*Financial Markets Policy Directorate, Ministry of Finance*

### **Assistant secretary**

Marco Knubben

*Enterprise Directorate, Ministry of Economic Affairs*

### **Members**

Frederik van Beuningen

*Director of Teslin Capital Management BV*

*Director of Darlin NV*

*Director of Todlin NV*

Professor Jaap Glasz

*Professor of Corporate Governance – University of Amsterdam*

*Chairman of the Board of Directors of Fortis NV*

*Deputy member of the Enterprises Section of the Court of Appeal in Amsterdam*

Gilles Izeboud RA CPA

*Former partner in PricewaterhouseCoopers*

*Deputy member of the Enterprise Section of the Court of Appeal in Amsterdam*

*Chairman of the Board of Governors of the postgraduate accountancy course, Free University*

Jan Kalff

*Chairman of the Supervisory Board of Hagemeyer NV*

*Vice-chairman of the Supervisory Board of Stork NV*

*Member of the Supervisory Board of Volker Wessels Stevin NV*

*Chairman of the Supervisory Board of NV Luchthaven Schiphol (Schiphol Airport)*

*Member of the Board of Directors of Aon Corporation*

*Former chairman of the Managing Board of ABN AMRO Holding NV*

Peter de Koning

*Chairman of the Foundation for Corporate Governance Research for Pension Funds*

*Former Managing Director of SPF Beheer BV*

George Möller

*Chief Operating Officer of Euronext NV*

*President of the Federation of European Securities Exchanges*

*Member of the Supervisory Board of Endex*

*Board member of the Dutch Securities Institute*

Rob Pieterse

*Member of the Supervisory Board of Royal Grolsch NV*

*Member of the Supervisory Board of Essent NV*

*Former Chairman of the Executive Board of Wolters Kluwer NV*

*Board member of the Association of Securities-Issuing Companies (VEUO)*

Peter Paul de Vries

*Director of the Association of Stockholders (VEB)*

*Vice-chairman of Euroshareholders*

*Member of the committee of shareholders of Nedlloyd NV*

*Member of the committee of shareholders of Stork NV*

Arie Westerlaken

*Chief Legal Officer, Royal Philips Electronics NV*

*Member of the Executive Board of the Confederation of Netherlands Industry and Employers (VNO-NCW)*

Professor Jaap Winter

*Professor of International Business Law – Erasmus University, Rotterdam*

*Chairman of the EU High Level Group of Company Law Experts*

*Partner De Brauw Blackstone Westbroek*