THE CORPORATE GOVERNANCE REVIEW

Eleventh Edition

Editor
Willem J L Calkoen

THE LAWREVIEWS

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PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this 11th edition, we can see that corporate governance is becoming a more vital and all-encompassing topic, especially this year with covid-19 as well as climate issues, political instability, technological change, environmental, social and corporate governance (a stakeholder model to which many countries are moving), green finance and the demand from both employees and customers for a sound reputation for the best personal health and moral responsibility. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, and most of us work for them. Most corporations aim to add value to society, and they very often do. There is increasing emphasis on this. Some, however, are exploiting, polluting, poisoning and impoverishing us, which can create a depressed reputation for business. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards, management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in better corporate governance: parliaments, governments, European Commission, US Securities and Exchange Commission (SEC), Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports and 17 social development goals, the media, supervising national banks, more and more shareholder activists, proxy advisory firms, the Business Roundtable and all stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working very diligently. Nevertheless, there have been failures in some sectors and trust must be regained.

How can directors do all their increasingly complex work and communicate with all the parties mentioned above? What should executive directors know? What should non-executive directors know? What systems should be set up for better enterprise risk management? How can chairs create a balance against imperial chief executive officers (CEOs)? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? Is diversity and inclusion actively being pursued? Is the remuneration policy fair? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans and takeover defences?

Governments, the European Commission and the SEC are all pressing for more formal, inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards. We see a large influence on norms by codes and influential investor groups.

More international investors, Business Roundtable, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have 'selected engagements' with stewardship shareholders to create trust: one-on-ones. What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better tone from the top and work at complying with demands and trends for a better society?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code, and many countries produced national versions along the lines of the Cadbury comply or explain model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances when CEOs have gradually amassed too much power, or companies have not developed new strategies and have incurred bad results – and sometimes even failure. More are failing since the global financial crisis than before, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, stewardship codes for shareholders and shareholder activists, and requirements for reporting on non-financial issues. The European Commission has developed regulation for these areas as well. We see governments wanting to involve themselves in defending national companies against takeovers by foreign enterprises. We also see a strong movement of green investors, which often is well appreciated by directors. There is a move to corporate citizenship. Business Roundtable, with about 180 signatories, has embraced stakeholder corporate governance.

This all implies that executive and non-executive directors should work harder and more as a team on long-term policy, strategy, entrepreneurship and investment in research and development. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management, with new risks entering, such as the increasingly digitalised world and cybercrime, is an essential part of directors' responsibilities, as is the tone from the top.

Each country has its own laws, codes and measures; however, the chapters in this Review also show a convergence. Understanding differences leads to harmony. The concept underlying the book is that of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, when a quick first look at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that this Review will be seen as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who have helped with this project. I hope this book will give you food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of its readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
March 2021

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NETHERLANDS

Geert Raaijmakers and Suzanne Rutten[1]

I OVERVIEW OF GOVERNANCE REGIME

The general rules of civil law relating to the governance of companies and listed companies in the Netherlands are laid down in Book 2 of the Dutch Civil Code (DCC). This sets out the duties and powers of the various corporate bodies, as well as rules on representation, conflicts of interest and the liability of management board members. The DCC also contains rules regarding financial reporting and disclosure. Compliance with the rules in the DCC can, if necessary, be forced through the courts. Furthermore, shareholders with a specific capital interest (in some cases even former shareholders)[2] have the right to request an inquiry into the company's policy and affairs, at a court specially designated for this purpose – the Enterprise Chamber of the Amsterdam Court of Appeal. Upon a showing of mismanagement, the Enterprise Chamber can intervene by, *inter alia*, suspending or nullifying a management board decision, suspending or removing management or supervisory board members and appointing temporary board members. In practice, inquiry proceedings have been an important part of the development of law in the area of corporate governance, for example with regard to the issue of the respective roles of the management board and the shareholders in determining the strategy of the relevant company.

In addition, the Netherlands has rules on the supervision of the business conduct of listed companies, laid down in Chapter 5 of the Financial Supervision Act (FSA). The FSA contains rules on, *inter alia*, the disclosure of major holdings, financial reporting, the prevention of market abuse and the obligations of institutional investors. Supervision of compliance with these rules is carried out by a specially designated body, the Authority for the Financial Markets (AFM).

Alongside these statutory rules, there is a system of self-regulation consisting of codes of conduct containing principles and best-practice provisions drawn up by the sector itself. The first Dutch Corporate Governance Code containing governance rules for listed companies entered into effect in 2004. In December 2016, a revised version was published, with more attention being paid to long-term value creation, culture, reporting of misconduct and risk management.

Since the introduction of the first Corporate Governance Code, several sectors have set up their own specific codes, such as the Code of the Dutch Pension Funds and the Housing Corporations Code. In 2010, the Banking Code was introduced to govern Dutch banks. This mirrors the Corporate Governance Code in many respects, but also contains rules specifically

1 Geert Raaijmakers is a partner and Suzanne Rutten is a professional support lawyer at NautaDutilh.
2 *SNS Reaal*, 4 November 2016.

targeted at banks (specific expertise of certain committee or board members, the treatment and interests of clients). The Banking Code (updated in 2015) applies to both listed and unlisted banks. Listed banks fall under the Corporate Governance Code and the Banking Code. Both codes adopt a 'comply or explain' system: on their websites, companies must state how they applied the principles and best-practice provisions and, if applicable, provide a reasoned explanation of why a provision has not been applied.

