EUMEDION
CORPORATE GOVERNANCE FORUM

Dutch Corporate Governance Code Monitoring Committee
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P.O. Box 20401
2500 EK The Hague

The Hague, 5 April 2016

Ref.: B16.07
Subject: Proposals for revision of the Dutch corporate governance code

Dear members of the Monitoring Committee,

Eumedion is pleased to avail itself of the opportunity to respond to your proposals for revision of the Dutch corporate governance code (hereafter: the Code).

The Corporate Governance Code Monitoring Committee (hereafter: the Monitoring Committee) recommended in its Monitoring Report on the 2013 Financial Year to set up a process for revision of the Code. Eumedion expressed its support for revision of the Code in a response to the said Report.[1] In a joint letter from the 'supportive parties' Eumedion requested you on 11 May 2015 to update the Code. Eumedion would like to express its appreciation for the fact that the Monitoring Committee has complied with this request within a relatively short period of time.

The Code was drafted in 2003 to give investors more confidence in the Dutch system of corporate governance and this guiding principle still applies. We have assessed the proposals in the light of the general premise that the Code must contribute to a sound and transparent system of checks and balances at Dutch listed companies; a system within which the management board manages, the supervisory board supervises, and the shareholders can exercise serious influence within the company. In addition, we have considered whether the updating of the Code will ensure it is state-of-the-art again and forward-looking in international terms, and if the best practice provisions are a concrete interpretation of the statutory minimum norms as regards accountability, transparency and control rights.

[1] http://www.eumedion.nl/nl/public/kennisbank/persberichten/2015-01-persbericht-monitoring-rapport.pdf.

Viewed against this background, Eumedion believes that the revised Code rightly pays more attention to long-term value creation (draft provision 1.1.1), internal culture (draft principle 2.5 and the corresponding draft provisions), the effectiveness of the internal risk management and control systems (draft provision 1.4.2), the emphasis on good succession planning (draft provision 2.2.4), the increase in the number of provisions concerning the internal audit function (draft principle 1.3 and the corresponding draft provisions), and transparency with respect to investors and other stakeholders (among other things the new paragraph regarding the 'Compliance with the Code').

We have major concerns regarding a number of proposals, particularly the following:

1. The proposal to increase the number of dependent members that will serve on the supervisory board (draft provision 2.1.7); the proposal to facilitate that supervisory board members can be awarded remuneration in the form of options or other derivative financial instruments (draft provision 3.3.2); and the proposal to allow supervisory board members with a personal and financial interest to sit on a special transaction or takeover committee (draft provision 2.7.5). These proposals detract from the basic principle of independent supervision by the supervisory board.
2. The proposal to delete so many remuneration provisions. For shareholders and other stakeholders it is very important that the supervisory board when implementing and rendering extern accountability on the remuneration policy complies with the generally accepted principles for a remuneration policy respectively the remuneration report. Furthermore, if these provisions are deleted, the Netherlands will no longer comply with a recommendation of the European Commission on the subject of executive remuneration.

Eumedion also suggests tightening up a number of elements of the Code, including the following:

1. Expansion of the (self-)evaluation of the supervisory board to include a periodic evaluation under external guidance. This can make a contribution to guaranteeing the quality of the (self-) evaluation.
2. Inclusion of an obligation to state in the published report of the supervisory board whether the key points of the external audit were also the most important points discussed between the audit committee/supervisory board and the auditor, and to explain how these points were addressed.
3. Inclusion of an obligation to provide substantiation in the remuneration report for the amount of the short-term bonuses awarded and for the (implications of the) use of the statutory authority to adjust or claim back bonuses. This information enables shareholders to form an opinion on the implementation of the remuneration policy by the supervisory board.

We will explain our most important concerns below.

Preamble

Eumedion welcomes the fact that the Monitoring Committee intends to better channel the operation of the 'comply or explain' principle and to give the quality of the explanation a prominent place in the Code. Good corporate governance demands customization; no 'one size fits all' approach is possible.

The ‘comply or explain’ principle provides the management board, the supervisory board and the shareholders the opportunity to adapt the corporate governance of their company to the specific characteristics of their business and to their own needs. Eumedion believes that there must be a specific explanation for a non-compliance with the Code and not a generic one. As is made clear by the latest report on compliance with the Code, the quality of the explanations that enterprises give for their failure to comply with the Code is frequently unsatisfactory and leaves room for improvement.[2] The European Commission has also studied this and it published an official recommendation in 2014 intended to improve the quality of the explanation in the event of a departure from the best practice provisions of the Code.[3] Eumedion welcomes the fact that the Monitoring Committee has implemented this recommendation by specifying in the revised Code which elements must always be contained in the explanation.

Section 1. Long-term value creation

Long-term value creation

Eumedion is pleased to note that the Van Manen Committee requires listed companies to set out their views on the creation of long-term value more clearly in the management report and to state whether this can be achieved with the existing business model. Further aspects that are welcomed by Eumedion are the proposals for a better description of the strategy intended to create that value and for information on how internal culture can contribute to this objective, on the most significant opportunities and risks for the company, and on how the risks are managed.[4] Investors who by their nature have a long-term horizon, such as pension funds, insurers and asset managers, will benefit from that. Better provision of information on these aspects may actually induce these investors to invest more in Dutch listed companies and these proposals are also very much in line with Eumedion’s appeal to listed companies to take steps towards more integrated reporting.

