

# Quoted

**The updated Dutch Corporate Governance Code**

# In this edition

- Introduction
- Sustainable long-term value creation
- Role of shareholders
- Diversity and inclusion
- Some other changes

# 1. Introduction

- 1.1 On 20 December 2022, the Corporate Governance Code Monitoring Committee (**Committee**) published an update to the Dutch Corporate Governance Code (**Governance Code**, and the so updated Governance Code: **2022 Governance Code**). According to the Committee, the Governance Code needed to be updated in areas such as long-term value creation, diversity and the role of shareholders.<sup>1</sup> Furthermore, the Committee considered it useful to make some updates based on legislative and regulatory changes.
- 1.2 The Governance Code applies to (i) Dutch limited liability companies whose (depository receipts for) shares are admitted to trading on an EU regulated market or a comparable system, and (ii) Dutch limited liability companies with a balance sheet value exceeding EUR 500 million whose (depository receipts for) shares are admitted to trading on a multilateral trading facility or a comparable system.<sup>2</sup> The Governance Code applies on a “comply-or-explain” basis, meaning that the Governance Code requires companies to give an account on how they have applied the Governance Code in the Company’s management report either by confirming that they have complied with the Governance Code’s principles or, where they have deviated from the Governance Code, by explaining their reasons.
- 1.3 The 2022 Governance Code entered into force as for the financial year beginning on or after 1 January 2023, meaning that compliance with the 2022 Governance Code will need to be accounted for in the management report for the financial year 2023. To the extent a company is required pursuant to the 2022 Governance Code to amend its existing policies, procedures or other written records, it must do so ultimately by the end of its financial year 2023.

- 1.4 In this edition of Quoted we discuss and highlight the main changes to the Governance Code, whereby we focus on three principal themes: sustainable long-term value creation (paragraph 2), the role of shareholders (paragraph 3) and diversity and inclusion (paragraph 4). In these paragraphs we also discuss other recent developments concerning these themes. Lastly, in paragraph 5 we address some other relevant updates to the Governance Code.<sup>3</sup>

## 2. Sustainable long-term value creation

Long-term value creation has been one of the underlying notions of the Governance Code ever since its inception in 2003. However, it was only in the 2016 revision of the Governance Code that long-term value creation was put at the heart of the Governance Code and drawn out as its very first principle. In the 2022 Governance Code, this very first principle has been amended and restated to read as follows:

Principle 1.1 Sustainable long-term value creation  
The management board is responsible for the continuity of the company and its affiliated enterprise and for sustainable long-term value creation by the company and its affiliated enterprise. The management board takes into account the impact the actions of the company and its affiliated enterprise have on people and the environment and to that end weighs the stakeholder interests that are relevant in this context. The supervisory board monitors the management board in this regard. *(underlining L&L)*

The underlined phrases reflect the substantive updates to this principle, which we further discuss in this paragraph.

### 2.1 Sustainability as part of long-term value creation

Creating long-term value remains one of the key responsibilities of the management board, but it has now been made explicit that it should do so in a sustainable manner. The best practice provisions accompanying this principle have also been updated to give further guidance

1 Consultation Document Proposal to Update the Dutch Corporate Governance Code 2022, p. 6.

2 In the preamble to the 2022 Governance Code, the Committee addressed the increasing diversity in the group of listed companies that falls within the scope of the 2022 Governance Code, including the (at that time) increasing number of SPACs. See the 2022 Governance Code, p. 7.

3 For a summary, see also our news flash: News flash on the updated Corporate Governance Code, 23 December 2022.

on how sustainability should be (further) embedded in the pursuit of long-term value creation.

