european corporate governance institute

Directors Remuneration in Listed Companies

The Netherlands*

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Questionnaire

1. General

1.1 Please indicate, as a general reference, the laws, case law, regulations, exchange rules and best practice concerning directors' remuneration in your country with respect to listed companies. Please indicate where these provisions (such as, for example, exchange rules) apply only to domestically-incorporated companies.

As a preliminary remark, it is important to note that Dutch listed corporations typically have a two-tier board structure. The management board is responsible for the day-to-day business and affairs of the company, whereas the supervisory board provides for oversight of the management board's activities. Depending on size and the number of employees, some listed companies are required by law to have a supervisory board (the so-called "*structuurvennootschappen*"), other listed companies have voluntarily installed a supervisory board based on practical considerations. At the moment, a legislative proposal is pending which, if enacted, would allow Dutch companies to choose between adopting a one-tier board (i.e. a single board with both executive- as well as non-executive board members) and maintaining their present two-tier board structure. This questionnaire, however, will take the current two-tier board system as a starting point.

There are multiple sources of Dutch corporate law where rules regarding the remuneration of directors of listed companies can be found. First, Book 2 of the Dutch Civil Code ("*Burgerlijk Wetboek*", hereafter: "DCC") contains the statutory rules which govern Dutch corporations ("*naamloze vennootschap"*, or "*N.V.*"), which is the legal form in which most Dutch listed companies are incorporated. These rules are mandatory and may only be deviated from if this is provided for in the statutory rules themselves. The relevant DCC provisions with regard to executive remuneration are article 2:135 DCC and article 2:145 DCC (addressing the competence to fix executive remuneration) and article 2:383c DCC (concerning certain disclosure requirements with regard to management board and supervisory board remuneration in the company's annual accounts). In addition, the general provisions of Book 2 DCC concerning Dutch corporations provide additional guidance, for instance as to the corporate decision-making process regarding executive remuneration and as to possible causes of action in case of abuse.

Second, the Dutch Corporate Governance Code (hereafter: "the Code") is an important source of principles and best practices regarding executive remuneration. The first Code was established in 2003 by a working committee consisting of representatives from Dutch listed companies, their shareholders, institutional investors and academics, and addressed a broad range of corporate governance issues, including executive remuneration. The provisions of the Code, divided into general principles and more specific best practices, are non-binding in nature, but Dutch listed companies are nonetheless obliged to pay special heed to them. Since 2004, all Dutch listed companies are required by law (Article 2:391 subd. 5 DCC) to include a statement in their annual report in which they describe for each individual provision of the Code whether they apply the provision or whether they deviate from it. In case of a deviation, the company must offer a substantive explanation for doing so. The Code

requires compliance by all companies whose registered offices are in the Netherlands and whose shares or depositary receipts for shares have been admitted to listing on a stock exchange, or more specifically to trading on a regulated market or a comparable system, and to all large companies whose registered offices are in the Netherlands (balance sheet value > € 500 million) and whose shares or depositary receipts for shares have been admitted to trading on a multilateral trading facility or a comparable system (referred to below as listed companies) (nr. 2, preamble Code).

The Corporate Governance Code Monitoring Committee, which was established after the publication of the Code (hereafter: "the Monitoring Committee"), monitors trends in the application of the Code and issues yearly reports thereon. Also, application of the Code is closely monitored by private parties, for instance shareholder rights advocacy groups. In December 2008, following an extensive market consultation project, the Monitoring Committee published an updated version of the Code (also dubbed "Code Frijns", referencing the committee's chairman). The Code, as well as the Monitoring Committee's reports, can be accessed through http://www.corpgov.nl.

In November 2008, the government presented to the Lower House of the Dutch Parliament a bill containing rules for cases in which executive and non-executive directors form part of one board (one-tier board structure). This bill focuses on the amendment of Book 2 of the DCC in connection with the adjustment of the rules governing management and supervision in public and private limited companies (Parliamentary Papers II 2008/09, 31 763, no. 2). A decision on this bill will be taken by the plenary meeting of the Dutch Parliament in June 2009.

Finally, there are a number of statutory provisions which directly or indirectly address executive remuneration which are scattered throughout various statutes and/or legislative proposals. For instance, in 2008, a bill was adopted pursuant to which variable components (i.e. bonuses) of executive remuneration are now more heavily taxed. Also, a bill is currently pending in the Dutch parliament under which the company's Works Council ("*Ondernemingsraad*") would have the authority to issue a statement with regard to the company's remuneration policy and to address the company's general meeting of shareholders prior to the adoption of that policy.