The role of the supervisory board in the management board’s adoption of the view on long-term value creation is not completely clear to Eumedion, however. Draft provision 1.1.2 stipulates that the management board should *engage* the supervisory board at a timely stage in formulating the view on long-term value creation and the strategy for its realisation, while it follows from the explanatory notes to this provision that this view must be submitted to the supervisory board *for approval*. Eumedion recommends that the best practice provision should be consistent with the explanatory notes included on this subject. Additionally Eumedion regrets that the supervisory board is only required to state in its report that a ‘discussion’ has been held on the subjects referred to in draft provision 1.1.2. We take the view that it may be expected of the supervisory board that it states in its published report how it monitored issues such as the establishment and implementation of the strategy to realise long-term value creation.

[2] Monitoring Report on the 2014 Financial Year from the Monitoring Committee, p. 27.
[3] Commission Recommendation of 9 April 2014 on the quality of corporate governance reporting (‘comply or explain’), PbEU 2014, L 109.
[4] Draft provisions 1.1.3, 1.4.1 and 2.5.5.

Accountability for risk management

Eumedion welcomes the fact that the revised Code gives more consideration to risk management. Furthermore, Eumedion endorses the position of the Monitoring Committee that every listed company must in principle have an internal audit function in place, in which context Eumedion is in agreement with the increase in the number of provisions relating to that internal audit function. If there is no internal audit function, the audit committee should among other things assess whether adequate alternative measures have been taken (draft provision 1.3.6). We argue to state the alternative measures that have been taken in the report of the supervisory board and recommend to adjust draft provision 1.3.6 accordingly.

Eumedion nevertheless regrets that scarcely any external accountability has to be rendered concerning the implementation of the proposals designed to strengthen risk management. We believe it is a major omission for example, that draft provision 1.5.4 only requires the supervisory board to state in its report that a 'discussion' has been held on the subjects referred to in draft provision 1.5.3. Various stakeholders have been pressing for a long time for a more informative report from the supervisory board. More specifically, we take the view that the supervisory board should render accountability externally on matters such as the effectiveness of the external and internal audit processes and the substantive considerations with regard to financial reporting. Since the financial year 2014 the external accountant has an obligation to disclose the key points of the audit in his comprehensive audit opinion. These are the matters that, in the professional opinion of the external auditor, were the most significant in the audit of the annual accounts. The least that may then be expected of the supervisory board – which is the first point of contact for the external auditor – is that it states in its published report on its activities that the key points of the external audit were also the most important points discussed between the audit committee/supervisory board and the external auditor, and that information is provided on how these points were addressed. It still occurs too often in practice that the audit opinion from the external auditor offers more insight into the risk profile of the company than the management report and the report of the supervisory board. We urgently request the Monitoring Committee to also consider including a reference to draft provision 1.5.3 in the provision regarding the content of the report of the supervisory board (draft provision 2.3.11).

Eumedion welcomes the proposal that listed companies should issue a press release in the event of the early departure of the external auditor, explaining the reasons for the said auditor's departure (draft provision 1.6.4). This would provide good points of reference for shareholders who wish to enter into a dialogue with the listed company on this subject. In addition, Eumedion welcomes the widening of the scope of the 'in control' statement. The management board may indeed be expected to be able to provide substantiation for the continuity of the company in the coming year.

Performance of the work of the external auditor

Eumedion approves the proposed widening of the provision of information to the external auditor (draft provision 1.7.1). All the more since, as from the 2016 financial year, the auditor does not merely audit the financial statements, but also has an obligation to actively investigate and identify material

misstatements in the management report and to report on these in the audit report. It follows from the revised Code that the management board is responsible for the provision of information to the external auditor. The external auditor in turn has a duty to inform the supervisory board of material irregularities at the company, including irregularities concerning the integrity of the financial reporting (draft provision 1.5.5). Eumedion wonders if this provision also extends to the situation in which the management board neglects to provide information to the external auditor. Clarification is required on this point.

In common with the Monitoring Committee, we believe that the external auditor must be given an identifying role with regard to failings in the accountability for compliance with the Code. The Monitoring Committee proposes that the external auditor must inform the management board and the supervisory board if he encounters misrepresentations of the company's compliance with this Code in the management report or the report of the supervisory board (draft provision 1.7.7). It is unclear what happens if the management board or the supervisory board does not remove the incorrect information. In our opinion, the auditor must in that case comment on this in his audit report. The draft provision must be expanded on this point.

To our surprise the Monitoring Committee is proposing to delete the provisions in the Code that refer to the contents of the report of the external auditor (best practice provision V.4.3). The reason provided for these deletions is that the list is not exhaustive in the opinion of the Monitoring Committee. This is not a convincing justification in Eumedion's opinion.