The management board should develop a view on sustainable long-term value creation by the company and accordingly, must determine a strategy and specific concrete objectives. New in the list of aspects to consider when developing the strategy are (i) the impact of the company where it concerns sustainability, including the effects on people and the environment, (ii) paying a fair share of tax to the countries in which the company operates and (iii) the impact of new technologies and changing business models. The latter includes identifying the risks involved such as cyber security, as well as getting a proper understanding of what impact artificial intelligence may have on the corporate governance when used by the company, its shareholders or other stakeholders. The “fair share of tax” aspect ties back to the ongoing discussions about distributing tax revenues from cross-border corporate activities in a way that is acceptable to all countries involved, rather than shifting corporate profits to low- or no-tax countries. In practice, it may be challenging to assess whether a company’s strategy in respect of tax indeed results in it paying its “fair share”. For the purposes of compliance with the 2022 Governance Code, in our view, it will be important to substantiate that tax governance and tax compliance are treated as important elements of a company’s oversight and broader risk management systems.<sup>4</sup>

## 2.2 Sustainable long-term value creation as part of broader trend

The 2022 Governance Code does not define the concept of “sustainable long-term value creation” and therefore leaves it to the management board to determine how and to what extent this concept applies to their business. Nevertheless, the 2022 Governance Code gives some guidance in this respect as it, *inter alia*, provides that “sustainability” in this context refers to the balance between social, environmental and economic aspects of

doing business, also known as the “three P’s”: people, planet and profit.

Under the 2022 Governance Code, various EU and other international initiatives should be taken into account when interpreting and applying the sustainable long-term value creation principle. Furthermore, the management board is expected to monitor and take into account the relevant developments in this area.

Nowadays, sustainability is on top of the agenda of companies’ boards worldwide. The (added) emphasis on sustainability when pursuing long-term value creation in the 2022 Governance Code, therefore, very much aligns with the broader focus on sustainability and the global trend towards the establishment of a sustainable economy. This is particularly true in respect of the suite of sustainability legislation developed by the EU as part of the “European Green Deal” which the European Commission communicated in December 2019.<sup>5</sup> Achieving a more sustainable corporate governance is an important element for the European Commission to deliver on the European Green Deal, and is complemented by sustainability reporting, auditing and transparency rules. In this context, already a number of new EU legislative instruments have been adopted or are being prepared, such as the Taxonomy Regulation<sup>6</sup>, the Corporate Sustainability Reporting Directive (**CSRD**)<sup>7</sup> and the Corporate Sustainability Due Diligence Directive (**CSDDD**)<sup>8</sup>. In addition, reference should be made to other, more global initiatives in this respect, which include the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct adopted in 2018, which provide guidance for companies with international operations in fulfilling their chain responsibility; the UN Guiding Principles on Business and Human Rights and the UN Global Compact; and the reporting standards of the Task Force on Climate-related Financial Disclosure.

4 In this regard, reference is made to chapter XI (*Taxation*) of Part I of the OECD Guidelines for Multinational Enterprises. Also see, for example, paragraph 5.12.2 (*Taxation*) of the Final Report on Minimum Safeguards as published by the EU Platform on Sustainable Finance in October 2022.

5 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, 11 December 2019 ([52019DC0640](#)).

6 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

7 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

8 The proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

## 2.3 Dialogue with stakeholders<sup>9</sup>

To ensure that the interests of relevant stakeholders are taken into consideration when determining such aspects of the strategy pertaining to sustainability, the management board should draw up and publish on the company's website a policy for effective dialogue with these stakeholders. The company is expected to facilitate such a stakeholder dialogue unless, in the opinion of the management board, this would not be in the interest of the company.<sup>10</sup>

The concept of stakeholders has been broadened to include groups and individuals who directly or indirectly may be influenced by the attainment of the company's objectives. The group of stakeholders includes, amongst others, employees, shareholders, creditors, suppliers and customers.<sup>11</sup>