1.2 As to best practices, please specify whether they are described in either a private (voluntary or non-statutory) code or other official report, and whether a "comply or explain" principle is applicable to compliance with the relevant provisions by listed companies. Where the "comply or explain" principle applies, please indicate, where such evidence is available, whether companies generally comply with best practices.

As described above under 1.1., the principles and best practices which supplement Dutch statutory corporate law with regard to executive remuneration are part of the Code. The Code follows a "comply or explain" approach, which is codified in article 2:391 subd. 5 DCC. The Monitoring Committee issues a yearly report in which it reports on compliance with the Code's provisions by Dutch listed companies. These reports are accessible through the Monitoring Committee's website (http://www.corpgov.nl). The most recent report, which was issued in December 2007 (based on the 2006 figures), indicated that the Code provisions regarding executive remuneration were ranked among the lowest in terms of compliance. According to the report (pp. 26-27) 85% of the Dutch listed companies in 2006 reported on those provisions: 70% applied the principles and best practices provided by the Code, whereas 15% deviated from one or more provisions and offered an explanation for the deviation in their annual report. Compared to the compliance measured for other Code provisions, this percentage of full compliance was deemed to be quite low. The current Code

provisions, however, were only adopted in December 2008, meaning that Dutch listed companies have not yet reported on their compliance therewith. It remains to be seen whether the new Code provisions (which are substantially different on a number of issues) will be able to achieve a better compliance rate.

1.3 Please describe in summary: the institutional structure for adopting executive remuneration rules or best practice codes; and any major proposals for reform concerning directors' remuneration

Since rules regarding executive remuneration can be found in both Dutch corporate statutory law as well as in the Code, there are two institutional structures through which new rules regarding executive remuneration can be adopted. As to the statutory rules, these rules are enacted by the Dutch parliament following a proposal by the Dutch government. At the moment, there are no proposals for the full-scale reform of the statutory rules regarding executive remuneration pending. The recent turmoil relating to the bonuses paid by crisis-stricken financial institutions to their managers, however, has recently prompted the Dutch Minister of Finance to threaten statutory regulation to curb excessive remuneration if the market does not correct itself. At the moment, it is unclear whether such regulation will actually be proposed to the Dutch parliament.

The Code is drafted by the Monitoring Committee, which is basically an independent organisation consisting of experts from the field. Even though the Monitoring Committee issues annual reports on compliance, the Code itself is not amended annually, nor is there a fixed timeline for periodical amendments. The 2008 Frijns Code in effect has been the first update of the Code since its inception in 2003. The Monitoring Committee had been requested by various interest groups in early 2008 to issue an updated version of the Code. The Dutch government subsequently asked the Monitoring Committee to take certain issues into account in doing so, which were at that time subject to debate in parliament, including the topic of executive remuneration. Another update of the Code is not expected in the near future.

2. Disclosure

2.1 Are listed companies required to publish a remuneration report, indicating the details of the remuneration paid to the members of the Board of Directors? How often must it be published and where is it retrievable?

Pursuant to best practice provision II.2.12 of the Code, the supervisory board must issue a yearly remuneration report. This report is to be drawn up by the remuneration committee of the supervisory board (best practice provision III.5.10c), which may be assisted by an independent remuneration advisor (best practice provision III.5.13). The remuneration report contains a description of the way in which the company's overall remuneration policy has been adopted in the preceding book year of the company and a description of the remuneration policy that the supervisory board envisages for the following years. The remuneration report also has to contain specific information with regard to the remuneration paid to individual members of the management board (For further details on the content of the remuneration report, please see § 2.3).

The Code prescribes as best practice that the remuneration report be published on the company's website (best practice provision II.2.12). Also, the company's annual report at minimum has to contain general information regarding the company's remuneration policy and the way in which the policy has been applied in practice in the preceding book year (article 2:391 subd. 2 DCC).

In addition, articles 2:383c DCC through 2:383e DCC provide for a statutory disclosure requirement of certain information with regard to specific remuneration components granted to individual members of the management board and the supervisory board (see below for specifics). This information has to be included in the supplementary notes along with the company's annual accounts. These accounts have to be deposited with the Dutch Chamber of Commerce ("*Kamer van Koophandel*") (article 2:394 DCC), where they are accessible to anyone, and pursuant to the Code would have to be published on the company's website as well (best practice IV.3.6).

2.2 Must these reports be submitted, or is it recommended that they be submitted, to a Securities Market Regulator or to a public authority responsible for collecting these documents?