Section 2. Effectiveness of management and supervision

Supervisory directors

The draft position paper published by Eumedion on the position of minority shareholders in companies with a controlling shareholder[5] makes it clear that the shareholder structure of Dutch listed companies has become increasingly concentrated in recent years. This is a development that has implications for the composition of supervisory boards, which more and more often includes representatives of major shareholders. Through their shareholdings those major shareholders have an economic interest by the performance of the company. Because of that economic interest those major shareholders have a direct interest that the company is internally supervised well. Since it can provide a positive impulse to the quality of the internal supervision, Eumedion is not opposed to the representation of major shareholders in supervisory boards. According to the current Code the number of dependent persons is limited to a maximum of one (best practice provision III.2.1). In the revised Code the impression is created that the appointment of multiple supervisory board members who have a shareholding in the company of at least ten percent should be encouraged (draft provision 2.1.7 and p. 28 of the consultation document). Since the majority of the supervisory board members should be independent members and the number of dependent supervisory board members within the meaning of draft provision 2.1.6 is limited to a maximum of one person, the

[5] http://www.eumedion.nl/en/public/knowledgenetwork/position-papers/2015-10-draft-position-paper-protection-minority-shareholders.pdf..

supervisory board members with shareholdings can exert much influence on the decision-making within the supervisory board. The question can therefore be raised whether the 'checks and balances' within the supervisory board will still be functioning well due to this proposal.

On the other hand, Eumedion is in agreement with the proposal that the chairman of the supervisory board should be independent (draft provision 2.1.9). This can contribute to the independent implementation of the supervision by the supervisory board. In addition, Eumedion would like to make a somewhat more technical remark. It is not clear to Eumedion why a supervisory board member representing a legal entity that holds ten percent of the shares in a company (draft provision 2.1.6, v) must be treated differently to a supervisory board member who holds the same interest directly (draft provision 2.1.7).That share capital is represented in the supervisory board in both situations.

Currently the Code states that a supervisory board member may not be granted any shares and/or rights to shares (best practice provision III.7.1). The current Code does not prevent a supervisory board member to acquire shares in the company on whose board he sits with the *cash* remuneration received. This was the reason for the Monitoring Committee to propose that supervisory board members in future may be awarded remuneration in the form of shares and/or rights to shares (draft provision 3.3.2).

Eumedion is of the opinion that the remuneration of a supervisory board member should contribute to long-term value creation and should not detract from the quality of internal supervision. The Monitoring Committee rightly concludes (p. 43) that a situation should be prevented in which remuneration encourages supervisory board members to focus too much on the short term, thus losing sight of long-term value creation. Against this background the proposal to grant supervisory board members remuneration in the form of rights to shares cannot count on Eumedion's support. Moreover, because of this the Netherlands would no longer comply with a recommendation of the European Commission from which it follows that the remuneration of supervisory directors must not include share options.[6] Also when supervisory board members are awarded remuneration in the form of shares Eumedion sees the risk that those supervisory board members will take their own personal and financial considerations seriously into account in the performance of their supervisory duties, especially in case of a (takeover) transaction. Therefore Eumedion would prefer that the current principle according to which a supervisory board member may not be granted any shares and/or rights to shares is maintained. Another reason is that Eumedion questions the Monitoring Committee's observation that " there is a need in the market for the option of share-based remuneration for supervisory board members"[7]. From the national supervisory board members study 2015[8] follows that a vast majority of the supervisory board members who took part in this study is not in favour of supervisory board members having any form of financial interest in the organization

[6] Commission Recommendation of 30 April 2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies (PbEU 2009, L. 120).
[7] P. 43 of the consultation document.
[8] https://www.tias.edu/docs/default-source/Kennisartikelen/rapport-nco-2015.pdf?Status=Temp&sfvrsn=2, p. 7 and 23. From this study follows that 86% of the supervisory board members who took part in the study is of the opinion that it is not a good idea to have any form of financial interest in the organization where they are members of the supervisory board.

where they are members of the supervisory board. By awarding remuneration in the form of shares it would only be stimulated that supervisory board members have such financial interest.

Nevertheless Eumedion acknowledges that there can be circumstances in which a supervisory board member holds shares in the company on whose board he sits. This includes the situation in which a major shareholder is appointed as supervisory board member. Therefore Eumedion supports the proposal to (just like in the current Code[9]) determine that any shares held by a supervisory board member in the company should be long-term investments.

Eumedion is in agreement with the proposal to require listed companies to issue a press release in the event of the early retirement of a member of the supervisory board or the management board, stating the reasons for his or her departure (draft provision 2.2.3) and with the proposal regarding the appointment and reappointment period of supervisory board members (draft provision 2.2.2). Eumedion wonders why it is necessary to prescribe that the chairman of the supervisory board is no longer permitted to be the chairman of the selection and appointment committee (draft provision 2.3.4). In Eumedion's opinion, this proposal is not really consistent with the overarching objective of the Monitoring Committee, which is the realization of long-term value creation. The fact is that the chairman of the supervisory board should be the person primarily responsible for good succession planning and for the effective functioning of the management board and the supervisory board. While the current Code states that a maximum of one member of each committee may not be independent (best practice provision III.5.1), the revised Code states that more than half of the members of the committees should be independent (draft provision 2.3.4). It follows from the consultation document (p. 33) that this change is the result of the Monitoring Committee's proposal regarding the independency of supervisory board members (draft provisions 2.1.6 and 2.1.7). According to Eumedion this is no convincing justification and recommends to maintain the current principle that a maximum of one member of each committee may be dependent.