The first Dutch Stewardship Code, which is a form of self-regulation that does not have a statutory basis, entered into force as of January 2019. Pension funds, insurers and asset managers have developed this Stewardship Code to emphasise the increasing importance of engaged and responsible share-ownership and the role that institutional investors play in promoting long-term value creation at Dutch listed companies. The principles of the Stewardship Code offer pension funds, insurers and asset managers the opportunity to inform their beneficiaries and clients about how they have used their shareholder rights. All institutional investors holding shares in Dutch listed companies are expected to aim for meaningful implementation of the principles of the Stewardship Code and to report on compliance with it.

II CORPORATE LEADERSHIP

i Board structure and practices

Dutch corporate law has traditionally provided for a two-tier board structure, consisting of a management board and a separate supervisory board (each of which is governed by different statutory provisions); however, the institution of a supervisory board is only mandatory for companies subject to the structure regime.[3] A company is subject to this regime if, for a period of three consecutive years:

a its issued capital and reserves amount to not less than €16 million;
b it has a works council instituted pursuant to a statutory requirement; and
c it regularly employs at least 100 employees in the Netherlands.

Since 2013, Dutch corporate law has also provided a statutory basis for the one-tier board structure. However, through the influence of international developments, the one-tier board structure had made its way into Dutch corporate practice prior to this legislation. Therefore, the Corporate Governance Code of 2008 already contained provisions relating to listed companies with a one-tier board structure. In 2016, the new Code clarified how companies with a one-tier board must apply the Code by, *inter alia*, specifying that the current rules for supervisory board members also apply to non-executive directors.

Generally, the one-tier model is considered to be suited to companies in a highly dynamic environment, such as those in the technology sector, complex companies that need to act quickly in crisis situations, companies that are in the process of being listed and in which a major shareholder is closely involved in the company's management or supervision (family businesses) and companies that form part of an international group or have an international group of shareholders.[4]

3 Dutch Civil Code [DCC], Book 2, Title 4, Part 6.
4 See Rients Abma (in Dutch), 'Naar de one-tier board', *Goed Bestuur*, 2012/3.

In practice, the one-tier model and the two-tier model appear to be growing closer to one another: in companies with a two-tier board structure the supervisory board is now expected to perform a more active role, while in those with a one-tier structure it is often required that the majority of board members consist of independent non-executives. According to the new Code, the latter is also mandatory. For this reason, some commentators speak of a convergence towards a 1.5-tier structure.[5]

Management board

The management board is charged by law with the duty to manage the company, subject to restrictions imposed in the articles of association.[6] It is generally accepted that management in any event includes directing the company's day-to-day affairs and setting out its strategy. It should be borne in mind that in accordance with the Dutch stakeholder model, the board must take into account various interests, not only those of the enterprise and shareholders, but also those of other interested parties, such as employees and creditors.

The average size of the boards of Dutch listed companies has been declining; a significant number of companies even have two-member boards (typically a chief executive officer (CEO) and a chief financial officer (CFO)). The rise of this CEO–CFO model can be explained by a number of factors, one of which is the popularity of the executive committee (exco), in which board members and senior managers have seats; in these set-ups, a larger management board makes less sense. Although clearly desirable in terms of efficiency, excos also raise several governance issues that require due consideration. The new Corporate Governance Code Committee does embrace the exco; however, it requires companies to render account of governance issues, such as how the interaction between the exco and the supervisory board will be structured. Furthermore, the exco's role, duties and composition must be set out in the management report.

Supervisory board

The function of the supervisory board is to supervise and advise the management board and oversee the general state of affairs within the company.[7] Like the management board, the supervisory board must take into account the interests of the company and its enterprise, as well as those of all other stakeholders.

The supervisory board of a structure-regime company has a number of important rights, including the right to appoint, suspend and remove management board members, and the right to approve (or refuse to approve) certain management board decisions, such as a decision to issue shares, enter into a joint venture, make a major acquisition or large investment, amend the articles of association or dissolve the company.[8]

To enable the supervisory board to perform its supervisory duties, the DCC requires the management board to provide the supervisory board with information at least once a year about the company's strategic policy, its general and financial risks and its internal control system. The Corporate Governance Code expands on the supervisory duties: if the

5 Willem J L Calkoen, 'The One-Tier Board in the Changing and Converging World of Corporate Governance', dissertation, Rotterdam, 2011, p. 305 in H H Kersten, 'Convergentie bestuursmodellen', Toezicht (Serie Van der Heijden Instituut nr 151), 2018, para. 3 5 1.

6 DCC, Article 2:129.

7 id., at Article 2:140(2).

8 id., at Article 2:164.

supervisory board consists of more than four members, it must appoint from among its members an audit committee, a remuneration committee and a selection and appointment committee, whose duties are also specified.

ii Directors (both management and supervisory board)

Appointment and removal

As previously stated, management board members of structure-regime companies are appointed and removed by the supervisory board. In companies not governed by this regime, the general meeting of shareholders has this power. Under the Corporate Governance Code, directors are appointed, in principle, for a maximum term of four years, but reappointment for successive four-year terms is permitted. However, this is limited to only one additional four-year term for supervisory board members with a possible third and fourth term of two year. In the event of a reappointment after an eight-year period, reasons should be given in the report of the supervisory board.