The company's remuneration report as described above under 2.1. does not need to be filed with an independent securities market regulator. Still, the Code prescribes as a principle of good governance that the general outline of the remuneration report is to be included in the report of the supervisory board which in turn has to be included in the company's annual report (principle II.2, second part). The company's annual report, annual accounts and certain accompanying materials, however, have to be filed with the Dutch Financial Markets Authority ("*Autoriteit Financiële Markten*", or "AFM") pursuant to the Dutch Financial Supervision Act ("DFSA"). The annual accounts have to be filed with the AFM both after they have been drawn up by the company's management and audited by the auditor (article 5:25n subd. 6 DFSA), as well as after they have been adopted by the company's general meeting of shareholders (article 5:25o subd. 1 DFSA). The AFM also serves as a conduit for the mandatory filing of the company's financials with the Dutch Chamber of Commerce.

2.3 What information on directors' remuneration, individually and collectively, and on the remuneration committee, must be included, or is recommended to be included as best practice, in the financial reports? Please include in your answer any specific requirements which apply to particular elements of remuneration, such as stock options, bonuses, and termination payments.

As explained above, articles 2:383c DCC through 2:383e DCC provide for specific disclosure rules for the remuneration of board members (both members of the management board as well as members of the supervisory board) of listed Dutch companies. Pursuant to these provisions, the total amount of remuneration paid to each individual management board member has to be disclosed in the supplementary notes to the company's annual accounts, distinguishing between:

- periodically paid fixed salaries;

- remuneration payable in the future;

- payments made on termination of a management board member's tenure;

- profit sharing payments and bonus payments, insofar as these payments have been made by the company in the relevant book year, with an additional notification requirement if the bonus has been paid on the basis of performance criteria which have been met in the relevant book year;

- remuneration awarded in the form of shares or options to acquire shares, which have not yet been exercised, along with detailed information regarding these shares and options (including information on the exercise price);

- loans, advance payments and warranties issued to management board members.

In addition, art. 2:383c subd. 3 DCC contains a similar provision on disclosure of the remuneration of supervisory board members, provided that if the corporation makes payments on remuneration in the form of a profit sharing scheme or bonus, particular disclosure is made of the reasons underlying such payments.

Article 2:383c subd. 2 and 4 DCC also requires the disclosure of the remuneration paid to each former director (both manager and supervisory director) to the extent that such remuneration is charged to the company in the relevant financial year. For former members of the management board this amount needs to be split into long-term remuneration and termination of contract rewards.

Finally, art. 2:383e DCC, requires the disclosure of possible loans, payments on account and guarantees provided to members of the management board or the supervisory board by the company, its subsidiary company or companies with whom it consolidates financial data.

The Dutch Corporate Governance Code serves as a supplement to the above-mentioned provisions of the DCC on public disclosure, indicating that the remuneration structure, including severance pay, shall be simple and transparent (principle II.2). More specifically, the Code requires the composition of a remuneration report. Principle II.2 elaborates, by stating that the report of the supervisory board shall include an account of the manner in which the remuneration policy has been implemented in the past financial year, as well as an *overview of the remuneration policy* planned by the supervisory board for the next financial year and subsequent years (principle II.2; best practice provision II.2.12). In particular, the report is required to explain how the chosen remuneration policy contributes to the achievement of the long-term objectives of the company and its affiliated enterprise in keeping with the risk profile (best practice provision II.2.12).

Best practice provision II.2.13 fills in the overview referred to in best practice provision II.2.12, stating that the overview of the remuneration policy should contain the following information:

a) an overview of the costs incurred by the company in the financial year in relation to management board remuneration; this overview shall provide a breakdown showing fixed salary, annual cash bonus, shares, options and pension rights that have been awarded and other emoluments;
b) a statement that the scenario analyses referred to in best practice provision II.2.1 have been carried out;
c) for each management board member, the maximum and minimum numbers of shares conditionally granted in the financial year or other share-based remuneration components that the management board member may acquire if the specified performance criteria are achieved;
d) a table showing the following information for incumbent management board members at year-end for each year in which shares, options and/or other share-based remuneration components have been awarded over which the management board member did not yet have unrestricted control at the start of the financial year:
   i) the value and number of shares, options and/or other share-based remuneration components on the date of granting;

ii) the present status of shares, options and/or other share-based remuneration components awarded: whether they are conditional or unconditional and the year in which vesting period and/or lock-up period ends;

iii) the value and number of shares, options and/or other share-based remuneration components conditionally awarded under i) at the time when the management board member obtains ownership of them (end of vesting period); and

iv) the value and number of shares, options and/or other share-based remuneration components awarded under i) at the time when the management board member obtains unrestricted control over them (end of lock-up period);

e) if applicable: the composition of the peer group of companies whose remuneration policy determines in part the level and composition of the remuneration of the management board members;

f) a description of the performance criteria on which the performance-related component of the variable remuneration is dependent in so far as disclosure would not be undesirable because the information is competition sensitive, and of the discretionary component of the variable remuneration that can be fixed by the supervisory board as it sees fit;

g) a summary and account of the methods that will be applied in order to determine whether the performance criteria have been fulfilled;

h) an ex-ante and ex-post account of the relationship between the chosen performance criteria and the strategic objectives applied, and of the relationship between remuneration and performance;

i) current pension schemes and the related financing costs;

j) agreed arrangements for the early retirement of management board members.