Eumedion can endorse the tightening up of the provision concerning the (self-)evaluation of the functioning of the supervisory board and the accountability for this in the report of the supervisory board (draft provisions 2.2.6 and 2.2.8). The Monitoring Committee could make a further contribution to guaranteeing the quality of this (self-)evaluation by including a best practice in the Code to the effect that an evaluation under external guidance should be organized at least once every three years.[10] This is line with the codes in various other countries.[11] Another point where improvements can be made, is the provision of information on the supervisory board meetings (draft provision 2.4.3). It is important for investors to be able to form an opinion on the time commitment of individual supervisory board members. Eumedion therefore recommends that the Code includes a provision that the report of the supervisory board should give information with respect to the level of attendance of the individual supervisory directors in the supervisory board meetings (instead of the currently

[9] Best practice provision III.7.2.
[10] In its Focus Letter 2014 Eumedion also asked that this possibility should be considered (https://www.eumedion.nl/en/public/knowledgenetwork/speerheadsletter/2014-focus-letter.pdf) . Also see the Banking Code of the Dutch Banking Association (NVB).
[11] Monitoring Report Financial Year 2014 from the Monitoring Committee, p. 51.

required naming of the supervisory board members who are frequently absent).[12] This too is already customary in other countries.[13] Additionally Eumedion believes that the report of the supervisory board should also give information with respect to the level of attendance of the members of the committees of the supervisory board in the meetings of those committees.

Diversity

A management board and supervisory board with diversified membership can contribute to the functioning of those bodies, which is of huge importance for institutional investors. Eumedion is consequently in agreement with the Monitoring Committee's proposal to expand the best practice provision on diversity to apply to the management board (draft provision 2.1.5). The Dutch Cabinet has announced that its target figure of having at least 30% female members in the management and supervisory boards at listed companies is to be reinstated.[14] Eumedion agrees with the Monitoring Committee (p. 26) that it is not necessary, therefore, to repeat the target figure in the Code. The letter from the Minister of Education, Culture and Science (OCW)[15] makes it clear that insufficient progress has been made on achieving the statutory target figure. In common with the Monitoring Committee, Eumedion does believe, however, that additional aspects of diversity can be provided for in the Code. Eumedion therefore welcomes the Monitoring Committee's proposal that, in future, the corporate governance statement must set out what measures are being taken in order to achieve the statutory target figure and by when. The proposal that in future this statement must also address the objectives of the diversity policy, how this policy has been implemented, and the results of the policy can rely on the support of Eumedion.

Culture

Knowledge of the culture at a company that is focused on long-term value creation is important to an investor who wants to be able to make a good analysis of a listed company and to make investment decisions on the basis of that analysis. Eumedion therefore welcomes the proposal that the management report should provide a better description of how internal culture contributes to long-term value creation (draft provision 2.5.5).

Avoidance of conflicts of interest

Currently the Code states that any conflict of interest or apparent conflict of interest between the company and its management board members and supervisory board members should be avoided (principle II.3 and III.6). De Monitoring Committee proposes to delete the word 'apparent'. This is motivated by mentioning that an apparent conflict of interest is of a subjective nature (p. 81). This seemingly technical adjustment results in a restriction of the scope of this provision. Eumedion is not in favor of it. In addition the Monitoring Committee proposes to delete the best practice provision which contains examples of situations in which there is a conflict of interest between the company and its management board member (best practice provision II.3.1). According to the Monitoring

[12] In its Focus Letter 2013 Eumedion also asked that this possibility should be considered http://www.eumedion.nl/en/public/knowledgenetwork/speerheadsletter/2013_spearheads_letter.pdf).
[13] Monitoring Report Financial Year 2014 from the Monitoring Committee, p. 51.
[14] https://www.government.nl/topics/gender-equality/news/2016/01/15/statutory-target-again-for-gender-balance-on-company-boards.
[15] Kamerstukken (Parliamentary Papers) II 2015-16, 30 420, no. 227.

Committee “the list is neither exhaustive nor representative of all situations that might occur in this respect”. Eumedion agrees that the answer to the question whether there is a (apparent) conflict of interest depends on the specific circumstances of the case. According to Eumedion this is still no reason to delete the further elaboration of the statutory concept of ‘conflict of interest’ from the Code. Also on other subjects the revised Code provides further elaboration on statutory provisions, in this respect the best practice provisions regarding diversity can serve as an example.

Special committee for takeover situations and transactions

Eumedion has no objection to the essence of the proposal that a special takeover or transaction committee should be formed consisting of members of the management and supervisory boards (draft provisions 2.7.4 and 2.7.5). The role of the supervisory board members who have seats on this committee should be limited to supervision. Eumedion is consequently in agreement with the Monitoring Committee’s conclusion that the formation of a special takeover or transaction committee should not affect the responsibilities of management board members and supervisory board members under the articles of association. Eumedion does, however, object to the proposal that also supervisory board members with a personal and financial interest should be permitted to sit on this special committee. Especially in ‘critical’ situations shareholders benefit from independent supervision by the supervisory board. Furthermore, Eumedion believes that a management board member or a supervisory board member who decides to join the bid must withdraw immediately from the takeover or transaction committee and must refrain from expressing an opinion on the amount and the other merits of the bid in the company’s position statement on the bid. That should also apply to the situation in which extraordinary arrangements have been made for management board and supervisory board members which are linked to the success of the takeover or the transaction.

