

Corporate Governance Code Monitoring Committee

Advisory report on the company-shareholder relationship and on the
scope of the Code

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I Summary

General findings

The aim of the Dutch corporate governance code (the Code) is to promote good corporate governance in Dutch listed companies. The choice of self-regulation by means of the Code emerges from the wish to provide tailor-made solutions and respond quickly to changing market conditions and practices. The Code is not an isolated set of rules, but part of a larger system, together with statute law and case law on corporate governance, which must be viewed in its entirety. The dominant feature of this system is the stakeholder model. In the stakeholder model the company is seen as a long-term collaborative venture between various parties having a stake in the company. They include employees, shareholders, other providers of capital, customers and suppliers. In this way the company endeavours to create long-term shareholder value.

Since the introduction of the Code shareholders have taken a more active approach. In a few cases disputes about the strategy of a company have occurred between company and shareholders. The Monitoring Committee does not believe that this is a reason for fundamentally changing the Dutch corporate governance system. In the Committee's view the Code still meets its objectives.

The Monitoring Committee considers it important for Dutch companies to remain attractive for investors, particularly foreign investors, and at the same time avoid falling prey to short-term investment strategies in the financial markets. According to the Committee, increasing use of (structural) anti-takeover measures is not an adequate means of achieving this objective. However, the Committee does consider that further rules are necessary to regulate the company-shareholder relationship in order to ensure that the processes involving the management board, supervisory board and shareholders (i.e. the general meeting of shareholders) pass off smoothly and that the best possible balance is struck between the various interests. Good relations between the various stakeholders can be of great value in this connection, particularly by allowing continuous and constructive dialogue between the company and its shareholders.

The Monitoring Committee has drawn up rules for this purpose by elaborating some aspects of the Code and making recommendations to the legislator. These rules are summarised below.

Further elaboration of the Code

1. Discussions with shareholders

The Monitoring Committee recommends that the discussions with shareholders should in principle be conducted by the management board. The chairman of the supervisory board should be cautious about conducting discussions with shareholders. Nonetheless, when the occasion arises, for example where shareholders get no response from the management board or where there is a dispute or potential dispute between the management board and one or more shareholders, the chairman of the

supervisory board may hold discussions with shareholders in order to ascertain their positions, provided he does so with the knowledge of the supervisory board and in the presence of another supervisory board member or a member of the management board. Such discussions may be held on the initiative of either a shareholder or the supervisory board.

2. Composition of the supervisory board

The Monitoring Committee recommends that the supervisory board should aim for a mixed composition. The Monitoring Committee will deal with this theme in more detail in its third annual report, which will be published in December 2007.

3. Communication outside the context of the general meeting

The Monitoring Committee recommends that the company should formulate an outline policy on bilateral contacts with the shareholders and publish this policy on its website.

4. Response time

The Monitoring Committee considers that it is good practice for shareholders to exercise the right to put a corporate governance issue on the agenda only after they have raised it with the management board of the company. If putting an item on the agenda is expected to result in a change of company strategy, including the resignation of current members of the management board and/or supervisory board and the appointment of other management board members and/or supervisory board members, the Monitoring Committee assumes as a rule of thumb that a period of 180 days (the response time) will be sufficient for the management board to form an opinion on the view of the shareholder and to identify and assess any alternatives. The management board will have to make effective use of the response time for further deliberation and constructive consultation, first of all (but not exclusively) with the shareholder who arranged for the item to be put on the agenda. Naturally, the management board and the supervisory board continue to have full responsibility during the response time for the careful assessment of all company-related interests, generally with a view to ensuring the continuity of the business and to creating shareholder value in the long term. It follows that the management board and the supervisory board should not use the response time for safeguarding their own position. The Monitoring Committee assumes that the management board will use the response time in practice for dialogue and deliberation and for assessment of the alternatives and that the supervisory board will monitor this process and assist the management board by providing advice. The same response time applies by analogy to a request to convene a general meeting.

5. Disclosure of the outcome of voting proxies deposited with an independent third party

The Monitoring Committee recommends that the company offers investors the opportunity to deposit their voting proxies with an independent third party prior to the general meeting. The Committee also considers that votes and/or voting proxies known to the company need not be disclosed prior to the general meeting.

6. Limiting the speaking time at meetings

The Monitoring Committee recommends that in monitoring the proper order of business at the meeting the chairman of the general meeting should be able to limit speaking times in order to ensure that the meeting proceeds in an efficient manner and the discussion is worthwhile in terms of content, on condition that this power is exercised reasonably.

7. Disclosure of change-of-control clauses

The Monitoring Committee recommends that the conditions for change-of-control clauses in contracts with management board members and for other prospective payments to management board members (whether in securities or otherwise) should be made public immediately (see also best practice provision II.2.11 of the Code). In addition, such information should be provided in the event of a resolution or motion of the management board in respect of a takeover or other important change in the character of the company which is presented to the general meeting of shareholders and may result in the clause becoming applicable or in the payment being made.