Each management board member who has been employed for two years or more is entitled to claim a transition payment when the contract is (1) terminated by the employer, (2) dissolved in court at the employer's request or (3) has ended by operation of law. Only in exceptional circumstances, such as in the event of any seriously culpable act or omission on the employer's part, or other extraordinary circumstances, could the board member be eligible for additional severance pay, referred to as fair compensation. Under the Corporate Governance Code, no remuneration is justified if the board member ended the contract on his or her own initiative or in the case of seriously culpable or imputable acts.[9]

Supervisory board members of structure-regime companies are appointed by the general meeting of shareholders based on a nomination by the supervisory board.[10] However, the general meeting of shareholders may overrule such a nomination. The general meeting of shareholders and the works council may recommend persons for nomination. An individual supervisory board member of a structure-regime company may be removed only by the Enterprise Chamber of the Amsterdam Court of Appeal, at the request of the company, the general meeting of shareholders or the works council.[11] However, if the general meeting of shareholders passes a vote of no confidence in the supervisory board as a whole, this results in the immediate removal of all board members.

Independence and expertise

The DCC and the codes contain several provisions intended to safeguard the independence of supervisory board members, such as the absence of family ties and business interests.[12] The Dutch Central Bank (DNB) has developed its own policy rules. It requires that supervisory board members are independent in mind (independent with respect to partial interests), in state (formal independence) and in appearance (no conflicts of interest).

A great deal of attention is being paid to the expertise of supervisory board members. For example, under the Banking Code, supervisory board members are expected to have knowledge of the risks of the banking business and of the individual bank's public functions.

9 Corporate Governance Code 2016, Best Practice 3.2.3.
10 DCC, Article 2:158.
11 id., at Article 2:161.
12 Corporate Governance Code 2016, Principle 2.1.

Moreover, banks are expected to introduce a permanent education programme, and legislation has been enacted; since 1 July 2012, management and supervisory board members of financial institutions have been subject to a stricter 'fit and proper' test, to be applied by the AFM or DNB.

Additionally, in 2017, the guidelines on suitability assessments of the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) and the European Central Bank's 2017 guide to assessments of board members were introduced. The AFM and DNB support this development. As shown in 2015 by the EBA Peer Review Report on suitability, Dutch assessment procedures are considered as good practice, and the European assessment procedures are largely in line with the current Dutch take on assessments.[13]

Caps on the holding of multiple supervisory board memberships

The number of supervisory positions a management board member or supervisory board member is allowed to hold at large legal entities is limited by the DCC. In principle, a management board member may hold a maximum of two positions as a supervisory board member in addition to his or her management board position; for a supervisory board member, the limit is five supervisory positions, with a position as a management board or supervisory board chairperson counting as two.

Under the Code, the approval of the supervisory board is required for a management board member of the company intending to accept a supervisory board membership elsewhere.[14]

For banks and certain types of investment firms, the Capital Requirements Directive (CRD IV) has introduced limitations for 'significant institutions'.[15] As a rule, a management board member is limited to two directorships, whereas for a director, a maximum of four directorships (in total) or one management board position combined with one other directorship applies. The Dutch implementing rules, which stay very close to the CRD IV regime, entered into force in August 2014.[16]

Diversity

Over and above these measures to improve the quality of management and supervision, rules to promote gender diversity within the management boards and supervisory boards of large companies have applied in the Netherlands since 1 January 2013, the target being that the board is at least 30 per cent female and 30 per cent male. The rules are of a comply or explain nature: if the target is not met, this will not lead to the imposition of sanctions, but an explanation must be given in the management report as to why the target was not met and what steps will be taken towards meeting it. In November 2020, a bill, to be implemented in stages, was submitted to the Dutch Parliament, introducing a 30 per cent quota for both women and men for the supervisory boards of listed companies. If a man is appointed to

13 Report on the peer review of the 'Guidelines on the assessment of the suitability of members of the management body and key function holders' (EBA/GL/2012/06) of 16 June 2015.

14 Corporate Governance Code 2016, Best Practice 2.4.2.

15 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

16 Act of 25 June 2014 implementing the Capital Requirements Directive (Directive 2013/36/EU of 26 June 2013) [CRD IV] and Capital Requirements Regulation (Regulation (EU) No. 575/2013 of 26 June 2013) (Bulletin of Acts and Decrees 2014, 253).

a vacancy on a supervisory board where fewer than 30 per cent of the seats are occupied by women, the appointment would be declared invalid and the vacancy would remain open. Additionally, large companies are required to set their own ambitious targets for the boardroom and senior management. The target must exceed the board's current percentage of women and should be increased gradually. Since legislative processes may be rather lengthy, entry into force is not expected before the end of 2021, at the earliest.

Narrower in scope but still relevant, Directive 2014/95/EU requires large companies to have a description of the diversity policy applied in relation to the undertaking's administrative, management and supervisory bodies.[17] The Non-Financial Reporting Directive was implemented in Dutch law and entered into force on 1 January 2017.[18] Diversity under this Directive has a wider significance than gender alone, but also includes, *inter alia*, background, expertise, nationality and experience.