## 2.4 Sustainability reporting<sup>12</sup>

When reporting its views on sustainable long-term value creation and corresponding strategy and objectives in its management report, the management board should include (i) the effects of the company's products, services and activities on people and the environment, (ii) how the interests of stakeholders have been taken into account, (iii) what action has been taken in that context, and (iv) the extent to which the set objectives have been attained. This best practice provision very much aligns with the sustainability reporting and transparency obligations under various of the EU sustainability legislative instruments mentioned above. As companies will already have to comply with the sustainability reporting provisions under the 2022 Governance Code in respect of their financial year 2023, such reporting may to some extent be regarded as a precursor for the more enhanced sustainability reporting that will be required under the CSRD and the CSDDD.<sup>13</sup>

## 3. Role of shareholders

Building on a development of regulating the role and position of shareholders, several new principles and best practice provisions for shareholders have been included in the 2022 Governance Code.

These newly introduced principles and provisions for shareholders to an extent reflect obligations that were already imposed on institutional investors under the Shareholder Rights Directive II,<sup>14</sup> as codified in Dutch law in 2019. Also, certain best practice provisions for shareholders are inspired by the Dutch Stewardship Code 2018, a self-regulation code prepared by Eumedion, a Dutch interest organisation representing institutional investors (**Dutch Stewardship Code**).<sup>15</sup>

In this paragraph, we will highlight the changes to the 2022 Governance Code where it concerns shareholder engagement and shareholder voting and also briefly address the topic of compliance and enforcement.

### 3.1 Recognition of strategy<sup>16</sup>

Shareholders, including institutional investors, should recognise the importance of the company's strategy for sustainable long-term value creation as defined by the management board. The aim of this provision is to align shareholders with the company by obliging shareholders to take this strategy into account when exercising shareholder rights.

### 3.2 Dialogue with shareholders<sup>17</sup>

The Governance Code already stipulated that a company should formulate an outline policy on bilateral contacts with the shareholders and should post this policy on its website. The 2022 Governance Code now puts more emphasis on this (constructive) dialogue between the

9 See also our Trend Report: The rise of stakeholder committees in the Netherlands, 11 July 2022.

10 Best Practice Provision 1.1.5 of the 2022 Governance Code.

11 In this context, it is worth noting that, in the initial proposal of the CSDDD, 'stakeholders' is defined as *"the company's employees, the employees of its subsidiaries, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business relationships"*.

12 In this regard also see Quoted, Sustainability reporting by listed and large company, June 2022, edition 149.

13 It being noted that (most of) the Dutch companies which are the subject of the 2022 Governance Code already need to include certain non-financial information pursuant to the Dutch codification of the Non-Financial Reporting Directive (Directive 2014/95/EU, the NFRD).

14 Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

15 Whereas the Dutch Stewardship Code applies to institutional investors only, the 2022 Governance Code in principle applies to all shareholders of Dutch listed companies.

16 Principle 4.4. of the 2022 Governance Code.

17 Best Practice Provision 4.2.2 of the 2022 Governance Code.

company and its shareholders. Shareholders and the company should be prepared to enter into a dialogue, where appropriate and at their own discretion.

The company is expected to facilitate dialogues, provided that the management board may unilaterally determine that engaging in a dialogue would not be in the interests of the company and for that reason decide not to engage with a shareholder.

Shareholders who engage in a dialogue with a company outside the context of a general meeting are required to disclose their full equity position (long and short and through derivatives) at the request of the company.

### 3.3 Voting as deemed fit and proxy advisors<sup>18</sup>

Similar to the previous version of the Governance Code, shareholders may exercise their voting rights as they deem fit. However, the 2022 Governance Code adds to this that shareholders should do so on an informed basis.

Moreover, the 2022 Governance Code expands on the use of services of proxy advisors and provides that it is up to the institutional investors using such services to (i) encourage those proxy advisors to be prepared to enter into a dialogue with the company regarding their voting policy, voting guidelines and voting recommendations, and (ii) ensure that their votes are cast in line with their own voting policy.