Finally, the Code aims to enhance transparency by requiring that the main elements of the management board member's contract with the company shall be made public after it has been concluded and in any event no later than the date of the notice calling the general meeting where the appointment of the management board member will be proposed (best practice provision II.2.14). In the Committee's opinion, the point is that shareholders should be able to take this information into account when considering how to vote on appointments to the board.

2.4 Is timely disclosure required with respect to stock options, their vesting, exercise, and the sale of the relevant shares to third parties?

In addition to the general reporting obligation described above in relation to shares and options awarded to board members of Dutch listed companies, the DFSA also contains a regime for timely ad-hoc disclosure of transactions in connection therewith. Pursuant to article 5:48 subd. 3 DFSA, each board member (including members of the management board as well as of the supervisory board) within two weeks after his or her appointment has to report to the AFM the number of shares (including share options) and/or voting rights the board member holds in the company, as well as shares and voting rights which are held in any other Dutch listed company. Board members are furthermore required to report any change in the shares and/or options and the voting rights they hold in any Dutch listed company to the AFM (article 5:48 subd. 6-7 DFSA).

2.5 What are the rules on disclosure of share transactions executed by the company's insiders (such as directors, officers, auditors etc.)?

As described above under 2.4, each management board member or supervisory board member who executes a transaction with regard to the shares held in the capital of the company (or any listed company for that matter), exercises share options, or engages in a transaction which affects the voting

rights with respect to any listed Dutch company is required to report the transaction to the AFM (see article 5:48 DFSA). Other corporate insiders are not subject to these specific notification obligations. Still, they are bound by the general notification requirement regarding substantial changes of interests. Article 5:38 DFSA requires any shareholder to notify the AFM upon passing predetermined thresholds in share ownership or voting rights. The thresholds are 5%, 10 %, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75% and 95% (article 5:38 subd 3 DFSA). If a corporate insider engages in a transaction regarding the shares held in the company's capital, exercises share options to acquire shares of the company, or engages in any other transaction which impacts on the voting rights held in the company through which one of these thresholds would be passed, he or she must notify the AFM.

2.6 What information on directors' remuneration must be included in public offer prospectuses and listing particulars?

Annex I, no. 15 (15.1-15.2) to EC Regulation 809/2004 provides that a prospectus of a Dutch listed company or a Dutch company seeking a listing has to contain information on the amount of remuneration paid to members of the management board and supervisory board as well as to certain senior managers in the preceding book year (including any contingent or deferred compensation and benefits in kind). The information has to be provided for each individual person. Also, the company must list the total amount set aside or accrued for pensions, retirement or similar benefit for its board members and/or senior managers.

In this context, the Dutch rules regarding public takeovers also have to be mentioned. These rules are laid down in the Public Offers Decree ("*Besluit openbare biedingen*"), which came into force in October, 2007. Pursuant to these rules, all offer documentation in connection with a public offer must contain information on the compensation for each individual board member of the target company who will resign upon the offer being declared unconditional as well as information on the compensation of each board member of the offeror company which he or she will receive upon the offer being declared unconditional (Annex A to the Public Offers Decree, nos. 2.8 and 2.9). If the public offer also envisages that the shares of a third party, not being the target or the offeror, might be used as consideration the public offer documentation additionally has to contain information regarding the compensation of the board members of the company whose shares are being offered. There must be disclosure of the compensation which they will receive if they step down upon the offer being declared unconditional, or which they will receive in connection with the offer being declared unconditional without stepping down (Annex F to the Public Offers Decree, nos. 5 and 6).

3. Remuneration of the Board of Directors

3.1 Who fixes the board of directors' remuneration? What are the relevant procedures? (in two-tier systems, please refer to the supervisory board)

Since Dutch listed companies typically have a two-tier board structure (see above no. 1.1), this section will address the remuneration of the members of the supervisory board.

Article 2:145 DCC provides that the general meeting of shareholders is to fix the remuneration of the supervisory board members. In practice the supervisory board itself will draw up a proposal for

remuneration packages for supervisory board members, which is then submitted to the company's general meeting of shareholders for approval.

3.2 Are there provisions and/or practices as to the amount of the remuneration and its distribution (for example, as to whether distribution should be proportionate) among board members? What types of remuneration are allowed?