Conflicts of interest

Neither a management board member nor a supervisory board member will be permitted to take part in any discussion or decision-making that involves a subject or transaction in relation to which he or she has a conflict of interest. The DCC provides subsequently that if the board member nevertheless does take part, he or she may be liable towards the company, but the transaction with the third party will remain valid, in principle.

Internal liability

A management board member or supervisory board member who has performed his or her duties improperly may be held personally liable to the company. In principle, each board member is liable for the company's general affairs and for the entire damage resulting from mismanagement by any other board member (principle of collective responsibility). A board member may avoid liability, however, by proving that he or she cannot be blamed for the mismanagement. The allocation of duties between the board member and his or her fellow board members is one of the relevant factors in that respect. In the one-tier board model, an internal allocation of duties among the board members is permitted, but this does not change the directors' collective responsibility for the company's management. The non-executive board members (i.e., those not charged with attending to the company's day-to-day affairs) may therefore be held liable for the mismanagement of an executive board member. For that reason, it is advisable that board members keep each other informed of their actions and actively inform each other, sometimes also referred to as a monitoring duty.

It is a well-established concept of Dutch law that personal liability should arise only in situations of apparent mistakes or negligence. In this context, the concepts of, for example, 'severe fault' or 'apparent mismanagement' are developed in case law or are part of statutory provisions. Case law reminds us, however, that this does not imply immunity.[19]

The Supreme Court has held that only the company, or a bankruptcy trustee in cases of insolvency, may sue a board member for mismanagement under Article 2:9 of the DCC;

17 Directive 2014/95 of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

18 Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

19 *Fairstar*, 30 September 2015.

there is no shareholder derivative action under Dutch law.[20] However, in certain situations, directors may incur personal liability as regards third parties, such as shareholders or creditors of the company on account of tort or on account of specific provisions in the law, such as in the case of insolvency caused by apparent mismanagement.

External liability

As a general rule, management board members will not be personally liable for the company's debts or other obligations as regards creditors or other third parties. Liability might only ensue if that board member (1) can be seriously blamed for having conducted a wrongful act on the company's behalf towards a third party, (2) is subject to liability pursuant to certain specific statutory grounds or (3) is penalised pursuant to criminal or administrative law. A parent company or its directors may, under certain circumstances, also be liable for the debts of a subsidiary.

If a company is declared bankrupt, special rules – including certain evidentiary presumptions – apply. Under these rules, each management board member is personally liable for debts that cannot be satisfied from the assets of the bankruptcy estate if the management board was guilty of clear mismanagement during the three years preceding the bankruptcy and it is likely that this was an important cause of the bankruptcy. Besides failure of the management board to comply with its accounting obligations and its obligation to file the annual accounts, clear mismanagement constitutes conduct that is seriously irresponsible, reckless or rash; the trustee in bankruptcy must show that no reasonably thinking board member would have acted in this way under the same circumstances. Case law shows that supervisory board members are not immune in this respect.[21]

III DISCLOSURE

Listed companies are subject to various disclosure obligations. The general rules on financial reporting can be found in Book 2 of the DCC, while the FSA contains additional rules applicable to listed companies. The Corporate Governance Code also lays down several specific financial disclosure obligations for listed companies.

The DCC contains rules with regard to the composition of the annual accounts and management report, the auditor's opinion, the adoption of the annual accounts and the publication requirement. Listed companies are required to send their annual accounts to the AFM after adoption. If the AFM believes that annual accounts do not comply with the relevant rules, it may initiate special annual accounts proceedings before the Enterprise Chamber of the Amsterdam Court of Appeal. Shareholders and employees may also initiate such proceedings. In these proceedings, the Court may order the company to amend the annual accounts and management report in accordance with its instructions.

In general terms, the transparency requirements can be divided into two categories: *ad hoc* disclosure obligations and periodic disclosure obligations.

20 *Poot-ABP*, 2 December 1994.

21 *Landis*, 19 June 2013, *Van der Moolen*, 15 February 2013 and *Meavita*, November 2015.

i Ad hoc

The main example in this category is the obligation for issuers of securities in regulated markets to disclose inside information that directly concerns the issuer as soon as possible.[22] Disclosure may be delayed if the following conditions are met:

a the immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;

b the delay of disclosure is not likely to mislead the public; and

c the issuer or emission allowance market participant is able to ensure the confidentiality of that information.

When the issuer or emission allowance market participant has delayed the disclosure of inside information it shall, immediately after the information is disclosed to the public, (1) inform the competent authority that the disclosure of the information was delayed and (2) provide a written explanation of how the conditions set out above were met. The Netherlands has opted in for the requirement of a written explanation to be given only at the request of the competent authority. An issuer that is a financial institution or credit institution has additional grounds for delaying public disclosure of inside information where disclosure would risk undermining the financial stability of the issuer and of the financial system, the delay is in the public interest, confidentiality can be ensured, and the competent authority consents.[23]

Another relevant disclosure obligation concerns shareholders of listed companies. They are required to notify the AFM if their holdings of voting rights or capital in listed companies reach, exceed or fall below particular thresholds.[24] Gross short positions in excess of a certain threshold (3 per cent) must also be disclosed; this obligation is intended to give an insight into the shareholder's true economic interest and, at the same time, to shed light on empty voting.[25] Moreover, shareholders are obliged to disclose the loss or acquisition of predominant control (30 per cent shareholding or voting rights). The issuer is required to disclose certain information as well, such as changes in its issued capital or in the number of voting rights on its shares. Management and supervisory board members of listed companies are also required to notify the AFM of their holdings of shares or voting rights in the company and of any transactions in these shares or changes in the voting rights.

ii Periodic

The periodic disclosure obligations consist mainly of the annual and half-yearly financial reporting requirements.[26] With regard to the auditing of financial disclosure, statutory auditors are required to enact an extensive, supplementary control statement for the audit

22 Section 17 of Regulation 596/2014 of 16 April 2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 004/72/EC [MAR].

23 MAR, Section 17(5).

24 Financial Supervision Act [FSA], Section 5:38-44.

25 The absence of any economic interest with the party legally entitled to exercise the voting right at the general meeting of shareholders.