It follows from the consultation document (p. 35) that the Monitoring Committee is using the consultation period to sound out whether it is considered advisable to expand the circumstances in which a special committee can be formed so as to include stress situations in general. Eumedion can imagine that a committee of that kind has additional value in those situations.

Section 3. Remuneration

General

The Monitoring Committee proposes to cut the principles and best practice provisions on remuneration back down to the core in the revised Code. A large number of principles and best practice provisions are being deleted to achieve this objective. Eumedion is in favour of a practicable and workable Code and the scrapping of provisions in the Code that overlap with existing legislation and regulations contributes to this. We are therefore in agreement with the proposal of the Monitoring Committee to delete the claw back provision and the reasonableness and fairness criterion from the Code, since this is already provided for in law.[16] Eumedion supports that the remuneration policy should specify the parameters on the basis of which the company may, under pre-determined

[16] Section 2:135, paragraphs 6 and 8, Civil Code of the Netherlands.

circumstances, reclaim the variable remuneration granted or adjust such remuneration downwards (draft provision 3.1.4). This may provide more clarity about the situations in which those powers can be used. Also the Dutch Financial Supervision Act mentions some circumstances in which a financial institution must use its statutory power of adjusting or reclaiming variable remuneration.[17] It is impossible for all situations that might develop to be described beforehand in the remuneration policy. Eumedion believes that the supervisory board must always – including in a situation which is not mentioned beforehand in the remuneration policy - be able to adjust bonuses on the basis of the concrete facts and circumstances of the individual case. [18] Eumedion recommends to clarify this in the guidance on draft provision 3.1.4.

In Eumedion's view, the Code should also address the settlement of the remuneration for management board members in the case of a public bid, legal merger or demerger. The fact is that it quite often happens in practice that all shares and/or options that are not yet vested are granted unconditionally to the management board members when a bid is declared unconditional. In Eumedion's opinion, the shares and/or options that have become unconditional should in the event of a public bid, legal merger or demerger be settled in proportion to the elapsed performance period[19] and argues that this should be embedded in the Code.

The Monitoring Committee also suggests that best practice provisions II.2.1 to II.2.7 inclusive and II.2.13 should be deleted. The reason given for this in the consultation document (p. 83 to 85 inclusive) is that these provisions have been "Deleted to make the company's remuneration policy simpler and more transparent." Although Eumedion supports this objective stated by the Monitoring Committee, we do actually wonder whether the time is ripe enough to eliminate so many provisions dealing with the remuneration of management board members. That an adequate remuneration policy for management board members is important, is demonstrated by the attention that is paid to it in the Dutch public debate. Also for shareholders the subject executive remuneration was an important subject last year, this follows from the evaluation of the 2015 AGM season carried out by Eumedion.[20] Recent experience has shown that the drafting of a remuneration policy is too important a matter to be left to the supervisory board alone. Furthermore, the Monitoring Committee concludes in its most recent monitoring report that the remuneration provisions are not consistently applied. Companies will be rewarded for this behaviour if the said provisions are abolished, which would be the reverse of what we should be trying to achieve. By deleting best practice provisions II.2.4, II.2.5 and II.2.6, the Monitoring Committee is sending out a signal that it has no problem with options and shares being granted without performance criteria, which is the wrong message in Eumedion's opinion. In Eumedion's view, the revised Code should at least contain a provision stating that the granting of remuneration of this kind must always be subject to performance criteria that are specified in advance and can be measured. If such provision is not incorporated the Netherlands would no

[17] Section 1:127, paragraphs 2 and 3, Financial Supervision Act of the Netherlands.
[18] See for example the discretionary downward adjustment of the variable remuneration for the members of the management boards at Unilever and Philips for the financial year 2015, as is referred to in the 2015 annual reports of these companies.
[19] This principle is also included in the Eumedion principles for a sound remuneration policy for the management boards of Dutch listed companies (http://www.eumedion.nl/nl/public/kennisbank/aanbevelingen/2016-uitgangspunten-verantwoord-beloningsbeleid.pdf).
[20] http://www.eumedion.nl/en/public/knowledgenetwork/publications/2015-proxy-season-evaluation.pdf.

longer comply with the recommendation of the European Commission regarding the remuneration of management board members.[21] The deletion of the above-mentioned best practice provisions and II.2.13 means that other elements of the said Commission Recommendation will no longer be complied with. This Recommendation stipulates for example that the remuneration statement must (also) contain sufficient information on the performance criteria that form the basis on which share options, shares and other variable remuneration components are granted and should address the relationship between remuneration and performance. In addition, the Recommendation states that a description should be given of the main characteristics of supplementary pension and early retirement schemes for management board members. It also follows from the Recommendation that when a variable remuneration component is granted, a large part of the variable component must be deferred for a minimum period and that shares do not become unconditional until at least three years after they have been granted.