In addition, the 2022 Governance Code explains to consider it logical for a shareholder using the services of a proxy advisor to check that such proxy advisor provides balanced advice based on fair consideration of all the issues.

### 3.4 Institutional investors' engagement policy<sup>19</sup>

The 2022 Governance Code expands the best practice provisions regarding the voting policy of institutional investors and requires institutional investors to draw up an "engagement policy" instead of a "voting policy", thereby broadening the scope of such policy.

In short, institutional investors (i) are required to reflect in their engagement policy how they recognise the importance of strategies of Dutch listed companies (see above under paragraph 3.1) and (ii) are subject to certain periodic disclosure requirements under the 2022 Governance Code.

A report on how the engagement policy was implemented should be published by institutional investors at least annually on their website, including a general description of the investors' voting behaviour and an explanation of the most significant votes<sup>20</sup> and the use of the services of proxy advisors.

In addition, institutional investors should report on their website at least once per quarter on whether and, if so, how they have voted as shareholders for each company and voting item. In the report, institutional investors should disclose the key points of the dialogues they have conducted with companies.

If an institutional investor votes against a resolution of the management board or abstains from voting on a resolution of the management board, the institutional investor should explain the reasons for its voting behaviour to the management board either pro-actively or at the company's request.

### 3.5 Short positions and securities lending<sup>21</sup>

The 2022 Governance Code introduces new provisions regulating shareholders that hold short positions and those that are engaged in securities lending.

18 Best Practice Provisions 4.3.1 of the 2022 Governance Code.

19 Best Practice Provisions 4.3.5 and 4.3.6 of the 2022 Governance Code and Principle 4.4 of the 2022 Governance Code.

20 Best Practice Provision 4.3.6 of the 2022 Governance Code includes an explanation on what should in any event be understood to constitute "most significant votes". According to this explanation "most significant votes" includes in any event: (i) votes on matters that have received substantive media attention or votes on items that are regarded by institutional investors as a priority in the run-up to the general meeting season, (ii) votes on a resolution on the agenda of a general meeting (a) that are of strategic importance, or (b) where the institutional investor disagrees with the resolution of the company's management board, and (iii) votes in general meetings of companies in which the institutional investor has a large holding compared to the institutional investor's holding in other investee companies.

21 Best Practice Provisions 4.3.7 and 4.3.8 of the 2022 Governance Code.

First, shareholders should abstain from voting if their short position exceeds their long position (i.e., holding a net short position).<sup>22</sup>

In addition, the 2022 Governance Code stipulates that shareholders should recall their lent-out shares before the record date of a general meeting if the agenda for that meeting includes one or more “significant matters”.

For background, this new best practice provision has been subject to debate during the consultation phase of the draft 2022 Governance Code, but the Committee has nevertheless decided to keep this best practice provision in the final version of the 2022 Governance Code. Among other things, the Committee in this context mentioned to attach great importance to shareholders voting on significant matters.<sup>23</sup>

The shareholder itself should determine what is regarded as a “significant matter”, but the 2022 Governance Code prescribes that significant matters in any event concern agenda items (i) that are of strategic importance, and (ii) in respect of which the shareholder disagrees with the proposal of the management board.

The draft updated Governance Code included a longer list of examples of significant matters, based on the Dutch Stewardship Code. With reference to the explanations of the Committee, not all such examples have been included in the list of significant matters in the final version of the updated Governance Code.<sup>24</sup>

### 3.6 Compliance and enforcement

The management board and the supervisory board are responsible for the corporate governance of the company and for compliance with the 2022 Governance Code, the principle being that compliance is based on

the “comply or explain” principle as referred to above (see above under paragraph 1.2).