26 FSA, Section 5:25c et seq.

committee of the board of directors.[27] Audit committees have to explain how the audit contributed to the integrity of the financial reporting, what the audit committee's role has been in the process, and bear responsibility for the selection procedure regarding the auditor.

The Corporate Governance Code also contains provisions on the auditing of the financial reports and the position of the internal audit function and the external auditor. These provisions cover subjects such as the role, appointment, remuneration and assessment of the functioning of the external auditor, as well as the relationship and communication of the external auditor with the management board, supervisory board and audit committee.

IV CORPORATE RESPONSIBILITY

The Netherlands has traditionally followed the stakeholder model, under which management and supervisory board members are required to take into account the interests of all stakeholders when making decisions and performing their duties. The Corporate Governance Code is based on the principle that a company is a long-term alliance between the various parties involved, such as employees, shareholders and other investors, suppliers, customers, the public sector and public interest groups. The Dutch Stewardship Code also confirms the duty of asset owners and asset managers to take the interests of stakeholders into account, such as banks, creditors, customers, suppliers, the works council and non-governmental organisations.

With regard to the scope of the responsibility, the Dutch Stewardship Code states that in assessing a Dutch listed investee company's long-term value creation opportunities, risks, strategy and performance, it is critical to consider environmental (including climate change risks and opportunities), social and governance information (including board composition and diversity) besides financial information. This is in line with the Corporate Governance Code. The Code requires the management board to draw up a view and strategy on long-term value creation setting out, *inter alia*, any aspects relevant to the company, such as the environment, social and employee-related matters, the chain within which the enterprise operates, respect for human rights, and fighting corruption and bribery.[28]

In light of the call for action on climate change, corporate responsibility is climbing up the agenda of governments all over the world, as well as regulatory authorities such as the DNB as the regulatory authority for financial institutions in the Netherlands, which reaffirmed this agenda during the coronavirus pandemic.[29] Another relevant development is the adopted Dutch Child Labour Due Diligence Act, which is expected to enter into force in mid 2022. This Act is aimed at all companies selling goods or serviced to Dutch end users, and imposes an affirmative due diligence obligation to investigate whether there is a reasonable suspicion that goods or services supplied have been produced using child labour and, if suspicion is found, to adopt and implement a plan of action. It also introduces serious penalties for companies and their directors. On an international level, large public-interest entities (in short, listed companies, banks and insurers) are required to include in their management reports a non-financial statement containing certain information in respect of corporate social responsibility.

27 Audit Firms (Supervision) Decree.

28 Corporate Governance Code 2016, Best Practice 1.1.1.

29 DNBulletin: The Dutch Central Bank [DNB] calls for green recovery from the coronavirus crisis (28 May 2020) and in general: DNB Supervisory Strategy 2018-2022: www.dnb.nl.

i Risk management

Not surprisingly, post-crisis governance reforms focus on risk management. As a result of the financial crisis in the Netherlands (2007–2011), risk management gained prominence in the Corporate Governance Code. The 2016 Code contains several best practices to further strengthen risk management and disclosure concerning risk. For instance, the position of the internal auditor and the role of the audit committee regarding staffing, work plan and functioning of the internal auditor are strengthened. Furthermore, the CFO, the internal auditor and the external auditor should attend the audit committee meetings, unless the audit committee determines otherwise. In practice, the 2016 Code also turns out to have a knock-on effect on other sectors. Often the rules of the Code are used by non-listed companies, serving as a model for codes of conduct in all sorts of sectors, including semi-public sectors such as healthcare and education.

In addition, Article 2:391 of the DCC requires the management board to describe in the management report the main risks to which the enterprise is exposed. If necessary, to properly understand the results or position of the company and its group companies, the management report should also contain an analysis of both financial and non-financial performance indicators, including environmental and employment-related issues.

ii Client focus

The client-focus principle forms part of the Banking Code and is regarded as a necessary precondition for the continuity of any financial undertaking. Complementary to the Banking Code, the Dutch Banking Association introduced a social statute setting out the sector's core values, a banking oath and disciplinary measures, in which the importance of client focus is stressed. Alongside the efforts of the sector itself, both the DNB and the AFM, within their respective areas of competence, continuously monitor progress on client focus and press for further change within financial institutions.

iii Remuneration

According to the Corporate Governance Code, the purpose of the remuneration structure should be to focus on long-term value creation for the company and its affiliated enterprise. The remuneration must 'not encourage management board members to act in their own interests nor to take risks that are not in keeping with the strategy formulated and the risk appetite that has been established'.[30] The Banking Code also contains a section on remuneration policy.