Recommendations to the legislator

1. Disclosure duty for shareholders

The Monitoring Committee recommends that the 5% threshold for disclosure of interests should be reduced to 3%, and there should also be a duty to report every change of 1%. This would bring the disclosure requirements into line with international practice.

2. Intentions of shareholders

The Monitoring Committee recommends that a shareholder having a specified percentage interest in a Dutch company should be obliged to disclose his intentions. It is thinking of a threshold of 5%. The Committee would suggest in this connection that in designing a scheme express attention should be paid to the implementation aspects, in particular such aspects as change of intentions, the connection with 'acting in concert' and voting for resolutions of shareholders who have disclosed other intentions. In addition, consideration could be given to the idea of limiting the right to put items on the agenda to shareholders who have disclosed their intentions.

3. Empty voting/securities lending

According to the Monitoring Committee the assumption that control should as far as possible be in keeping with the financial interest is embedded in the Code. It therefore considers empty voting to be undesirable. At the same time, the Monitoring Committee acknowledges that the scope for combating empty voting is limited. The Committee notes that there is at present insufficient information about the problem of securities lending for the exclusive purpose of acquiring voting rights. It therefore recommends that the scope for discouraging securities lending for the (exclusive) purpose of acquiring

voting rights should be investigated. Express attention should be paid to international developments in this connection.

4. Identification of shareholders

The Monitoring Committee recommends that legislation be developed in order to enable the company to establish the identity of a shareholder (the person beneficially entitled to the shares).

5. Right to put items on the agenda of general meetings

The Monitoring Committee recommends that the position with regard to the right to put items on the agenda should be brought into line with international practice and that the threshold be raised to 3%. The alternative criterion of the nominal amount could then be dropped. The 3% threshold is in keeping with the threshold proposed by the Monitoring Committee for control disclosure.

6. Resolutions for dismissal of/no confidence in supervisory board

The Monitoring Committee recommends that the freedom of companies under their articles of association to impose requirements for resolutions on the dismissal of members of the management board and/or supervisory board be maintained. The Monitoring Committee recommends that this freedom under the articles of association should also be introduced for statutory two-tier companies.

7. Application of the Code to alternative trading systems

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

8. Local companies

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

9. Dutch companies exclusively listed abroad

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

II The Dutch context

The Dutch corporate governance code (the Code) is a self-regulation tool whose aim is to promote good corporate governance in Dutch listed companies. The Code contains principles, elaborated in the form of specific best practice provisions, which focus on the company's stakeholders (including members of the management board and supervisory board) and other parties (including institutional investors).

The Code has been drawn up in accordance with the Dutch company law system. This means that the stakeholder model predominates: the management board and the supervisory board must be guided in their actions by the interests of the company and its affiliated enterprise. The Code therefore assumes that the company is a long-term collaborative venture between various parties having a stake in the company. They include employees, shareholders, other providers of capital, customers and suppliers. In this connection the company endeavours to create long-term shareholder value.

The Code is not an isolated set of rules, but part of a larger system, together with Dutch and European legislation and case law on corporate governance, which must be viewed in its entirety. As far as legislation is concerned, Book 2 of the Civil Code (company law provisions and accounting and reporting law), parts of the new Financial Supervision Act (market abuse, disclosure of control and prospectus rules) and the new Financial Reporting Supervision Act are of special importance. The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten / AFM*) has been given a supervisory role under the two Acts. As far as the development of company law is concerned, the judgments of the Enterprise Chamber of the Court of Appeal of Amsterdam and the Supreme Court are of major importance. The Enterprise Chamber can decide by means of an inquiry whether the policy of a company stands the test of criticism, and it also the power to take (immediate) measures where necessary. This can include assessment of how the powers of the management board and supervisory board as well as those of the shareholders (i.e. the general meeting of shareholders) are exercised. The various stakeholders in the company are required to treat each other in accordance with the criteria of reasonableness and fairness.

The management board has a central position within the company: it determines corporate strategy and is thus bound (unlike the shareholders) by the need to ensure the continuity of the company and to weigh the interests of all the company's stakeholders. The supervisory board monitors the policy of the management board and advises the management board. It is the role of the management board and supervisory board to weigh up the different interests in keeping with the principles described above in order to determine a strategy. Both boards report to the general meeting of shareholders.

This Dutch framework of legislation, Code and case law establishes the basis for good corporate governance aimed at creating long-term shareholder value. This means that Dutch companies should remain attractive for (foreign) investors and should also avoid falling prey to short-term investment strategies in the financial markets. The Committee considers that it would not be logical to achieve

these objectives by means of increased use of (structural) anti-takeover measures. It recommends that further rules be introduced to regulate the company-shareholder relationship in order to ensure that the processes involving the management board, supervisory board and shareholders (i.e. the general meeting of shareholders) pass off smoothly and that the best possible interest is struck between the various interests. Good relations between the various stakeholders can be of great value in this connection, particularly by allowing continuous and constructive dialogue between the company and its shareholders.