As illustrated by this paragraph 3, the 2022 Governance Code contains various best practice provisions that focus on shareholders (as opposed to the management board and/or the supervisory board). It is important to note that the Committee has acknowledged and explained that, insofar as the management board and the supervisory board are unable to influence shareholders’ compliance with best practice provisions, the “comply or explain” approach may be disregarded by the management board and the supervisory board respectively.<sup>25</sup>

Against that background, limited guidance is available as to how enforcement would play out. Certain best practice provisions, such as those relating to short positions and securities lending, may also be difficult to monitor for companies. Generally, we expect that enforcement of shareholders’ adherence to and compliance with the 2022 Governance Code will primarily take place through the Dutch courts.<sup>26</sup>

## 4. Diversity and inclusion

The Committee has acknowledged the increasing emphasis on diversity since the Governance Code was last updated in 2016, thereby taking into consideration the Dutch legislation on achieving a more balanced male/female ratio on boards<sup>27</sup> which entered into force on 1 January 2022<sup>28</sup> (**Diversity Act**). Unlike the Diversity Act, the 2022 Governance Code includes principles and provisions on diversity that go beyond gender diversity and the Committee recognises that the change in Dutch law does not take into account developments on gender identity and expression.

22 As regards short positions, we note that holders may be required to make a notification to the AFM pursuant to the EU Short Selling Regulation (Regulation (EU) 236/2012) in respect of net short positions (first notification threshold being 0.01%) and/or pursuant to the Dutch financial supervision act in respect of gross short positions (first notification threshold being 3%).

23 Accountability Document to Update the Dutch Corporate Governance Code 2022, p. 19.

24 Accountability Document to Update the Dutch Corporate Governance Code 2022, p. 19.

25 Explanatory note to Principle 4.1 of the 2022 Governance Code.

26 Reference is made to our Trend Report of 16 February 2023 regarding developments in the regulation of the position of shareholders of Dutch listed companies.

27 Wherever reference is made to management board members and supervisory board members, this is meant to also refer to executive directors and non-executive directors, respectively, in a one-tier board structure.

28 Act of 29 September 2021 amending Book 2 of the Dutch Civil Code in connection with balancing the ratio of men and women on the management and supervisory boards of large public and private limited liability companies (*Wet van 29 september 2021 tot wijziging van Boek 2 van het Burgerlijk Wetboek in verband met het evenwichtiger maken van de verhouding tussen het aantal mannen en vrouwen in het bestuur en de raad van commissarissen van grote naamloze en besloten vennootschappen*).

In addition to diversity, the 2022 Governance Code also covers the topic of “inclusion”. Inclusion concerns the company’s ability to ‘create a culture in which every employee feels valued and respected, ensuring equal opportunities for employees regardless of identity and facilitating diversity in employee progression to the top of the organisation’.<sup>29</sup>

In this paragraph, we discuss the changes to the 2022 Governance Code where it concerns diversity and inclusion, as well as recent developments in Dutch and EU legislation on the topic of gender diversity.

#### 4.1 Diverse composition

The management board, the supervisory board and the executive committee (if appointed) should be composed such that there is an appropriate balance between expertise, experience, competencies, personal qualities, age, sex or gender identity, nationality and (cultural) background.<sup>30</sup> In addition to broadening the scope of this principle to also include the executive committee, the aspects which are considered relevant for a diverse composition of the boards and executive committee now also include personal qualities, age, sex or gender identity, nationality and (cultural) background. The Committee has indicated that diversity within the boards and executive committee results in different perspectives, which can help to prevent groupthink.<sup>31</sup>

#### 4.2 Diversity and inclusion Policy

Companies should have a diversity & inclusion policy (**D&I Policy**) for the entire enterprise that not only covers the management board, the supervisory board and the executive committee (if appointed), but also at least the category of employees identified by the management board as “senior management”. The D&I Policy should include specific, appropriate and ambitious targets to obtain a good balance in gender-diversity and other D&I aspects that are relevant to the company.<sup>32</sup>

Under the 2022 Governance Code, a company should have two D&I Policies, one pertaining to the composition of the management board and the supervisory board, which policy is adopted by the supervisory board, and one for the composition of the executive committee (if appointed), senior management and the rest of the workforce, which policy is adopted by the management board with prior approval of the supervisory board.<sup>33</sup> These two D&I Policies can be combined in one document.