The variable remuneration of management board members of banks is maximised to 100 per cent of the fixed salary and subject to strict conditions: if breached, the rate of a newly introduced bank tax will be increased by 10 per cent.[31] Moreover, there is a maximum of variable remuneration within the whole of the financial sector of 20 per cent of the fixed salary.[32]

30 Corporate Governance Code 2016, Principle 3.1.

31 Banking Tax Act (Bulletin of Acts and Decrees 2012, 325); the Act entered into force on 1 October 2012.

32 Bulletin of Acts and Decrees 2015, 45.

The supervisory board of financial companies and Dutch public companies (NVs) have the authority to claw back bonuses from management board members.[33] The Act that introduced this authority effectively contains three variations:

a the possibility to revise a bonus prior to payment, if payment of the bonus would be unacceptable pursuant to the criteria of reasonableness and fairness;

b the possibility to claw back (part of) a paid bonus, if payment took place based on incorrect information about the fulfilment of the bonus targets or conditions for payment of the bonus; and

c in the event of a change of control, such as a public offer, in which the management board members of a listed company benefit from the increase of value of their equity in the company, the supervisory board has an obligation to revise the proceeds of that value increase of equity to an appropriate level, if those proceeds would be unacceptable pursuant to the criteria of reasonableness and fairness.

Furthermore, say on pay has been at issue, partly in the context of the revised Shareholder Rights Directive (see Section V.i) and in part following the adoption of a law that introduced a say-on-pay right for the works council as of January 2019.[34] Since the Bill implementing the Shareholder Rights Directive entered into force on 1 December 2019, the works council also has the right to render an opinion on the proposed remuneration policy adopted by the annual general meeting at least every four years. Besides the new requirements for the content of the remuneration policy that are introduced by the Shareholder Rights Directive, the Dutch government added an additional requirement, namely that, henceforth, the remuneration policy must explain how the identity, mission and values of the company and its affiliated companies, the company's internal remuneration ratios and those of its affiliates, and public consensus have been taken into account. Furthermore, a majority of at least 75 per cent is required to approve a change to the company's remuneration policy, unless the articles of association provide for a lower majority. Finally, another new rule introduced by this Bill affects companies that are subject to the structure regime. Within these companies, the works council has by law a strengthened right to recommend a third of the members of the supervisory board. According to the new rule, if the supervisory board establishes an incentives or remuneration committee from among its members, the board members appointed further to the works council's recommendation will automatically sit on this committee.

V SHAREHOLDERS

i Shareholder rights and powers

The general meeting of shareholders has important powers within the company, such as the power to amend the articles of association, dissolve the company, approve a merger, adopt the annual accounts and appoint supervisory board members. In addition to these specific powers, Article 2:107 of the DCC assigns all residual powers (i.e., those not assigned to the management board or other corporate bodies) to the general meeting of shareholders. However, the general meeting of shareholders of a Dutch public limited liability company

33 The Clawback Act (Bulletin of Acts and Decrees 2013, 563).

34 Act amending the Works Councils Act regarding the competences of the Works Council on directors' remuneration, Stb. 2018, 221.

is not entitled to give the management board binding instructions regarding the manner in which the board carries out its duties. Management board decisions resulting in an important change in the company's identity or character require the approval of the general meeting of shareholders.[35] This applies, for example, to decisions to transfer the enterprise or almost the entire enterprise, enter into or terminate a significant long-term cooperation, or acquire or divest a significant holding. The provision applies only to decisions that are so fundamental that they change the nature of share ownership, in the sense that the shareholder will, as a result of the decision, in effect have provided capital to and hold an interest in a substantially different enterprise.[36]

Another important shareholder right is the right to have items placed on the agenda of a general meeting.[37] The threshold is 3 per cent. The consequences in practice of the right to have an item placed on the agenda of a general meeting are discussed further in Section V.iv.

The revised Shareholder Rights Directive entered into force in 2017.[38] Some of the rules are new to the Netherlands; others already apply under Dutch law, although these are generally those that have attracted the most media attention. For example, listed companies throughout the European Union will have the right to identify their shareholders; in the Netherlands, this is already possible under the Securities Book-Entry Transfers Act.[39] Similarly, the 'new' right for shareholders to vote on the remuneration policy is already laid down in Section 2:135(1) of the DCC. The Bill implementing the revised Shareholder Rights Directive entered into force partially on 1 December 2019 and partially on 3 September 2020.

ii Equality of voting rights

The most fundamental right of a shareholder is the right to vote at meetings. In principle, Dutch corporate law adheres to the principle of equality of voting rights: all shares carry equal rights and obligations in proportion to their nominal value and all shareholders whose circumstances are equal must be treated in the same manner.[40] The articles of association, however, may provide otherwise. The principle of one share, one vote also applies.[41] There are important exceptions to these principles, however, a few of which are mentioned below.

