

Introduction to the history, background and operation of the Code

1. The history of the Dutch Corporate Governance Code – in brief

Making its way across the Channel from the UK – where following a number of serious corporate mishaps, such as the bankruptcies of the Maxwell Group, BCCI and Polly Peck, the ‘mother of all codes’, the Cadbury Report, was published in 1992 making some 20 recommendations in the form of a Code of Best Practice – the history of the Dutch Corporate Governance Code began with ‘Forty Recommendations’ on corporate governance drawn up by a committee led by former Aegon CEO Jaap Peters. This committee published its final report in 1997, now more than 25 years ago.

The Forty Recommendations covered issues that still occupy corporate governance minds, such as the degree of independence of supervisory directors; the time that supervisory directors have available to perform their role (and the number of supervisory directorships); the requirement for managing and supervisory directors to hold shares for long-term investment purposes only; the prevention of conflicts of interest; the division of tasks and working procedures of the management board and supervisory board; the role and responsibilities of the management board and supervisory board where the company’s strategy and the risks it takes on are concerned; the role and function of the general meeting; and how corporate governance is accounted for in the management report.

The application of the Forty Recommendations was evaluated in 1998, leading to a relatively critical report of findings, especially from the perspective of the role and (limited) powers of shareholders at listed companies. This included the emergence of institutional shareholders and the possible role they could play as stable, core shareholders. Based on this report, the government believed that additional legislation was

appropriate in several areas, including the function and powers of the general meeting. More specifically, this led to legislation that required more transparency, facilitated remote voting by shareholders, and increased their role and powers.

Meanwhile, in the early 21st century, the corporate world in the US and in Europe (again) faced several serious corporate mishaps, such as accounting fraud at Enron, Worldcom, Parmalat and – in the Netherlands – Ahold. This led to an acceleration in the consultations already underway on the design of a Dutch Corporate Governance Code (the ‘Code’) between what later came to be called the Code’s ‘supporting parties’. These parties were the Dutch Confederation of Netherlands Industry and Employers (VNO-NCW), the Dutch Association of Securities-Issuing Companies (VEUO), the Dutch Association of Stockholders (VEB), the Dutch Organisation of Supervisory and Managing Directors (NCD), Euronext, and the Dutch Foundation for Corporate Governance Research for Pension Funds (SCGOP) (the organisation of institutional investors that would later form Eumedion). In March 2003, these consultations led to the establishment of a Corporate Governance Committee headed by former Unilever top executive, Morris Tabaksblat. This committee was tasked with drafting a ‘code of best practice’ in the field of corporate governance. The Tabaksblat Committee came up with a draft corporate governance code as early as 1 July 2003. After a consultation round and adjustments to the draft code, the Tabaksblat Code was finalised and presented in December 2003. Subsequently, this Code was enshrined in legislation by stipulating in former article 2:391(5)¹ of the Dutch Civil Code (DCC) that the Tabaksblat Committee’s proposal constituted *the* Dutch Corporate Governance Code. That statutory provision also made it mandatory for Dutch listed companies to apply this Code or, if they failed to do so, account for that failure and explain in the management report why the Code had not been applied. Since 1 January 2004, listed companies have thus been required to state in their annual report, on a ‘comply or explain’ basis, the extent to which they comply with the Code.

In the period from 1 January 2004 to 2023, new ‘monitoring committees’ were appointed time and again to survey and publicly report on compliance with the Code. Monitoring committee members are appointed by the Minister of Economic Affairs and Climate Policy on the recommendation of the Code’s ‘supporting parties’. The monitoring committees were successively chaired by Professor Jean Frijns (2004 to

1 Article 2:391(5) DCC has lapsed and was replaced by article 2:391a(2)(e) DCC with the entry into force on 30 December 2023 of the *Implementatiewet Richtlijn openbaarmaking winstbelasting* (Act Implementing the Country-by-Country Reporting Directive (EU) 2021/2101) (*Bulletin of Acts and Decrees* 2023, 517).

2009), Jos Streppel (2009 to 2013), Professor Jaap van Manen (2013 to 2018) and Pauline van der Meer Mohr (2019 to 2023).

In addition to investigating the operation of the Code, the monitoring committees focused on whether the Code should be revised in light of their findings. In 2008, this led to amendments to the Code following proposals to this effect by the Frijns Committee (also known as the ‘2008 Code’). These amendments aimed, among other things, to somewhat dilute the powers previously granted to shareholders after it was found that in a number of cases shareholders had taken far-reaching actions against companies. This led, among other things, to the introduction of what is known as the ‘response time’ and the explicit stipulation in the Code that the management and supervisory boards should also take the ‘social aspects of doing business’ into account. The latter is in line with the recommendations of a committee led by former Unilever top executive Antony Burgmans, which was commissioned to further examine whether and how a policy on corporate social responsibility should be linked to corporate governance. The Burgmans Committee published its report in October 2008. It concluded that integrating corporate social responsibility (CSR) into business operations was the appropriate approach to connect business ‘in a positive way to the social issues of today and tomorrow’.

Besides monitoring developments, the monitoring committee – led by former Aegon executive Jos Streppel and which took over from the Frijns Committee in 2009 – also focused on providing further guidance on the application of the Code. In its final report, the Streppel Committee added that a new monitoring committee should be given the scope to propose changes to the Code because corporate governance is always changing and it is important that the dialogue on corporate governance has an impact on the Code so that it remains a living document.