#### 4.3 Reporting on diversity

The Committee identified a need for improvement when it comes to compliance with diversity guidelines.<sup>34</sup>

The information which should be included in the corporate governance statement explaining the D&I Policy and how the policy has been implemented should, in addition to the targets as set out in the D&I Policy, include the manner in which these targets will be achieved and the results of the policy in the previous financial year (including an insight into inflow, promotion and retention of employees), if and where relevant. The statement should furthermore include information on the gender composition of the management and supervisory boards, executive committee (if appointed) and group of employees to which the respective D&I Policy applies. If one or more of the diversity targets have not been met, the statement should include the reasons therefor and which measures will be taken to attain such targets, as well as by when the targets are likely to be achieved.

#### 4.4 Dutch legislation on gender diversity

The Diversity Act entered into force on 1 January 2022. For Dutch listed companies of which the (depository receipts for) shares are admitted to listing and trading on a regulated market in the Netherlands<sup>35</sup>, the Diversity Act introduced an in-growth quota (*ingroeiquota*) for the supervisory board. Pursuant to the quota, if the supervisory board does not consist of at least one-third male and one-third female members, any appointment of a supervisory board member which does not result in a

29 Explanatory note to Best Practice Provisions 2.1.5 and 2.1.6 of the 2022 Governance Code.

30 Explanatory note to Principle 2.1 of the 2022 Governance Code.

31 Explanatory note to Principle 2.1 of the 2022 Governance Code.

32 Best Practice Provision 2.1.5 of the 2022 Governance Code.

33 Best Practice Provision 2.1.5 of the 2022 Governance Code.

34 Consultation Document Proposal to Update the Dutch Corporate Governance Code 2022, p. 9.

35 These requirements therefore not apply to a Dutch listed companies of which the (depository receipts for) shares are listed on a non-Dutch stock exchange, including e.g. a U.S. stock exchange.

more balanced male/female ratio would be void (*nietig*).<sup>36</sup>

<sup>37</sup> The quota does not apply (i) to reappointments which take place within eight years after the year of the first reappointment of such supervisory board member and (ii) in the event of an appointment due to exceptional circumstances, which latter appointment is then for a maximum of two years.<sup>38</sup> Such exceptional circumstances may, for example, include the situation in which a large part of the supervisory board resigns unexpectedly or if the company urgently needs to appoint a new supervisory board member (e.g., due to the company being in distress) and does not have the time nor the resources to conduct an extensive search in finding a suitable candidate.<sup>39</sup>

For 'large' Dutch companies<sup>40</sup>, the Diversity Act introduced the requirement of setting an appropriate and ambitious target figure (*streefcijfer*) to balance the male/female ratio within the supervisory board, management board and senior management.<sup>41</sup> Companies are required to prepare a plan to achieve such balanced male/female ratio by a certain target year, which plan is submitted to the Social and Economic Council of the Netherlands (*Sociaal Economische Raad*, **SER**). Companies must annually report on their progress and, if one or more targets have not been achieved, the reasons for this, to the SER within ten months following the end of the financial year.<sup>42</sup>

If a Dutch company is considered a 'large' company and its (depository receipts for) shares are admitted to listing

and trading on a Dutch regulated market, it will only be required to set a target figure for the management board and senior management. As regards the supervisory board, such Dutch listed company will be required to comply with the in-growth quota.