There are no legal constraints as to the amount of remuneration and its distribution among the members of the supervisory board. In practice, however, supervisory board members are usually paid a fixed salary for their services and typically there is not a lot of difference in the amounts of remuneration paid to the various members of the same supervisory board. Given the fact that the supervisory board is to exercise independent oversight on the company's general activities and policy, it would not make sense to primarily award variable remuneration components to supervisory board members.

Best practice provision III.7.1 of the Code provides that the company in principle should not grant members of the supervisory board shares or options to acquire shares as part of their remuneration packages.

3.3 Are personal loans to the company's directors and officers allowed?

Under Dutch law, there is no statutory provision which would prohibit granting personal loans to the company's directors and officers (assuming that this question applies to members of both the management board as well as the supervisory board). Article 3:83e DCC (described above under no. 2.3) does require that these loans be reported in the supplementary notes to the company's annual accounts. Best practice provision II.2.9 of the Code, however, provides that the company is not to provide any personal loans or guarantees to members of the management board except for when this is done in the ordinary course of business and at conditions which apply to the entire staff of the company. The same best practice provision prescribes that these loans need to be approved by the supervisory board and that these loans are not to be remitted. Best practice provision III.7.3 contains the same requirements vis-à-vis members of the supervisory board.

4. Executive Directors' Remuneration

4.1 Who fixes the executive directors' remuneration? What are the relevant procedures? Are shareholders required to approve directors' remuneration, the remuneration policy, or the remuneration report (see question 2) on an annual or other basis? (In two-tier systems, please refer to the management board)

The remuneration of members of the management board is essentially fixed in two stages. Put generally, the company has both a general remuneration policy with regard to executive remuneration as well as separate contracts with individual members of the management board in which their specific remuneration packages are subsequently laid down. Each of these instruments is fixed through a different procedure, which will be described in further detail below.

Article 2:135 DCC provides that every Dutch large corporation (N.V.) - which would include all Dutch listed companies - is required to have a policy with regard to executive remuneration in place which is approved by the general meeting of shareholders. According to the same statutory provision, this policy has to cover at least the remuneration items mentioned in article 2:383c DCC, being periodically paid fixed salaries, remuneration payable in the future, payments made on termination of a management board member's tenure, and profit sharing payments and bonus payments.

As to the procedure, article 2:135 DCC does not indicate which body of the company is responsible for drawing up the remuneration policy. In practice, however, this would be the supervisory board, since the management board would have a clear conflict of interest if it were to draw up a policy for its own remuneration. For listed companies, principle III.5 of the Code prescribes that if the supervisory board has more than four members, a separate remuneration committee is to be installed within the supervisory board (see below under 4.2). In that case, the remuneration committee draws up a proposal for the remuneration policy for internal discussion within the supervisory board. The entire supervisory board, however, would still have to decide on the proposal which is to be submitted to the general meeting of shareholders. This overall responsibility cannot be delegated to the remuneration committee.

The remuneration policy is then to be submitted to the general meeting of shareholders for approval. Thus, the remuneration policy will have to be included on the agenda on the annual general meeting of shareholders and the policy itself will have to be distributed to shareholders in advance. Pursuant to article 2:135 subd 2 DCC, the remuneration policy simultaneously has to be sent to the company's works council ("*Ondernemingsraad*") if the company is required by law to establish such a works council. Currently, the works council has no formal involvement with regard to the remuneration policy (under article 27 of the Works Council Act, the works council does have a right of approval with regard to a contemplated change in the company's remuneration systems, but this in principle does not concern executive remuneration), but a bill which is currently pending before the Dutch parliament, if enacted, would allow the works council to issue a statement in advance with regard to the remuneration policy and also to attend and address the general meeting of shareholders in which the remuneration policy is to be adopted.

The shareholders may then either vote in favour of adopting the remuneration policy or vote against it. There is no agreement as to whether or not shareholders may amend the proposed remuneration policy or adopt the policy in amended form. As of yet, the power of the shareholders appears to be limited to a voting right only, meaning that they can only force a modification of a proposed remuneration policy if they were to vote against adopting it altogether. Still, shareholders can exert substantial influence on a listed company's remuneration policy, especially if institutional investors are involved and/or if important voting advisory firms such as RiskMetrics issue a negative recommendation. In 2008, for instance, the shareholders of Philips N.V. rejected the company's proposed remuneration policy. Again in 2008, the board of Corporate Express N.V. was prompted to withdraw its proposed remuneration policy after the shareholders had voiced strong objections to the proposal prior to the general meeting of shareholders.