III Experience of the Code

The Code was introduced in 2003 in order to restore trust and confidence in Dutch corporate governance and its supervision and also to bring the Dutch corporate governance rules and practices into line with the best in the Western world. The Code sets out principles and best practice provisions designed to strengthen the position of both the supervisory board and the general meeting of shareholders, thereby avoiding an undue concentration of power in the management board. The independence of the external auditor has been strengthened by requiring him to report directly to the supervisory board.

The choice of self-regulation by means of the Code emerges from the wish to provide tailor-made solutions and respond quickly to changing market conditions and practices. The Code is not voluntary: companies are required to apply the Code or explain why they do not do so. The Monitoring Committee has been established against this background. The Committee's task is to ensure that the Code is up to date and practicable, for example by keeping track of how it is enforced and applied, monitoring international developments and practices and identifying any gaps or lack of clarity in the Code. In the view of the Monitoring Committee the Code still meets its objectives.

Since the introduction of the Code shareholders have taken a more active approach. In a few cases disputes about the company's strategy have occurred between company and shareholders. This 'shareholder activism' was a factor that prompted the Monitoring Committee in December 2006 to publish a consultation document on the company-shareholder relationship in the Dutch corporate governance model. Moreover, the Monitoring Committee has been questioned about this by the Ministers of Economic Affairs, Finance and Justice. The consultation document also deals with the scope of the Code in relation to unregulated financial markets, local companies and Dutch companies exclusively listed abroad.

Market participants were given the opportunity to respond to the consultation document until 15 March 2007. 29 responses were received in total. The Monitoring Committee also held talks with various special interest groups and government bodies. A symposium on the subjects raised in the consultation document was held on 17 April 2007 to conclude the consultations.

It is evident from the reactions during the consultation round and the symposium that most of the Monitoring Committee's proposals can count on broad support. The respondents and symposium participants also made some interesting suggestions. The Committee deals with what it considers to be the most important suggestions in sections IV and V. Section IV elaborates certain parts of the Code, while section V contains some recommendations to the legislator.

IV Further elaboration of the Dutch corporate governance code

1. The role of the supervisory board

The supervisory board monitors the policy of the management board and advises the management board. The role of the supervisory board members is becoming increasingly important in practice. This is partly due to the fact that shareholders are exercising their rights more than previously. More generally, the duty of the management board and supervisory board to report and account to the shareholders is also being interpreted more broadly. As a result, the importance of the supervisory role of the supervisory board members is growing.

The supervisory board, in particular the chairman, deals with shareholders not only indirectly but also directly. In the contacts with shareholders, the chairman of the supervisory board acts as chairman of the general meeting of shareholders (general meeting). Even outside the context of the general meeting, shareholders (particularly those used to the one-tier system) tend to believe that the chairman of the supervisory board is their main contact.

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

2. Composition of the supervisory board

In addition to expertise, independence is a crucial requirement for a properly functioning supervisory board (Principle III.2). An important way of enabling the supervisory board to act independently is to ensure that its composition is varied.

The Monitoring Committee recommends that the supervisory board should aim for a mixed composition. The Monitoring Committee will deal with this theme in more detail in its third annual report, which will be published in December 2007.

3. Communication outside the context of the general meeting

The Monitoring Committee stresses that a dialogue with the shareholders and other market participants outside the context of the general meeting can be useful. An important function of one-on-one discussions with investors is to enable them to make their positions known and engage in an exchange of views with the company. Naturally, any such discussions are conditional in particular on

full observance of the statutory rules on market abuse. The company continues to have primary responsibility for determining in each case whether or not certain information is price-sensitive.

In view of the duty of care which the company and shareholders should observe when engaging in dialogue, any price-sensitive information should not be furnished until the parties have given each other the opportunity to take whatever measures are necessary to allow inside information to be handled responsibly. Naturally, a refusal to receive price-sensitive information should be respected. The willingness to enter into discussions with individual shareholders does not affect the duty of the management board and supervisory board to account to the general meeting.

Owing to the possible tension between an active dialogue and the provisions intended to counter market abuse, the Monitoring Committee has suggested that the company formulates a policy on bilateral contacts with the shareholders and publishes this policy on its website. In the Committee's opinion, this should be an outline policy aimed at clarifying the procedure applied by the company. Such transparency would enable the shareholders to adjust their behaviour accordingly. The company could, among other things, clarify whether it has such contacts, whether it takes an active or a passive role in this respect (does the company approach the shareholders or does it allow itself to be approached?), on which shareholders it focuses, in what period of the year it is prepared to hold such discussions and whether or not it wishes to conduct such discussions exclusively in the presence of analysts.