The first exception is the use of loyalty shares, to which extra voting rights or extra dividends are attached as a reward for long-term shareholders.[42] A second exception to the principle of equality of voting rights is the issuance of protective preference shares: listed companies may protect themselves against hostile takeovers or shareholder activism by issuing preference shares to an independent foundation set up in advance for this purpose (see Section V.v). A third exception to the principle of equality of voting rights is financial preference shares, which are used as a financing instrument. In respect of these shares, too, there is a disproportionate relationship between the voting rights acquired and the capital invested. With respect to the issuance of financing preference shares, the Corporate

35 DCC, Article 2:107a of the DCC.
36 *ABN-AMRO*, 13 July 2007.
37 Article 2:114a of the DCC was introduced by means of the Corporate Governance Act; see Section V.iv.
38 Directive (EU) 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.
39 Wet firaal effectenverkeer.
40 DCC, Article 2:92 of the DCC.
41 id., at Article 2:118(2).
42 *DSM*, 14 December 2007.

Governance Code provides that the voting rights attached to such shares must be based on the fair value of the capital contribution.[43] This represents an attempt to return to the one share, one vote principle.

iii Shareholder duties and responsibilities

Under Dutch law, shareholders – unlike management and supervisory boards – are in principle not required to be guided by the interests of the company and its affiliated enterprise. Therefore, shareholders may give priority to their own interests, in principle, with due regard for the principles of reasonableness and fairness. Based on these principles, however, larger shareholders are considered to have a certain responsibility towards other parties. The Corporate Governance Code's preamble states: 'The greater the interest which the shareholder has in a company, the greater is his or her responsibility to the company, the minority shareholders and other stakeholders.' Institutional investors in particular, therefore, are being called on to accept greater responsibility.

In this regard, the Corporate Governance Code seeks to increase the transparency of voting behaviour. Institutional investors must publish their voting policy on their website and report annually on how that policy has been executed in the preceding year. They must also report quarterly to the general meeting of shareholders on how they have exercised their voting rights.[44] Furthermore, Eumedion[45] adopted a set of Best Practices for Engaged Share Ownership in June 2011, which, *inter alia*, call on institutional investors to inform clients of conflicts of interest if, in relation to a particular matter, the investors have divergent roles that could affect their voting behaviour.

At the European level, similar developments have taken place. In this regard, the ESMA updated its guidelines in 2014 on acting in concert in the Directive on Takeover Bids (see Section V.v).[46] In addition, the revised Shareholder Rights Directive requires institutional investors to be more transparent about their voting policies, as this would lead to better investment decisions and could also facilitate dialogue with the relevant company.

iv Shareholder activism

In practice, the shareholder rights described in Section V.i have also been actively exercised by hedge funds, most notably the right to have an item placed on the agenda of a general meeting.[47] Although the aim of the new rights was to increase shareholder participation and strengthen the monitoring of management boards, the actions of hedge funds have also revealed a dark side to participation. In particular, the focus on short-term profits has had adverse effects in some cases.

A number of situations in which activist investors targeted companies with similar proposals caused both government and Parliament to reconsider the desirability of shareholder activism. To this end, the Corporate Governance Act was introduced in 2013. The idea

43 Corporate Governance Code 2016, Best Practice 4.3.4.

44 id., at Best Practice 4.3.6.

45 Eumedion represents the interests of institutional investors in the field of corporate governance and sustainability.

46 This statement was updated in June 2014.

47 To put things into perspective, Eumedion estimates that between 2005 and 2011 a total of 40 shareholder proposals (not just hedge funds) were submitted in the Netherlands, against around 7,500 management proposals.

behind the Act is to enable the management board, through the introduction of disclosure obligations, to learn the identity and intentions of its shareholders at an early stage, so that it can enter into a dialogue with them. The minimum threshold for the obligation to disclose substantial holdings of capital or voting rights in listed companies has been reduced, therefore, from 5 per cent to 3 per cent.[48] In addition, the threshold for the right of shareholders to have items placed on the agenda for a general meeting has been substantially raised, from a capital interest of 1 per cent to a capital interest of 3 per cent; the alternative threshold in the case of an interest of €50 million for listed companies has been cancelled. Finally, the Act contains a mechanism enabling a listed company to identify its ultimate investors.

The issues of empty voting or securities lending, both of which have appeared to be important instruments for activists, have not been directly provided for in the Act. Hedge funds can use these devices to influence decision-making in the general meeting of shareholders, without bearing any economic risk. Furthermore, shareholders of listed companies are not only obliged to disclose their long positions in excess of a certain threshold, but also their gross short positions (see Section III.i) and should, when exercising the right to place an item on the agenda, disclose their full economic interests (both long and short). As a result, the shareholder's true motives for placing an item on the agenda should be revealed, which is supposed to discourage the practice of empty voting as well.

In limiting the right to have items placed on the agenda, the Corporate Governance Code goes further than the Act.[49] The Code provides that a shareholder of a listed company may exercise this right only after having consulted the management board. If the item to be placed on the agenda may possibly result in a change in the company's strategy, the management board must be given a period of a maximum of 180 days to respond (the response time). The management board should use this response time to confer with the relevant shareholder. The statutory period for these requests, however, is 60 days before the meeting – even for items concerning the company's strategy – and, therefore, may clash with the response time. The response time is an elaboration of the statutory principles of reasonableness and fairness to which shareholders are required to adhere in their relations with the company and, therefore, must be respected by an activist large shareholder. It may be disregarded only on compelling grounds.[50] Furthermore, on 19 December 2019, a Bill was submitted to the Dutch Parliament, introducing a statutory cooling-off period of up to 250 days, during which the meeting of shareholders would not be able to dismiss, suspend or appoint board members of a listed Dutch company under attack. The cooling-off period may also be invoked if there is unwanted shareholder activism. The Bill is expected to enter into force in 2021.