Within the framework of the remuneration policy - provided that this policy has been approved by the general meeting of shareholders - specific remuneration packages are then awarded to the individual members of the company's management board. Article 2:135 subd 3 DCC provides that in principle, these specific remuneration packages are fixed by the general meeting of shareholders, but this power can be delegated to another body through a provision in the company's articles of association. For Dutch listed companies, it is common practice that this power is delegated to the supervisory board.

Individual remuneration packages are awarded through a contract (either for employment or for services) between the company and the individual member of the management board.

The Code prescribes as best practice that if a remuneration committee has been established within the supervisory board, the remuneration committee will prepare a proposal for individual remuneration packages (III.5.10). However, the Code clearly stipulates (principle II.2, first part) that the entire supervisory board is responsible for the remuneration process. Thus, the entire supervisory board will ultimately have to decide on the remuneration package which is to be granted to a management board member. The company's works council is not formally involved in this process, even though under pending legislation the works council would be granted the right to issue a statement with regard to the appointment and resignation of members of the management board, and also to address the general meeting of shareholders on those subjects. It is conceivable that the works council could use this power to covertly address remuneration issues for new members of the management board which are to be appointed.

Thus, shareholders are not formally involved in the decision-making process regarding the fixing of individual remuneration packages. There is, however, one notable exception. If an individual remuneration package contains a component of shares and/or options to acquire shares, a proposal in relation to those components has to be submitted to the general meeting of shareholders for approval (article 2:135 subd 4 DCC). The proposal is to contain at least the amount of shares or options that a board member could acquire and the criteria that will be applied for awarding those shares or options. Shareholders therefore have a vote with regard to these share- or options-based remuneration components. In principle however, a negative shareholder vote does not affect the supervisory board's authority to execute the contract with the management board member (article 2:135 subd 4, last sentence DCC).

The Code prescribes as best practice that the supervisory board is to draw up a scenario-analysis of the possible consequences - more specifically, the possible outcomes of the variable remuneration components such as cash bonuses and share options - prior to setting the proposed overall remuneration policy as well as prior to fixing the specific remuneration packages for individual management board members (best practice provision II.2.1).

Finally, the Code contains two new best practice provisions (best practice provisions II.2.10 and II.2.11) which address the issue of adjusting the value of remuneration which has been granted but which has not yet been paid (such as options which have not yet vested) and the issue of reclaiming remuneration which has already been paid (claw back). Pursuant to best practice provision II.2.10, the supervisory board has the authority to readjust the value of the variable remuneration components (both upwards as well as downwards) on the grounds of exceptional circumstances which have arisen during the time period in which the performance criteria to which the conditional variable components had been linked would have had to have been to be met. This authority could only be applied if the outcome of the variable remuneration system which is in place would lead to unreasonable outcomes. In addition, pursuant to best practice provision II.2.11, the supervisory board has the authority to reclaim remuneration paid to a member of the management board if it turns out that this remuneration has been paid on the basis of incorrect financial information. In essence, this claw back provision somewhat resembles an unjust enrichment cause of action. It should be noted that both of these Code-provisions – being non-binding – will probably not be directly enforceable. According to the explanatory notes to the Code, the supervisory board will have to implement these remuneration adjustment powers in the contracts which it enters into on behalf of the company with the individual

members of the management board. At the moment, there is not yet any relevant experience in the Netherlands as to how these arrangements can function effectively in practice.

4.2 Is the board required, or recommended as best practice, to create a remuneration committee? If yes, please specify: (i) the committee's composition (if independent directors should be appointed to this committee, please give the relevant definition and indicate whether any special procedures apply to the appointment of independent non-executive directors); (ii) the committee's competences and which company body it reports to; and (iii) how the committee operates

As already briefly touched upon under 4.1, the Code prescribes as best practice that a separate remuneration committee be created within the supervisory board if the supervisory board consists of more than four members (III.5). Alternatively, if no separate remuneration committee is created, the specific Code provisions applying to the remuneration committee (best practice provisions III.5.10 - III.5.13) apply to the entire supervisory board. In practice, most Dutch listed companies have established such a remuneration committee.

As to the composition of the remuneration committee, the Code lists two separate best practices (best practice provisions III.5.11 and III.5.12). Pursuant to these best practices, the chairman of the supervisory board is barred from simultaneously serving as chairman of the remuneration committee. In addition, former members of the company's management board, as well as supervisory board members who also serve on the supervisory boards of other listed companies, are precluded from serving as the remuneration committee's chairman (these persons can still serve on the remuneration committee as ordinary members). Finally, the remuneration committee may contain only one supervisory board member who simultaneously serves as management board member at another listed company.