The Monitoring Committee recommends that the company should formulate an outline policy on bilateral contacts with the shareholders and publish this policy on its website.

4. Response time

In discussions prompted by the consultation document, it emerged that when confronted with unexpected action on the part of shareholders, the management board might feel obliged to make hasty decisions while it is unclear whether they are in the interests of the company. The wish was expressed for the management board to be given the time required to consider responsibly how to respond to wishes expressed by shareholders and at the same time take account of the interests of all stakeholders.

The Monitoring Committee considers that it is good practice for shareholders to exercise the right to put a corporate governance issue on the agenda only after they have raised it with the management board of the company. If putting an item on the agenda is expected to result in a change of company strategy, including the resignation of current members of the management board and/or supervisory board and the appointment of other management board members and/or supervisory board members, the Monitoring Committee assumes as a rule of thumb that a period of 180 days (the response time) will be sufficient for the management board to form an opinion on the view of the shareholder and to identify and assess any alternatives. The management board will have to make effective use of the response time for further deliberation and constructive consultation, first of all (but not exclusively) with

the shareholder who arranged for the item to be put on the agenda. Naturally, the management board and the supervisory board continue to have full responsibility during the response time for the careful assessment of all company-related interests, generally with a view to ensuring the continuity of the business and to creating shareholder value in the long term. It follows that the management board and the supervisory board should not use the response time for safeguarding their own position. The Monitoring Committee assumes that the management board will use the response time in practice for dialogue and deliberation and for assessment of the alternatives and that the supervisory board will monitor this process and assist the management board by providing advice. The same response time applies by analogy to a request to convene a general meeting.

5. Disclosure of the outcome of voting proxies deposited with an independent third party

From the perspective of due care, it would be advisable for the company to make it possible for investors to deposit voting proxies with an independent third party prior to the general meeting. This would not affect the shareholders' right to inform the management board about how they vote or intend to vote. This could help in the proper preparation of the general meeting and in determining the right order of items on the agenda.

It is clear from the responses during the consultation that it is already common practice to deposit voting proxies with a third party. The Monitoring Committee believes that it might be useful to draw this to the attention of companies and shareholders that do not yet make use of this possibility.

The Monitoring Committee recommends that the company offers investors the opportunity to deposit their voting proxies with an independent third party prior to the general meeting. The Committee also considers that votes and/or voting proxies known to the company need not be disclosed prior to the general meeting.

6. Limiting the speaking time at meetings

The Monitoring Committee considers that limiting the speaking time of individual shareholders could be useful in ensuring that general meetings are conducted efficiently and have a worthwhile content. The chairman of the general meeting should check the order of business at the meeting. For this purpose he can determine the order of business prior to or during the meeting and limit the speaking time, either per shareholder or per item) provided that he exercises these powers reasonably. When the occasion arises, it is recommended that the chairman make more use of these powers than hitherto.

The Monitoring Committee recommends that in monitoring the proper order of business at the meeting the chairman of the general meeting should be able to limit speaking times in order to ensure that the meeting proceeds in an efficient manner and the discussion is worthwhile in terms of content, on condition that this power is exercised reasonably.

7. Disclosure of change-of-control clauses

Whether a public bid for a company succeeds partly depends in practice on the position taken by the management board of the company. The view expressed by the management board is one of the main considerations of shareholders in deciding whether to offer their shares to the bidding party. The same applies in respect of other attempts to gain control of a company or parts of it where this could bring about a major change in the character of the company. Here, too, the management board's position is an important factor for shareholders in deciding whether to cooperate in the transaction.

The Monitoring Committee considers that it should be sufficiently clear what interest the management board members themselves have in the success of a public bid or other proposed transactions involving a major change in the character of the company.

Some management board members have clauses in their contracts with the company to the effect that they will receive a given remuneration in the event of a takeover or major change of control (a change-of-control clause). In addition, the possibility cannot be excluded that a third party (the bidder or other person wishing to gain control) may offer payments to a management board member that are conditional on the success of the offer or of the transaction involving a major change of control. A management board member who has such a contract or has been offered a payment of this kind may therefore have a conflict of interest.

The Monitoring Committee recommends that the conditions for change-of-control clauses in contracts with management board members and for other prospective payments to management board members (whether in securities or otherwise) should be made public immediately (see best practice provision II.2.11 of the Code). In addition, such information should be provided in the event of a resolution or motion of the management board in respect of a takeover or other important change in the character of the company which is presented to the general meeting of shareholders and may result in the clause becoming applicable or in the payment being made.

8. Other focus areas

a) Long-term share ownership

The great majority of the respondents believe that the development of initiatives for promoting long-term share ownership is something that should be left to the market itself. A few respondents have advocated the introduction of legislation to support this.