Remuneration policy and accountability for remuneration

From the consultation document (p. 41) follows that remuneration structures are frequently complex and that this results in blurred transparency. Draft principle 3.1 states that the remuneration policy applicable to management board members should be simple and transparent. In Eumedion's view it has to be about a clear and understandable remuneration policy[22] and advises to embed this principle in draft principle 3.1. Eumedion supports that external account should be rendered by describing in the remuneration report in a clear and transparent manner how the remuneration policy is implemented so the general meeting can perform its supervisory duties (draft provision 3.4.1). However the content of the remuneration report should be tightened up in the revised Code. Eumedion believes that the remuneration report should also provide substantiation of the amount of the short-term bonus granted on the basis of the performance criteria that have or have not been met (is the score 'at threshold', 'below target', 'at target' or 'above target'?). The supervisory board is able to adjust bonuses or claim them back on the grounds of the law. It is advisable in Eumedion's opinion that the remuneration report must provide reasons for the use of these powers and also state the financial consequences of their use. Eumedion recommends to amend the Code in the sense of what is stated above.

Press release in the event of early retirement

Eumedion is in favour of the proposal that, in the event of the early retirement of a member of either the management board or the supervisory board, the listed company should be required to issue a press release containing the reasons for his or her departure (draft provision 2.2.3). Eumedion suggests that, in addition to this, the press release should also be required to address the (special) arrangements that have been made with the management board member and which were not included in the previously published elements of the contract between the board member and the company (draft provision 3.4.2). These could be advisory positions or the settlement of shares and/or

[21] Commission Recommendation of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies (PbEU 2004, L. 385) and Commission Recommendation of 30 April 2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies (PbEU 2009, L. 120).

[22] This principle is also included in the Eumedion principles for a sound remuneration policy for the management boards of Dutch listed companies (http://www.eumedion.nl/nl/public/kennisbank/aanbevelingen/2016-uitgangspunten-verantwoord-beloningsbeleid.pdf).

options that have not yet become unconditional. If a former management board member receives a payment on his or her departure, the press release – and not only the remuneration report (according to draft provision 3.4.1) - should provide substantiation of how this remuneration does not reward inadequate performance.

Role of the general meeting as regards remuneration

Eumedion believes it is a missed opportunity that the Monitoring Committee has not embedded the culmination of the 'say on pay' discussion in the Code. Shareholders who have objections as to how the remuneration policy has been implemented by the supervisory board now have no other choice than to express their dissatisfaction by voting against the proposal to discharge the members of the supervisory board for the performance of their duties. That is a drastic remedy. The implementation of the remuneration policy is not the only responsibility of the supervisory board. Therefore Eumedion believes that shareholders must have a 'deterrent' when the remuneration policy they have adopted is not implemented adequately by the company. The European Commission, the European Council of Ministers and the European Parliament are currently negotiating on the proposal for a directive on shareholder engagement. It is already clear at this moment, however, that the remuneration report will have to be put to a vote at the general meeting in future.[23] In view of the implementation period that applies to this European directive, it will be some time yet before Dutch law includes a provision that shareholders have the right to vote on the remuneration report. In the interim period, therefore, we suggest that a requirement for the remuneration report to be submitted to a separate vote at the general meeting should be embedded in the Code.

Furthermore, Eumedion would like to argue in favour of tightening up the Code on another point and clarifying it on one point. In line with the present Code, the proposal for the appointment of a member of the management board should be dealt with as a separate item on the agenda during the general meeting (draft provision 4.1.3). Eumedion believes that a special payment to a management board member (such as a signing bonus, severance pay, retention or takeover bonus) that does not come under the remuneration policy adopted by the general meeting should be dealt with as a separate item on the agenda. This means that the proposal for special compensation of this kind must be voted on at the general meeting separately from the proposal for the appointment of this management board member. In addition, Eumedion argues that the Code should provide clarification on when an amendment to the remuneration policy is so substantive that the policy has to be re-submitted to the general meeting for adoption.

Section 4. The (general meeting of) shareholders

General

The consultation document (p. 46) refers to the various discussions and developments concerning the rights and responsibilities of shareholders, such as the directive on shareholder engagement and the discussion on the position of (minority) shareholders of companies with a controlling shareholder.

[23] http://data.consilium.europa.eu/doc/document/ST-11243-2015-INIT/en/pdf.

In view of this, the Monitoring Committee believes it is too early at the time of this revision to introduce radical substantive changes to the present Code with regard to the relationship between the company and its shareholders. Eumedion is in agreement with the approach taken by the Monitoring Committee, which is to wait until the present discussions and developments have crystallized further before making concrete proposals for principles and best practice provisions. It is important to avoid proposing principles and best practice provisions that are in conflict with the outcomes of the said developments and discussions. In Eumedion's view, however, the Monitoring Committee could actually draft proposals now to address those issues where the discussion has already crystallized, such as putting the remuneration report to a vote at the general meeting.

The Monitoring Committee also argues that, in a future revision of the Code, it would be worthwhile exploring the possibilities of incorporating the shareholder responsibilities included in the Code into a stewardship code. Eumedion is in agreement with this, but recommends seeking alignment with existing initiatives. In 2011 Eumedion itself formulated ten best practices for engaged share ownership for its members.[24]

One of the new elements in the best practice provisions for the decision-making process at general meetings is the proposal that management board and supervisory board members nominated for appointment should attend the general meeting at which votes will be cast on their nomination (draft provision 4.1.6). Eumedion supports this proposal and sees added value in creating an opportunity for shareholders to directly question the aforementioned candidates for appointment to the management board and supervisory board. The Monitoring Committee rightly concludes that this will contribute to the relationship and interaction between the company's management board members and supervisory board members and its shareholders. In addition, Eumedion believes that the external auditor being proposed for appointment should also be present at the general meeting where his or her appointment will be voted on and recommends that this will be embedded in the Code. Another new proposal is to sum up in a single best practice provision all the subjects that must be submitted to the general meeting as separate items on the agenda. Eumedion is generally in favour of this proposal and believes that the transparency and practicability of the Code will benefit from this new provision. However Eumedion argues, as already stated above, that special payments and in addition to that the external auditor's appointment[25] should be added to this list.