The competences of the remuneration committee are specified by the supervisory board, given that the latter draws up terms of reference for each committee, which indicate the role and responsibilities of the committee and the manner in which it discharges its duties (best practice provision III.5.1). In any event, the remuneration committee is charged with the following competences by the Code (best practice provision III.5.10):

a) making a proposal to the supervisory board for the remuneration policy to be pursued;
b) making a proposal for the remuneration of the individual members of the management board, for adoption by the supervisory board; dealing with: (i) the remuneration structure and (ii) the amount of the fixed remuneration, the shares and/or options to be granted and/or other variable remuneration components, pension rights, redundancy pay and other forms of compensation to be awarded, as well as the performance criteria and their application; and
c) preparing the remuneration report as referred to in best practice provision II.2.12.

The competences of the remuneration committee imply that it has the initial responsibility for formulating the basic remuneration policy principles, whether or not on the basis of an evaluation of the existing remuneration policy.

Under best practice provision III.5.1 of the Code, the remuneration committee is required to establish an internal regulation with regard to its operations, which regulation is also to be published on the company's website. In addition, best practice provision III.5.13 provides that the remuneration

committee may only enlist the aid of a specialised remuneration advisor if this advisor is not at the same time advising the members of the management board on remuneration issues.

4.3 Which types of remuneration are permitted?

As a preliminary remark, it should be noted that there are no statutory provisions which prohibit granting specific types of remuneration. Thus, in principle, each of the specific remuneration components described below would be allowed under Dutch law. The Code, however, does contain a number of best practices regarding certain types of remuneration. These best practices will be described in more detail below. Additionally, the Code also contains a number of general principles with regard to overall remuneration. Most of these provisions have recently been added to the Code in the 2008 updated version. Since these provisions are of relevance for a better understanding of the Code's approach to remuneration (and therefore, of the approach that Dutch listed companies should take to that subject), a brief summary thereof will be provided below.

The first issue which is addressed in the Code is the relationship between fixed remuneration components and variable remuneration components. Typically, a remuneration package for management board members consists of a mix of both of these types of remuneration. These variable remuneration components, often in the form of cash bonuses and/or shares and options to acquire shares, are usually linked to certain predefined performance criteria and are aimed at securing alignment between the company's interests and those of its management board members. Recently, these variable remuneration components have drawn some heavy fire in the Netherlands and abroad, because they were viewed as the cause of executive remuneration excesses, and – perhaps more significantly – because it was widely held that these variable remuneration components in effect provided incentives to management for high risk- and even irresponsible behaviour.

Partially in response to this public sentiment, the Code now provides that the relationship between fixed remuneration components and variable remuneration components is to be "appropriate" (principle II.2 first part). The Monitoring Committee in drafting the 2008 updated Code considered prescribing a maximum of 50% for variable remuneration components vis-à-vis fixed remuneration components, but this proposal was not maintained in the final version. Also, the variable remuneration components are to be linked to "mostly long term" goals (principle II.2 first part). This again is a modification which was implemented in the 2008 Code, since the 2003 Code merely prescribed that variable remuneration components were to be linked to a mix of both short- as well as long term goals.

In fixing the remuneration for management board members, the supervisory board has to take into account the impact on (and presumably: the relationship with) the overall level of remuneration within the entire enterprise of the company (principle II.2 first part). Through this 2008 amendment, the Monitoring Committee aimed to provide an internal check on excessive remuneration of management board members. Also, the supervisory board in determining the level and structure of a management board member's remuneration package has to consider – among other things – the overall development of the company's results, the development in the value of the company's shares and non-financial indicators which are relevant for the long term value creation of the company (principle II.2 first part). The last part on the non-financial indicators is a recent addition to the 2008 Code. Since usable non-financial indicators will not always be readily available for all kinds of listed companies, it remains to be seen how this requirement will be dealt with in practice.

Finally, the Code prescribes that the structure of the individual remuneration packages (i.e. the way in which the various remuneration components are put together and the way in which each of these components functions) is to be straightforward and transparent (principle II.2 first part), and also that the total remuneration package is to be in line with the company's risk profile. The latter requirement follows implicitly from the requirement that the remuneration may not induce management board members to take risks which are inconsistent with the company's strategy and overall policy (principle II.2 first part). Thus, the supervisory board will have to reconsider the alignment of its remuneration incentives with the company's desired risk profile. As a result, the company's executive remuneration is basically linked to a company's risk management.

The rules relating to each specific remuneration component will be highlighted below.

In answering, please consider each of the following:

(a) bonuses

In principle, bonuses are allowed under Dutch law. However, the bonuses will have to fit within the framework of the company's overall executive remuneration policy, will most likely be required to be linked to specific and predefined performance criteria, and will have to fall within the general parameters described above.