The Monitoring Committee notes that a recent initiative to promote long-term share ownership was unable to withstand the test applied by the Enterprise Chamber of the Court of Appeal.

The Monitoring Committee considers that its recommendations to the legislator for greater transparency on the part of shareholders (see section V) and its call for a dialogue between company and shareholders can help to promote a constructive relationship between them. The Committee does

not see a role for the legislator in distinguishing between long-term and short-term shareholders. Nonetheless, the Committee takes a positive view of initiatives by companies to promote long-term share ownership.

(b) Role of the general meeting and passing of resolutions

The Monitoring Committee notes that general meetings can often no longer be seen as a forum in which resolutions are passed as the 'fruit of consultation'. The Committee considers that there is still sufficient need for a physical meeting of shareholders as a forum for accountability and reporting. It regards the physical general meeting of shareholders as an important final link in the decision-making process of the general meeting. In this connection dialogue with shareholders, even outside the context of the general meeting, can play a useful role.

A clear majority of the respondents share the Monitoring Committee's view of the general meeting as an organ of the company and of the need for a physical meeting of shareholders. Some respondents consider that the general meeting is the ideal place for a dialogue between company and shareholders. These reactions have not led the Monitoring Committee to revise its view.

c) Compulsory attendance at general meetings and opportunity to ask questions prior to meetings

The Monitoring Committee sees no reason to oblige shareholders to attend or address the general meeting, even shareholders who hold a given percentage of the shares and/or voting rights.

The Committee considers that the submission of questions prior to the meeting could help to promote the efficiency of meetings, since the number of questions asked during the meeting would be reduced. The questions could then also be answered prior to the meeting.

The Monitoring Committee considers that, in addition to the possibility to ask questions prior to a general meeting, it should also be possible for shareholders to indicate what questions they wish to raise during the meeting. This could support the efficient answering of questions since it would enable the chairman to group questions into clusters or deal with questions in a specific order. This would not prejudice the right of the shareholders to ask additional questions, subject to observance of the order of business at the meeting.

V Recommendations to the legislator

General

The Monitoring Committee takes the view that only sparing use should be made of the possibility of proposing new legislation in the field of corporate governance. Legislation tends to cause companies or the parties involved (depending on the legislation's target group) considerable expense in compliance. Moreover, the Monitoring Committee believes that borrowing certain elements from foreign legal systems entails the risk that the Dutch system may start to lack coherence, and that foreign elements may accumulate within the Dutch system. Caution should therefore be observed regarding any further expansion of the statutory rules in order to maintain a sound balance in the corporate governance system, in comparison with other countries.

The Committee considers that regulation in the Code in accordance with the 'apply or explain' principle is to be preferred. Section IV contains various recommendations for further implementation of the Code. For some topics, however, it would be desirable to facilitate the operation of the Code by means of legislation. Some specific proposals to this effect are made in this section.

1. Disclosure duty for shareholders

Shareholders and others with voting rights who own (or potentially own) more than 5% of the shares and/or the voting rights in a listed company should disclose their interest under the Financial Supervision Act (previously the Disclosure of Major Holdings in Listed Companies Control Act).

The Monitoring Committee believes that it is important for companies to know the identity of shareholders who have an interest of a given size, and that shareholders and potential shareholders should have sufficient information about voting ratios and important movements of capital when making their investment decisions. Lowering the threshold and introducing a duty of disclosure for each major change in voting ratios or capital movements could contribute to this. However, the Monitoring Committee believes that lowering the threshold to 1%, as proposed by some people, would put an excessive burden on those subject to the duty of disclosure, in view of the far-reaching consequences which infringement of the duty of disclosure could entail. If the Netherlands is to remain attractive for (foreign) investors, it would be advisable to adopt the thresholds applied in neighbouring countries. A threshold of 3% is applied in the United Kingdom and Germany. In making this recommendation the Monitoring Committee has weighed investors' objections to a lowering of the threshold against the requests for the threshold to be lowered to 1%.

The Monitoring Committee recommends that the 5% threshold for disclosure of interests should be reduced to 3%, and there should also be a duty to report every change of 1%. This would bring the disclosure requirements into line with international practice.

2. Intentions of shareholders

Besides disclosure of control, information about the intentions of shareholders having a substantial interest could be useful for companies. It may be helpful for management board members to know, when carrying out their duties, whether a shareholder with a substantial interest should be regarded as a 'passive' investor or whether he intends actively to influence the company's strategy or take other similar action.

For shareholders and potential shareholders too, knowledge of the intentions of other shareholders can constitute important information on which they can base investment decisions and voting behaviour. Other countries such as the United States and France already have rules obliging shareholders with a substantial interest to disclose their investment objectives.