The trend towards limiting shareholder rights can also be discerned in Dutch case law. For example, the Supreme Court, in summer 2010, held that it is up to the management board to determine corporate strategy. Decisions of this nature need not be submitted to the shareholders for approval or consultation, not even on the grounds of reasonableness and fairness or non-statutory governance rules.[51] This judgment limits the possibility for shareholders to demand strategic changes. This is echoed in a judgment in 2018, in which a large investor was denied the right to add a strategic item to the agenda.[52]

48 See Section III.

49 Corporate Governance Code 2016, Best Practices 4.1.5 and 4.1.6.

50 *Cryo-Save*, 6 September 2013.

51 *ASMI*, 9 July 2010.

52 *Boskalis/Fugro*, 12 January 2018.

v Takeover defences and other protective measures

In Dutch practice, various (structural and *ad hoc*) defensive measures have been developed against the threat of hostile takeovers, shareholder activism, among other things:

a the incorporation of a protective foundation with a call option to acquire preferred shares;
b a binding nomination right for the company's board or another body regarding the appointment of directors;
c a proposal right for the board or another body in respect of certain resolutions of the general meeting of shareholders;
d imposing an ownership limitation on shareholders; and
e listing of depositary receipts instead of shares.

The most common takeover defence is the incorporation of a protective foundation with a call option to acquire preferred shares. The shares, which are issued when a threat materialises, change the balance of control within the general meeting of shareholders and make it possible to pass certain resolutions desired by management or, in some cases, block certain undesired resolutions. The Supreme Court permits the issuance of protective preference shares provided they are necessary with a view to the continuity of the enterprise, and are adequate and proportional. The construction must be temporary in nature and have the purpose of promoting further dialogue.[53]

Shareholder and voting rights plans, and similar measures

Dutch law accepts a number of deviations from the one share, one vote principle (see Section V.ii). Instruments that are typically used as a defensive tool are dual-class structures, ownership limitations and, to a lesser extent, loyalty shares. The listing of depositary receipts instead of the shares themselves is not allowed as a defensive measure under the Corporate Governance Code[54] and its use by listed companies has slowly declined.

White-knight defence and staggered boards

White-knight defences only occur occasionally in the Netherlands, probably because of the availability of preferred alternatives. Directors are typically appointed and reappointed on the basis of a rotation scheme, as required under the Corporate Governance Code.[55] The concept of staggered boards, as far as we are aware, is not applied by Dutch listed companies.

vi Contact with shareholders

Although the general meeting of shareholders has a statutory right to obtain information, based on which it is accepted that shareholders have the right to ask questions at a general meeting, it is unclear from the relevant DCC provisions whether the management board can itself take the initiative to discuss its intentions with individual shareholders outside a meeting. In practice, one-on-one meetings of this kind do take place. According to the Corporate Governance Code, the company should formulate a policy on bilateral contacts with shareholders and publish this policy on its website. It is important that particular shareholders are not favoured and given more information than others, however, as this

53 *RNA*, 18 April 2003.
54 Corporate Governance Code 2016, Principle 4.4.
55 id., at Best Practice 2.2.4.

would violate the principle that shareholders in the same circumstances must be treated equally. It goes without saying that price-sensitive information may not be disclosed. The fear of violating the market abuse rules causes some shareholders and companies to be hesitant about participating in one-on-one meetings.

Furthermore, shareholders among themselves may be afraid of being regarded as parties acting in concert because, under the provisions of the Directive on Takeover Bids,[56] these parties are obliged to make an offer for the listed shares of a company if they collectively acquire dominant control (30 per cent or more of the voting rights in that company's general meeting of shareholders). At the end of 2013, ESMA drew up a white list of activities on which shareholders can cooperate without being presumed to be acting in concert, which was updated in 2014 and again in 2019.[57] However, if shareholders engaging in an activity on the white list in fact turn out to be cooperating with the aim of acquiring control over the company, they will be regarded as persons acting in concert and may have to make a mandatory bid. The sensitive subject of cooperation with regard to board appointments has been acknowledged, but was nevertheless left off the white list.

VI OUTLOOK

Looking at the 2021 legislative programme, modernisation and simplification of corporate law remain key. Besides the previously mentioned Bill introducing a quota for women, a consultation on the modernisation of public limited liability companies was published in 2020 and a Bill is expected to be submitted in 2021. Additionally, a consultation on the modernisation of partnerships is expected. The protection of companies also remains on the agenda, but has become even more relevant since the pandemic. Besides the previously mentioned Bill introducing a statutory cooling-off period, a Bill introducing an investment test for risks to national security during takeovers and investments is also being prepared.

Also noteworthy is the change in the statutory administrative duty of directors and supervisory board members that was advocated by 25 corporate law professors in 2020. According to them, directors should ensure that the company operates in a socially responsible manner, and supervisory board members should monitor this. A motion to research the possibilities to establish this corporate social responsibility in law or otherwise stimulate compliance, has been adopted. The government has committed to implement the motion, presumably in the first quarter of 2021.

56 Directive 2004/25/EC.

57 Public statement, Information on shareholder cooperation and acting in concert under the Takeover Bids Directive, ESMA31-65-682, January 2019.

Appendix 1

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