## 4.5 EU Directive on gender diversity

The Directive of the European Parliament and the Council on improving the gender balance among directors of listed companies and related measures (**Gender Balance Directive**)<sup>43</sup> was adopted by the Council on 17 October 2022. Pursuant to the Gender Balance Directive, the supervisory board<sup>44</sup> of an EU listed company<sup>45</sup> should be made up of at least 40% male and 40% female members by 30 June 2026. If a Member State chooses to apply these new rules to both the management and supervisory board<sup>46</sup> a target percentage of 33% applies.<sup>47</sup> Micro, small and mid-sized companies do not fall within the scope of this Directive.<sup>48</sup>

Member States are not required to implement the Gender Balance Directive for a period of five years if (i) the Member State has already adopted binding measures which are considered equally effective to those laid down in the Gender Balance Directive or (ii) if members of the underrepresented sex hold at least 30% of all seats on the supervisory board or at least 25% of all seats on the management board in listed companies in such Member State (i.e. if the targets as required by the Gender Balance Directive are close to being met).<sup>49</sup> In a letter dated

<sup>36</sup> In the case a company has a one-tier board, this in-growth quota applies to the non-executive directors.

<sup>37</sup> It can be argued that if the supervisory board consists of one-third female and one-third male members it is allowed for a person to be appointed as supervisory board member, as a result of which the composition of the supervisory board would no longer meet the one-third threshold for both female and male. For example, if the supervisory board consists of four male and two female members, it could be allowed for a man to be appointed to the supervisory board although, as a result thereof, the female members on the supervisory board will no longer make up for one-third. From the legislative history it is unclear whether the legislator intended to allow for such appointment to result in the composition of a supervisory board to no longer be balanced in terms of male/female ratio.

<sup>38</sup> Section 2:142b of the Dutch Civil Code.

<sup>39</sup> Kamerstukken II 2020/21, 35628, nr. 3, p. 12.

<sup>40</sup> A company which meets at least two of the following three criteria on two consecutive balance sheet dates: (i) a (consolidated) balance sheet total exceeding €20 million, (ii) a (consolidated) net turnover exceeding €40 million and (iii) an average of at least 250 employees over the financial year.

<sup>41</sup> In the case a company has a one-tier board, target figures need to be set in respect of the executive directors and the non-executive directors.

<sup>42</sup> Section 2:166 of the Dutch Civil Code.

<sup>43</sup> Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures.

<sup>44</sup> In the case a company has a one-tier board, this applies to the non-executive directors.

<sup>45</sup> A company which has its registered office in an EU Member State and whose shares are admitted to listing and trading on an EU regulated market, see Article 2 jo. Article 3 of the Directive.

<sup>46</sup> Or, in the case a company has a one-tier board, to the executive directors and the non-executive directors

<sup>47</sup> Article 3 of the Directive.

<sup>48</sup> Consideration (29) of the Directive. For these companies the measures could represent a disproportionate burden.

<sup>49</sup> Article 12 of the Directive.

22 December 2022, the Dutch Minister of Education, Culture and Science indicated that the percentage of women on supervisory boards in the Netherlands, on the basis of the Female Board Index<sup>50</sup>, has increased to 38% and that, for this reason, the Netherlands will invoke the exemption provision as included in the Directive.

## 5. Some other changes

In addition to the updates as discussed in the paragraphs 2 through 4, below we have listed some of the other changes which we feel are worth flagging.

### 5.1 Remuneration policy and remuneration report

Dutch companies of which the (depository receipts for) shares are admitted to listing and trading on an EU-regulated market, are required to comply with Sections 2:135a and 2:135b of the Dutch Civil Code, dealing with the remuneration policy and remuneration report, respectively. The Committee has clarified what additional information is required to be provided under the 2022 Governance Code by companies that already report on the basis of such legal provisions.<sup>51</sup>

The Committee has also provided some guidance on the requirement that a company should prepare a remuneration report which, *inter alia*, should describe

the pay ratios within the company.<sup>52</sup> In short, the term “pay ratios” is understood to mean the ratio between (i) the total annual remuneration of the CEO and (ii) the average annual remuneration of the employees of the company and the consolidated group companies.<sup>53</sup>

### 5.2 Response period

Albeit there is some overlap between the 250-day statutory reflection period as prescribed by the Dutch Civil Code<sup>54</sup> and the 180-day response time as included in the 2022 Governance Code<sup>55</sup>, the Committee decided not to abolish the latter as it found there were sufficient differences between the two. For example, the response time can often be stipulated at an earlier stage and for more subjects than the statutory reflection period, and the consequences of such stipulation are different.