The Monitoring Committee recommends that a shareholder having a specified percentage interest in a Dutch company should be obliged to disclose his intentions. It is thinking of a threshold of 5%. The Committee would suggest in this connection that in designing a scheme express attention should be paid to the implementation aspects, in particular such aspects as change of intentions, the connection with 'acting in concert' and voting for resolutions of shareholders who have disclosed other intentions. In addition, consideration could be given to the idea of limiting the right to put items on the agenda to shareholders who have disclosed their intentions.

3. Empty voting/securities lending

The Monitoring Committee considers that the Code entails the assumption that the control should as far as possible reflect the scope of the financial interest (see provisions IV.1.2 and IV.2.8). One way in which empty voting can take place is by means of securities lending. The Monitoring Committee therefore considers that securities lending with a view to exercising control should be discouraged. Various suggestions for this purpose have been made in the responses to the consultation document, for example bringing forward the record date and introducing a specific duty of disclosure for those who vote on borrowed shares or provisions to ensure that the voting right remains invested in the lender.

It should not be overlooked that securities lending also has positive aspects. Liquidity is injected into 'the market', which promotes efficient pricing and allows delivery obligations to be performed. The Monitoring Committee does not therefore believe that securities lending as such should be made impossible.

The problem of securities lending aimed at exercising control can be tackled only at international level, owing to the cross-border nature of capital movements. The European Commission has published a consultation document on a recommendation concerning shareholders' rights, in which it addresses the problem of securities lending. The developments in this field in the US should also certainly be studied.

According to the Monitoring Committee the assumption that control should as far as possible be in keeping with the financial interest is embedded in the Code. It therefore considers empty voting to be undesirable. At the same time, the Monitoring Committee acknowledges that the scope for combating empty voting is limited. The Committee notes that there is at present insufficient information about the problem of securities lending for the exclusive purpose of acquiring voting rights. It therefore recommends that the scope for discouraging securities lending for the (exclusive) purpose of acquiring voting rights should be investigated. Express attention should be paid to international developments in this connection.

4. Identification of shareholders

The desirability of a dialogue between the company and its shareholders is apparent at various places in the Code. The anonymity of the shareholders is regarded by many companies as an obstacle to the establishment of a dialogue. Rules for establishing the identity of shareholders (i.e. beneficial owners of shares) have been created at national level in various legal systems and have an international impact. The European Commission recently published a consultation document on a recommendation concerning shareholder rights, which addresses the problem of the passing on of votes through intermediaries.

A large majority of the respondents gave an affirmative answer to the question whether it would be advisable to enable companies to establish the identity of their shareholders. The Tabaksblat Committee has already made a recommendation to this effect (recommendation 6 to the legislator). The Bearer Securities Working Group developed proposals for a scheme in 2001, although this was only of national scope. The Monitoring Committee believes that it would be worthwhile considering the introduction of rules having international effect in the Netherlands too, based on the English and/or French systems. Such a scheme might also increase the attractiveness of the Dutch stock exchange for companies.

Some respondents drew attention to the need for shareholder privacy. The Monitoring Committee considers that, in view of the increased corporate transparency, the shareholders too cannot escape the requirement of greater openness, certainly if they wish to play an active role in the company.

The Monitoring Committee recommends that legislation be developed in order to enable the company to establish the identity of the shareholder (the person beneficially entitled to the shares).

5. Right to put items on the agenda of general meetings

Although this subject was not dealt with specifically in the consultation document, some respondents advocated a higher threshold for the right to put items on the agenda. Pursuant to article 2:114a of the Civil Code, shareholders who represent 1% of the issued capital or EUR 50 million can request that an item be put on the agenda of the general meeting.

A higher threshold is applied for this right in neighbouring countries. For example, shareholders in Germany and France have this right if they hold 5% of the issued capital. The UK too has a threshold of 5%, or 100 shareholders each of whom has invested at least 100 pounds sterling. The threshold in Italy is 2.5%. The European directive on shareholders' rights, which must shortly be transposed into Dutch law, puts the threshold at a maximum of 5%.

The Monitoring Committee recommends that the position with regard to the right to put items on the agenda should be brought into line with international practice and that the threshold be raised to 3%. The alternative criterion of EUR 50 million could then be dropped. The 3% threshold is in keeping with the threshold proposed by the Monitoring Committee for control disclosure.

6. Resolutions for dismissal of/no confidence in supervisory board

Under current Dutch law the general meeting can dismiss the management board and supervisory board by an absolute majority of votes. Companies can include more stringent requirements for dismissal resolutions in their articles of association. The general meeting of shareholders of companies having statutory two-tier status ("*structuurregime*") may pass a resolution of no confidence in the entire supervisory board by an absolute majority of votes, provided that at least a third of the issued capital is represented at the meeting. The Enterprise Chamber of the Court of Appeal then appoints supervisory board members for a fixed term. In the case of companies having statutory two-tier status there is no scope to derogate in the articles of association from the statutory system.

