

Proposal for the revision of the Dutch corporate governance code

On 11 February 2016, the monitoring committee corporate governance code ("Committee") published (in Dutch) a discussion draft for a revision ("Proposal") of the current corporate governance code of 2009 ("Code"). Interested parties are invited to give their comments before 7 April 2016. The Committee will then prepare a final text of the revision. The final text is to be published later this calendar year. The Committee expects that the revised Code will take effect and start applying on 1 January 2017.

The Committee has announced that it will prepare a separate corporate governance code for companies with a one-tier board (and possibly publish a discussion draft) in the coming months, which, pursuant to the Committee's intention, would take effect at the same time.

The Proposal entails a major overhaul of the Code. The structure of the Code is to be reorganised and many provisions are to be deleted, either because they are considered to be too detailed (eg the provisions on remuneration and conflicts of interests) or because they are already dealt with in legislation (eg claw back of bonuses, limitation of board memberships, procedure in case of conflicts of interests).

The key changes in the Proposal are as follows.

1. Comply or explain

- For each deviation from a Code provision, the company will be required to describe: (i) how the decision was reached to deviate from that provision, (ii) when the company intends to comply again, (iii) what alternative approach, if any, has been adopted and (iv) how this complies with the underlying objective of the relevant provision.

2. Strategy, long term value creation; risk management; in control statement

- The management board must formulate and implement a strategy on long term value creation, including in particular risk control.

- The management board must involve the supervisory board at an early stage when formulating the view on, and the strategy realising, the long term value creation and the supervisory board must then supervise the process.
- The management board must analyse the key risks facing the company and articulate the company's risk appetite in the annual board report.
- The management board should explain in the in control statement (i) that the internal risk control and the controlling systems have been functioning adequately (also in relation to non-financial issues); (ii) that these systems provide reasonable certainty as to the correctness of the financial reporting; and (iii) that it is reasonable to expect that the company's continuity is safeguarded for the next coming twelve months.

3. Internal audit function; audit committee; external accountant

- There are several proposals to strengthen the internal audit function, including a clearer division of tasks between the internal auditor, the audit committee and the management board.
- The internal auditor must have direct access to the external accountant and audit committee.
- The audit committee must in its report to the supervisory board address the question whether it can be expected that the company's continuity is safeguarded for the next coming twelve months.

- Audit committee meetings must be attended by internal auditor and the external accountant.
- The audit committee must have an important role in the selection and nomination of the external accountant and in reporting on his functioning.
- The external accountant must report irregularities to the audit committee, and report to the management and supervisory board when noting an incorrect statement regarding the compliance with the code in the board report or the report of the supervisory board.

4. Appointment and functioning of boards

- The current Code allows supervisory board members to serve three terms of four years. It is proposed to shorten this to two periods of four years although after this eight-year period a supervisory board member can be re-appointed for up to two additional two-year periods if this is justified on the basis of special circumstances, which must be explained in the report of the supervisory board.
- At least one member of the supervisory board must possess specific knowledge on technological innovation and new business models.
- Management board members must resign in case of malfunctioning, irreconcilable conflicts of interest and when the supervisory board considers this necessary.
- If a company has an executive committee, its role and function must be explained in the board report. This description should also cover the way in which the contact between executive committee and supervisory board is structured. In addition, the management board must ensure a proper information stream and the supervisory board must supervise the dynamics between management board and executive committee.
- If fewer than 30% of the management board members or the supervisory board members are female, the corporate governance statement must explain how and when this ratio can be achieved.
- The management board must assess its functioning on an annual basis (as is currently already required for the supervisory board).
- Management board members and supervisory board members must report to the supervisory board if and when they wish to accept a position with another other company or entity. The supervisory board member must give prior approval if a management board

wishes to become a supervisory board member of another company.

5. Independent supervisory board members

- There is to be some further flexibility in relation to the independence of supervisory board members. Currently, only one supervisory board member may fail the independence tests, which include a link with a party holding (himself or his family) 10% or more shares in the company's capital. It is proposed that large family shareholders may nominate more non-independent members, provided that a majority of the supervisory board members meet the independence tests.
- The chairman of the supervisory board is to be independent as defined in the Code; it is no longer sufficient that he complies with the independency criterion that he is not a former member of the management board.
- The chairman of the supervisory board or a former management board member cannot act as chairman of the selection and nomination committee.
- More than half of each of the committees of the supervisory board should be independent within the meaning of the Code.
- The management and supervisory board must establish a special committee with a special responsibility in the event of a proposed public offer.

6. Remuneration

- It is proposed to simplify and decrease the number of provisions on determination of and reporting on directors' remuneration.
- Members of the supervisory board may receive share-based compensation, provided that the shares will be held by the supervisory director until at least two years after the term of the appointment and the value of the shares may not exceed 50% of the fixed remuneration.
- The management board members must express a view on their own remuneration, taking into account the aspects that are weighed when the remuneration policy is established.

7. Response time

- If and when the management board seeks extra time to respond to a proposal from a shareholder for an agenda item for a shareholders meeting in relation to the company's strategy, at the end of that period it must report on its deliberations and this process must be supervised by the supervisory board.
- The key corporate decisions listed in art. 2:107a DCC, which include material acquisitions and disposals, should be deemed a "change in the company's strategy."

8. Depositary receipts of shares

- The committee is of the opinion that the view that the issue of depositary receipts of shares may not be used as a protection device does no longer correspond with practice, as it is being used as such in practice (eg ABN AMRO); depositary receipts may be issued as protective device if this enhances the company's long term creation of value.
- The provision that holders of depositary receipts at all times have the right to receive of proxy to vote in shareholder meeting, is to be deleted, allowing the board to refuse to grant proxies in the cases provided for in Dutch company law.

9. Culture

- Much attention in the revised Code is devoted to creating a culture of openness and integrity, aimed at long term value creation. The management board and the supervisory board are responsible for developing, safeguarding and embedding this culture, including the "tone at the top".
- The management board is to determine common values that contribute to the creation of long term value; develop a code of conduct (and whistle blowers rules) and make sure it is embraced by all employees; and provide an explanation in the board report on the way in which the culture in the company is given proper attention.

We welcome the proposed simplification of the Code. For example, we like the further balancing of rights between shareholders and the boards.

On the other hand, we have a number of technical comments on specific provisions. For example, it is not clear to us why a family-owned large shareholder may have more "non-independent" nominees on the supervisory board than other large shareholders.

Another concern relates to the use of rather abstract goals or languages, such as the need for a strategy aimed at long-term value creation. Whilst most of the relevant points are understandable at a conceptual level, we can imagine that they may be problematic to apply in a meaningful manner in specific situations.

We anticipate a lively debate with input from various stakeholders resulting in further improvement of the contents and impact of the revision of the Code.

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