Eumedion is somewhat less enthusiastic about the proposal that information should always be made available to shareholders in English (draft provision 4.2.2). We wonder whether a provision of this kind is appropriate in a Code that is intended to become more 'principle based'. Furthermore, it is not up to the management board and supervisory board of a company to decide that the most important accountability documents – the management report and the annual accounts – should be prepared in English; this decision rests with the general meeting.[26] If a general meeting of a (small) listed company takes the view that the management report and the annual accounts may be drawn up in

[24] http://www.eumedion.nl/en/public/knowledgenetwork/best-practices/best_practices-engaged-share-ownership.pdf .
[25] See draft provision 1.6.1.
[26] Section 2:362 paragraph 7 and section 2:391 paragraph 1 of the Civil Code of the Netherlands.

the Dutch language, it would be very strange to have to explain this in the management report as an instance of non-compliance with the Code.

The revised Code stipulates that the chairman of the supervisory board should ensure that "effective communication with shareholders is assured" (draft provision 2.3.6, xii) and that the company should have a policy on bilateral contacts with shareholders (draft provision 4.2.3). From the preamble follows that shareholders should act in keeping with the principles of reasonableness and fairness. In that context shareholders are expected to be willing to engage with the company and fellow shareholders. Participants of Eumedion do what they can to enter into dialogue with the company, but they cannot do without the cooperation of the company. In order to conduct a dialogue alongside a favorable attitude of shareholders also a favorable attitude of both the management board and the (chairman of the) supervisory board is important. Therefore Eumedion argues to include in the preamble – just like the Code currently states[27] – that the management and supervisory board should be prepared to enter into a dialogue. Furthermore, the supervisory board should report annually on the relationship with the shareholders of the company.

Response time

One of the starting points observed for the revision of the Code is the elimination of provisions that conflict with legislation and regulations. The preservation of the response time in the Code detracts from this starting point. It follows from the legislation[28] that an agenda item proposed by a shareholder must, in principle, be placed on the agenda, if the listed company has received a request to this effect no later than on the sixtieth day prior to the date of the general meeting and this shareholder meets the capital requirements (under the articles of association). The Code stipulates that the management board can additionally invoke a 'waiting period' of no longer than 180 days in the event that a shareholder wishes to place a subject on the agenda that could lead to a change in the company's strategy. Doubts exist, however, about whether the response time is in line with the mandatory rules on the right to place an item on the agenda, which are of European origin. It follows from the memorandum in response to the second report on the Frijns bill, for example, that the shareholder himself decides "*whether he will honour a response time for the management board that is longer than the time that the board has - on the grounds of the statutory provision - to consult on a request for an item to be placed on the agenda. If the does so, he is in fact waiving his entitlement to invoke the right to place an item on the agenda within a shorter period*. *Neither the law nor the Code compels him to do this, so that the characterization "erosion of the right to place an item on the agenda" does not seem appropriate. The shareholder is entitled to invoke the shorter statutory period of notice required for putting items on the agenda.*"[29] In Eumedion's opinion, therefore, the provision about the response time should be deleted.

[27] Preamble 4 of the current Code.
[28] Section 2:114a Civil Code of the Netherlands
[29] Kamerstukken (Parliamentary Papers) II 2010/11, 32 014, nr. 12, p. 10.

Issuing depositary receipts for shares

In the past trust offices were usually set up to prevent a (chance) majority of shareholders from controlling the decision-making process as a result of absenteeism at a general meeting. In 2015 approximately 70% of the share capital took part in decision-making at general meetings[30] and the decision-making process has become much more representative as a consequence. Eumedion agrees with the Monitoring Committee that it is definitely time to dissolve trust offices that were set up to prevent (chance) majorities of shareholders from controlling the decision-making process as a result of absenteeism at a general meeting.[31] In addition to that Eumedion supports the proposal of the Monitoring Committee that depositary receipts for shares may only be used as an anti-takeover protective measure in future, provided that this is the only anti-takeover protective measure of the company (draft principle 4.4). In Eumedion's opinion, the new best practice provisions on the issue of depositary receipts for shares should be in line with this new principle. That is currently not the case. It appears that draft provisions 4.4.5 (in exercising its voting rights, the trust office should be guided primarily by the interests of the depositary receipt holders) and 4.4.8 (each depositary receipt holder may also issue binding voting instructions to the trust office) are still consistent with the guiding principle observed by the Tabaksblat Committee and the Frijns Committee that the issue of depositary receipts for shares may still be used as a means to safeguard the continuity of the decision-making process, while the Van Manen Committee in 2016 actually rejects this same principle.