The responses to the consultation document show that some respondents feel a need for more stringent statutory requirements for votes of no confidence in the supervisory board in statutory two-tier companies. It has also been suggested that in the case of statutory two-tier company resolutions to dismiss should be passed at meetings at which at least half the issued capital is represented in order to prevent decision-making by 'chance' majorities at general meetings as a consequence of shareholder absenteeism.

The Monitoring Committee recommends that the freedom of companies under their articles of association to impose requirements for resolutions on the dismissal of members of the management board and/or supervisory board be maintained. The Monitoring Committee recommends that this freedom under the articles of association should also be introduced for statutory two-tier companies.

7. Application of the Code to alternative trading systems

The Monitoring Committee considers that the Corporate Governance Code need not be applicable by law to the trading of securities of small and medium-sized enterprises (SMEs) on alternative trading systems. Examples of SME-g geared trading systems include Alternext (Amsterdam, Brussels and Paris) and AIM (London). The reason why these rules should not be applicable here is that these trading systems are intended as a feeder channel for the regulated market.

However, if securities of companies that cannot be regarded as SMEs are traded on alternative trading systems, the Code should be declared compulsorily applicable in order to avoid a situation in which the obligation to comply with the Code can be circumvented by the tradability of such shares on alternative trading systems. The criterion could, for example, be total assets that do not exceed a given amount (for example EUR 500 million).

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

8. Local companies

In the 2005 financial year local companies¹ scored on average just over 90% for compliance with the Code. The rate of application of code provisions averaged 86% in that year. The average rate of application of the Code by local companies is markedly lower in a number of areas. These are in particular the code provisions concerning:

- internal risk management and control systems;
- the remuneration of management board members;
- the role and procedures of the supervisory board; and
- the general meeting of shareholders, particularly the logistics and the provision of information to the meeting.

The Monitoring Committee considers that it must be assumed that shareholders and potential shareholders in local companies need the same information from these companies as do their counterparts in AEX, AMX and ASX companies. On the other hand, it has to be recognised that local companies have fewer financial resources and a smaller organisation than larger companies. The responses to the consultation document do not mention specific provisions that could cause special problems.

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

9. Dutch companies exclusively listed abroad

The Code applies to all companies that have their registered office in the Netherlands and whose shares or depositary receipts for shares are officially listed on a market in financial instruments. This

¹ The term local companies means Dutch companies that are listed on Euronext Amsterdam and do not belong to the AEX, AMX or ASX categories.

means that the Code is also applicable to Dutch companies whose shares or depositary receipts for shares are listed exclusively on one or more foreign (officially recognised) markets in financial instruments.

This scope of application was expressly chosen by the Tabaksblat Committee to avoid pressure on the competitive position of the Dutch stock exchange. After all, in view of the current internationalisation of the stock exchanges, it is relatively easy for companies which are unwilling to apply the Code to move their listing to a different stock exchange.

Some Dutch companies that have only a foreign listing state in their annual report that they apply the Code. Other companies that have only a foreign listing often indicate that they comply with the corporate governance code in the country concerned. Some of the companies in this category apply more than one corporate governance code.

If companies that are exclusively listed abroad wish to comply with a foreign corporate governance code rather than the Dutch Code they should explain this in their annual report. The 'apply or explain' rule gives them the scope to do so.²

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

² On this point see the explanation of the Dutch Minister of Justice: "The 'comply or explain' rule applies to listed companies under Dutch law, even if they are also listed in, say, New York. However, a company may explain that it applies a foreign Code rather than the Dutch code in order to avoid the need to explain the same thing twice. After all, the Dutch code is also complied with if a company explains why it applies other rules in respect of the principles and best practices," Official Reports of the Senate 2003-2004, 28179, no. 38.

VI Reporting and accountability

Task and role of the Monitoring Committee

The Committee was established by the Minister of Finance, the State Secretary for Economic Affairs and the Minister of Justice in December 2004 to promote the use of the Code and to monitor compliance and application. The Committee publishes its findings on compliance with the Code and the up-to-dateness and practicability of the Code annually. In addition, the Monitoring Committee examines specific corporate governance themes on request and reports on them to the government.

Consultation document

In its first report, which was published in December 2005, the Monitoring Committee announced that its focus in 2006 would be on among other things the preparation and effectiveness of the general meeting of shareholders, the dialogue between company and shareholders, and compliance with the corporate governance code (the Code) by local companies and 'Dutch' companies having their primary listing abroad.

Against this background the Monitoring Committee held a survey in April 2006 on the role of shareholders. Partly on the basis of the response to the questionnaire, the Monitoring Committee published a consultation document in December 2006 on the role of shareholders and the scope of the Code for local companies exclusively listed abroad and on unregulated markets. Market participants, special interest organisations and other interested parties were then given ample opportunity (until 15 March 2007) to respond to the consultation document.