The explanatory notes to the 2022 Governance Code address this overlap, thereby indicating that where the same matter is involved, overlapping or successive application of both the reflection period and the response time is undesirable. The 2022 Governance Code therefore stipulates that the response time may not be invoked if the statutory reflection period has been invoked already. If it were to be the other way around and the reflection period is invoked after the company's management board has already invoked the response time, it will ultimately be up to the court to rule on any undesirable interplay of the

50 Reference date 31 August 2022. The Female Board Index is prepared by Prof. dr. Mijntje Lückers from the TIAS School for Business and Society (Tilburg University) and indicates the number of female members on the management boards and supervisory boards of Dutch public limited liability companies (*naamloze vennootschappen*) of which the (depository receipts for) shares are admitted to listing and trading on Euronext Amsterdam.

51 Explanatory notes to Best Practice Provisions 3.1.2 and 3.4.1 of the 2022 Governance Code.

52 Best Practice Provision 3.4.1 of the 2022 Governance Code.

53 Explanatory note to Best Practice Provision 3.4.1 of the 2022 Governance Code.

54 See Section 2:114b of the Dutch Civil Code for the statutory reflection period. In short, the management board may invoke a statutory reflection period in the circumstances as described in Section 2:114b of the Dutch Civil Code. If the company has a supervisory board, supervisory board approval is required to invoke the reflection period. If the statutory reflection period would be invoked, this causes the powers of the general meeting of the company to appoint, suspend or dismiss management board members and/or supervisory board members (and to amend the articles of association in this respect) to be suspended. The management board must use the statutory reflection period to obtain all necessary information for a careful determination of the policy it wishes to pursue in the given situation. The management board shall thereby, in any event, consult those shareholders that represent at least 3% of the issued capital at the time the statutory reflection period is invoked, as well as the works council. The management board shall report on the course of events and the policy that has been pursued since the statutory reflection period was invoked. No later than one week after the last day of the statutory reflection period, the company shall have to publicly disclose the report. The report shall also be discussed at the first general meeting of the company after the expiry of the statutory reflection period.

55 See Best Practice Provisions 4.1.6 and 4.1.7 of the 2022 Governance Code for the response time. In short, a shareholder should only exercise the right to put items on the agenda after having consulted the management board. If one or more shareholders intend to request that an item be put on the agenda that may result in a change in the company's strategy, for example as a result of the dismissal of one or more management board or supervisory board members, the management board should be given the opportunity to stipulate a reasonable period in which to respond (i.e., the “response time”). The relevant shareholder should respect the response time stipulated by the management board. The management board should use the response time for further deliberation and constructive consultation, in any event with the relevant shareholder (or shareholders), and should explore the alternatives. At the end of the response time, the management board should report on this consultation and the exploration to the general meeting. This should be monitored by the supervisory board.

response time with the statutory response period and/or other protective measures.<sup>56</sup>

### 5.3 Internal audit function

Following the report 'Strengthening the Accountability Chain' by Leiden University (commissioned by the Dutch Minister of Finance), several changes have been made pursuant to the 2022 Governance Code where it concerns the internal audit function, such as an evaluation of the internal audit function by an independent party at least every five years. Also, the internal audit function should report to a management board member (preferably the CEO) and the management board must first discuss with the audit committee before assessing the functioning of the internal audit function.

<sup>56</sup> Explanatory note to Best Practice Provision 4.1.7 of the 2022 Governance Code.

## About Loyens & Loeff

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