The monitoring committee led by Jaap van Manen, which took office at the end of 2013, in line with the recommendations of the Streppel Committee, proposed a review of the Code after consultation with the supporting parties. These parties also made that request to the Van Manen Committee in 2015. Based on this, the Van Manen Committee presented a draft for a revised Code in February 2016. An extensive public consultation then took place. Furthermore, this committee issued an additional consultation which concerned the application of the Code to companies with a one-tier board. Following these extensive consultations, which resulted in a considerable number of changes compared to the draft for a new code, the Van Manen Committee presented the revised Dutch Corporate Governance Code 2016 on 8 December 2016.

The monitoring committee headed by Pauline van der Meer Mohr took office in 2019. Initially, this committee focused on the quality of compliance. In its first monitoring report, the committee stated that the high compliance rates as revealed by the compliance survey did not seem justified in all cases.² In the subsequent financial year, the committee therefore changed the format of the compliance survey, by commissioning a ‘more in-depth desk study’ on certain topics instead of a ‘more in-depth survey’. In the 2019 financial year survey, compliance with provisions on conduct was also monitored through the related provisions on reporting. This showed, according to the committee, that the previously applied survey methodology gave too rosy a picture of actual compliance with several ‘fundamental provisions on conduct’ in the Code.³ In addition, for the first time, the monitoring report looked closely at compliance with the Code by Dutch companies with only a foreign listing. The committee continued this line in the monitoring report for the 2020 financial year.⁴ In 2022, the Van der Meer Mohr Committee published an updated version of the Code⁵ after having previously published a consultation document.⁶ This book focuses on the updated Code, details its specific provisions, and provides comments and practical experiences.

In its final document, the Van der Meer Mohr Committee shared its view on the future of the Code.⁷ Although the Code was ‘alive and kicking’ according to this committee, it noted three developments that gave cause for reflection. First, demand from politics and society had led to the Code covering more and more societal topics. The committee saw this as the cause of the increased overlap between the Code and legislation. According to the committee, the Code lacked a vision on which topics were suitable for self-regulation in the Code and where legislation was the right instrument. Second, in the committee’s view, companies were struggling to flesh out social themes, particularly in the areas of sustainability, digitalisation and diversity. The committee felt that society played a role in this. Third, the committee observed that the tendency for society to litigate also led to more tension on the ‘principle-based’ nature of the Code. According to the committee, this made it more

2 *Monitoring Report financial year 2018*, p. 7.

3 *Monitoring Report financial year 2019*, p. 11.

4 See also C.R. Nagtegaal, ‘*Monitoring Rapport 2020: Pas toe [en] [of] [dus] leg uit (doorhalen wat niet van toepassing is)*’, *Ondernemingsrecht* 2022/28.

5 See C.R. Nagtegaal & M. van Olffen, ‘*De Corporate Governance Code 2022, een duurzame actualisatie?*’, *Ondernemingsrecht* 2023/44 and S. Rietveld, ‘*De Herziene Corporate Governance Code 2022. Vernieuwend of toch een politiek compromis?*’, *Maandblad voor Ondernemingsrecht (MvO)* 2023, no. 1 & 2.

6 See C.R. Nagtegaal & M. van Olffen, ‘*Voorstel voor actualisatie van de Corporate governance code: nadruk op “ESG”*’, *Ondernemingsrecht* 2022/72.

7 *Final document*, December 2022.

difficult for supporting parties and other stakeholders to reach consensus when updating the Code. The Minister of Economic Affairs and Climate Policy took note of the committee's considerations and, accordingly, decided not to establish another monitoring committee from 1 January 2023. The government departments involved and the supporting parties subsequently started a mutual exploration of how the Code can remain future oriented.⁸ The aim was to consider whether and how the Code could continue to provide a basis for good governance and supervision in the coming decade. On 19 January 2024, the same Minister published the study's main conclusions in a letter to parliament.⁹ In response to the study, the Dutch government agreed to "strengthen the future" of the Code as part of the corporate governance system.

The main findings of the study were that stakeholders endorse the Code's relevance, and that there is strong support to continue the current Dutch corporate governance system, which includes the Code and a committee that monitors compliance with the Code ('Monitoring Committee'). The study's conclusions further stated that the core of the Code should remain intact, and that care should be taken to prevent it from becoming an overly legalistic document containing too much detail. The Minister's letter also highlighted several concerns, including the increasing overlap between laws and the Code, and the increasing "juridification" of society. The Minister further addressed the differing views about the exact division of the roles between the Monitoring Committee, the supporting parties and the government, and concluded that these differing views had been an inhibiting factor in establishing the effectiveness of and support for the Code and for the Monitoring Committee's work.

The Minister has pledged to support the future-proofing of the Code by amending the decree on establishing the Monitoring Committee in order to clarify the tasks of the Committee. This includes ensuring that the Committee pays attention to the quality of any explanations in the event of deviation from the Code, and explicitly adding that the Committee's role is to prevent and eliminate overlap with legislation. The Minister will also provide a robust back office to support the Committee, not only to ensure practical support, but also to act as a link between the Committee, the supporting parties and the government.

8 Letters to the House of Representatives from the Minister of Economic Affairs and Climate Policy dated 20 December 2022 and 28 March 2023, regarding: Latest developments on the Corporate Governance Code and Cabinet response to updated Corporate Governance Code and Monitoring Report financial year 2021.

9 *Parliamentary Papers II* 2023/2024, 31 083, no. 67.