Government questions

In a letter of 7 November 2006 the Minister of Finance, writing also on behalf of the Ministers of Economic Affairs and Justice, put questions to the Monitoring Committee about the increased shareholder activism in the Netherlands since the introduction of the Dutch Corporate Governance Code.

These questions were answered by the Monitoring Committee in December 2006. The answers were in some respects of a provisional nature as some parts of them referred to the consultation document.

The Minister of Finance then sent the Monitoring Committee's answers, together with the Committee's second report and the consultation document, to the House of Representatives.³

Responses to the consultation document

29 responses were received by the Monitoring Committee in the consultation period (January-March 2007). The Monitoring Committee thanks all respondents for their valuable contributions.

³ Letter of the Minister of Finance of 9 February 2007 (Parliamentary Papers II 2006/07, 30 111, no. 15).

Responses were received from: AEGON, Arcadis, Boskalis, CSM, De Brauw Blackstone Westbroek (representing a number of Dutch companies listed exclusively abroad), DLA Piper, Eumedion, Euronext, FNV, Getronics, HES Beheer, the Governance Platform, KAS BANK, Macintosh, Mazar, Nauta Dutilh, Nevir, Nederlands Centrum van Directeuren (Dutch Executive and Non-Executive Directors' Centre), Dutch Bankers' Association (NVB), Randstad, Rematch, Rinnooy Kan & Partners, Robeco, SBM Offshore, Van Lanschot, VEB, Vedior, Association of Securities-Issuing Association (VEUO) and the VNO-NCW employers' organisation.

The responses, with the exception of those of Van Lanschot and Rinnooy Kan & Partners, can be consulted at the website of the Monitoring Committee (www.commissiecorporategovernance.nl).

In preparing this advisory report, the Monitoring Committee conducted a number of informal bilateral discussions about the subjects dealt with in the consultation document. These were discussions with a delegation of members of the House of Representatives, a delegation of chairmen of Dutch listed companies, Euronext, the Federation of Dutch Trade Unions (FNV), and the Social and Economic Council (SER).

Symposium

To conclude the consultation period, the Monitoring Committee held a symposium on the 'role of shareholders' on 17 April 2007. Representatives of listed companies, institutional and private investors, trade unions, the Bar, accountancy organisations, the House of Representatives, the European Parliament, government ministries and regulatory authorities attended the symposium.

Professor H.J. de Kluiver chaired the symposium. Mr M. Tabaksblat gave the talk during the seminar. Panel discussions were then held on:

- the division of powers between company organs with:

1. P.N. Wakkie, member of the executive board of Royal Ahold N.V.
2. P.C. van den Hoek, chairman of ASM International N.V. and Buhrmann N.V.
3. W. Rosingh, MSc. MBA, managing director of Hermes Focus Asset Management Europe

- rights and duties of shareholders, identification of shareholders and long-term share ownership with:

1. P.P.F. de Vries, director of the Dutch Investors' Association
2. C.W. de Monchy, member of the supervisory board of Van Lanschot N.V.
3. P. Gortzak, general secretary and treasurer of FNV

- company-shareholder communication:

1. J.S.T. Tiemstra RA, management board member of the VEUO and Chief Financial Officer of Hagemeyer N.V.
2. P.M. Koster RA, management board member of the Netherlands Authority for the Financial Markets
3. R. Abma, director of Eumedion

The symposium was concluded by Professor J.M.G. Frijns, chairman of the Dutch Corporate Governance Code Monitoring Committee.

Advisory report

The consultation document, the responses, the bilateral discussions and the discussions during the symposium have formed the basis of the present advisory report.

Composition of Corporate Governance Code Monitoring Committee

Chairman

Professor Jean Frijns

Professor of Investment at the Vrije University of Amsterdam

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

Members

Professor Kees Cools RA

Professor of Corporate Financing and Strategy at the University of Groningen

Partner in The Boston Consulting Group

Gert-Jan Kramer

Chairman of the Supervisory Board of Royal BAM Groep NV

Former President of Fugro NV

Professor René Maatman

Professor of Asset Management, Radboud University Nijmegen

Head of the Legal and Tax Department of ABP Vermogensbeheer

Professor Jaap van Manen RA

Professor of Auditing at the University of Groningen

Partner in PricewaterhouseCoopers Accountants NV

Mrs Kitty Roozmond

Director of the Association of Provincial Authorities

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

Jos Streppel

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

Member of the Supervisory Board of KPN NV

Member of the Supervisory Board of Van Lanschot NV

Chairman of the Shareholders Communication Channel Foundation

Professor Albert Verdam

Professor of Company Law at the Vrije University of Amsterdam

Legal adviser to Royal Philips Electronics NV

Secretariat

Wouter Kuijpers

Financial Markets Directorate, Ministry of Finance

Martha Meinema

Enterprise Directorate, Ministry of Economic Affairs

Wim Helmink

Enterprise Directorate, Ministry of Economic Affairs