If a company decides to maintain their depository receipts for shares, this measure should in Eumedion's opinion only provide for protection in 'war time'. In line with this principle in 'peace time' the trust office may only take part in voting at the general meeting on the explicit instructions of a holder of depositary receipts (and may not automatically vote on the receipts for which no proxies have been asked) and that the trust office should automatically grant voting proxies for each individual general meeting to holders of depositary receipts, which means without the holders having to ask explicitly for these. This practice is already in place at the ABN AMRO Group. With this principle also matches that the management board of the trust office in 'peace time' is attending the general meeting as an observer.[32] A trust office should in Eumedion's opinion resemble as much as possible a anti-takeover foundation. The obligation for trust offices to call meetings of holders of depository receipts in 'peace time' are at odds with this principle.[33] Those meetings should in future only be mandatory in case the trust office have used its power to limit, exclude or revoke the voting proxies of holders of depository receipts.[34] In this meeting the trust office should render accountability why the voting proxies are limited, excluded or revoked and, if applicable, how long this situation will last. This meeting should be organized within six months after the decision of the trust office to not grant voting proxies. This is in line with what is customary for anti-takeover foundations of listed

[30] http://www.eumedion.nl/en/public/knowledgenetwork/publications/2015-proxy-season-evaluation.pdf.
[31] Like ING Group intends to do (agenda of general meeting of ING Group dated 25 April 2016).
[32] Possibly also as a voter when a holder of depository receipt has given a voting instructions to the trust office.
[33] Thereby Eumedion has taken into consideration that meetings of holders of depository receipts in practice are poorly visited. During the 2015 meeting of holders of depository receipts of ING Group only 0.016% of the issued share capital was presented or represented, at the meeting of Unilever 0.005% of the issued share capital and at the meeting of Heijmans 0.02% of the issued share capital (a grand total of three holders of depository receipts). At the 2015 meeting of Telegraaf Media Group only one holder of depository receipts was present.
[34] Section 2:118a, paragraph 2, Civil Code of the Netherlands.

companies who have taken anti-takeover preference shares.[35] Since both depository receipts and anti-takeover foundations may in future only be used as temporary anti-takeover protective measure the moment of external accountability about the use of such measure should be the same.

In the present Code the maximum appointment period for management board members of a trust office is linked to the maximum appointment period for supervisory board members. The Monitoring Committee suggests that the appointment period for a supervisory board member should be reduced (in principle) from twelve years to eight (draft provision 2.2.2), but retains the twelve-year appointment period for management board members of a trust office (draft provision 4.4.3). Eumedion wonders why the said link has been abandoned and advises to align the maximum appointment period of the management board members of the trust office with that of supervisory board members.

Other points

Ban on quarterly reports

On the grounds of the Dutch Act on Financial Supervision, listed companies are no longer obliged to publish quarterly reports.[36] The Dutch Minister of Finance has urged the Monitoring Committee to consider including a ban on the publication of quarterly figures by listed companies in the proposals for revision of the Code.[37] According to the Minister the publication of quarterly figures may result in too much focus on short-term interests.

Eumedion shares the Monitoring Committee's opinion that it would be going too far to advise against the voluntary publication of quarterly reports altogether. The fact is that quarterly reports often contain information that is of value to investors when making investment decisions. For investors who by their nature have a long-term horizon, such as pension funds, insurers and asset managers, it is important that in those reports information is provided on the progress of the implementation of the strategy intended to create long-term value creation. The decision on whether or not to continue publishing quarterly reports should lie with the listed companies themselves, in Eumedion´s view.

Regular revision and monitoring of the Code

It has been established that guaranteeing the successful operation of the Code comprises not only monitoring, as has been done adequately in the past years, but also ensuring that the Code itself continues to be dynamic and effective. Eumedion therefore supports the suggestion of the Monitoring Committee that the Code should be evaluated at fixed regular intervals in future and amended if necessary. Furthermore, the Monitoring Committee suggests that continuity in monitoring could be improved by appointing a permanent committee with rotating membership. Eumedion will be pleased to enter into consultations on this subject with the other 'supportive parties', such as the Confederation of Netherlands Industry and Employers (VNO-NCW), the Association of Securities-

[35] Manual Corporate Governance of Eumedion, page 43 (http://www.eumedion.nl/en/public/knowledgenetwork/manual/eumedion_cg_manual_2013.pdf).
[36] Netherlands Bulletin of Acts and Decrees 2016, 31 and Netherlands Bulletin of Acts and Decrees 2016, 41.
[37] Annex to Kamerstukken (Parliamentary Papers) II 2015/16, 34232, no. 9.

Issuing Companies (VEUO), the Dutch Trade Union Confederation (FNV) and the Association of Stockholders (VEB).

Revised code for one tier boards

Eumedion welcomes the fact that the Monitoring Committee wishes to offer companies with a one tier board a clearer basis for applying the Code. It is stated on page 25 of the consultation document that the Monitoring Committee has commenced preparations to tailor the full text of the proposals for the revised Code to one tier boards. It is not certain whether separate consultation on that text will follow, but Eumedion would be grateful if the Monitoring Committee were to organize this.

Eumedion would appreciate it greatly if the points set out above were taken into consideration in the adoption of the final new version of the Corporate Governance Code. We will of course be pleased to clarify our comments orally. Our point of contact is Diana van Kleef (diana.vankleef@eumedion.nl, tel. 070 2040 302).

Yours faithfully,

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