(b) stock options, including discounted stock options

Stock options are permitted, again presuming that they meet the general criteria for variable remuneration components described above. In addition, best practice provision II.2.4 of the Code requires that stock options cannot be exercised within a period of three years after the options have been granted. Also, these options have to be linked to predefined performance targets, the exercise price may not be set below a certain predefined and measurable price rate (best practice provision II.2.6), and the conditions of the stock options arrangement – including the exercise price – may not be amended prior to vesting of the options (best practice provision II.2.7).

(c) stock grants

In principle, stock grants are permitted as part of executive remuneration. Pursuant to best practice provision II.2.5 of the Code, however, a management board member is barred from disposing of shares received in the form of stock grants for a period of five years after issuance, or alternatively until loss of office, depending on which period is the shortest. Again, the requirement of a link to predefined performance targets applies.

(d) profit sharing

Neither Dutch statutory corporate law, nor the Code explicitly addresses the issue of permissibility of profit sharing (even though article 2:383c DCC contains a disclosure obligation with regard to profit sharing arrangements). It would therefore appear that this kind of arrangements is allowed. Still, the general requirements with regard to all variable remuneration components described above also apply to profit sharing systems.

(e) Benefits in kind

There are no specific requirements with regard to this kind of remuneration. The same approach used in relation to profit sharing arrangements would apply.

4.4 Are there specific rules, including shareholder approval requirements, as to these different types of remuneration?

The DCC indicates that the remuneration of directors in the form of shares or options to acquire shares, is subject to the prior approval of the general meeting of shareholders (art. 2:135 subd. 4 DCC). A more detailed elaboration of the subject, however, is provided by the Dutch Corporate Governance Code. In particular, the Code concentrates on the ultimate aim of assuring long-term value creation and elaborates on the responsibilities of the supervisory board in relation to the proportionality – *i.e.* the balance between fixed and variable components with regard to the share price performance– and the transparency of directors' remuneration. For this purpose, the supervisory board is granted an expanded set of competences to monitor both the management board and the implementation of the remuneration policy, including the scenario analysis (best practice provision II.2.1.-II.2.2), the power to adjust variable components of remuneration (best practice provision II.2.10) and the right to invoke a claw-back clause (best practice provision II.2.11).

Concerning the proportionality of remuneration, the Code starts by indicating that when the overall remuneration is fixed, its impact on pay differentials within the enterprise should be taken into account. The remuneration structure should promote the interests of the company in the medium and long term, may not encourage management board members to act in their own interests or to take risks that are not in keeping with the adopted strategy, and may not 'reward' failing board members upon termination of their employment (principle II.2). Accordingly, in its best practice provisions the Code takes a clear stand against the use of unconditional grants of shares or options to take shares. The Code provides that options to acquire shares are a conditional remuneration component, which become unconditional only after a period of at least three years from the grant date, provided that the directors have then achieved challenging targets specified beforehand (best practice provision II.2.4). In a similar vein, the Code indicates that shares granted to management board members without financial consideration shall be retained for a period of at least five years or until at least the end of the employment, if this period is shorter. The number of shares to be granted shall then be dependent on the achievement of challenging targets specified beforehand (best practice provision II.2.5). By virtue of these provisions, the Code does facilitate the assignment of shares and options as remuneration components, yet submits their actual exercise to the preconditions of certain performance criteria being met and a particular time span having elapsed.

The criteria on the basis of which the variable components of remuneration are granted, however, are not entirely straightforward and do not give any account of what might constitute unexpected circumstances. Consequently, the supervisory board is now committed to perform a scenario analysis in an attempt to better anticipate future changes. The Code provides that, before drawing up the remuneration policy and determining the remuneration of individual management board members, the supervisory board should analyse the possible outcomes of the variable remuneration components and how they may affect the remuneration of the management board members (best practice provision II.2.1). The supervisory board should then determine the level and structure of the directors' remuneration with reference to this scenario analysis and with due regard for the pay differentials within the enterprise (best practice provision II.2.2), the results, the share price performance and non-financial indicators relevant to the long term objectives of the company and the risks to which variable remuneration may expose the enterprise (best practice provision II.2.3).

After the remuneration structure has been set, the supervisory board still retains two important instruments in order to remove the possible unreasonable effects of variable components of remuneration. The first instrument is considered to be the 'ultimate remedy' power of the supervisory board. In essence, if a variable remuneration component conditionally awarded in a previous financial year would, in the opinion of the supervisory board, produce an unfair result due to extraordinary circumstances during the period in which the predetermined performance criteria have been or should have been achieved, the supervisory board has the power to adjust the value downwards or upwards (best practice provision II.2.10). According to the explanations of the Monitoring Commission, this

provision does not only comprise new contracts, giving the supervisory board the responsibility to endeavour to include such a provision in existing contracts as well.

The second instrument concerns the claw-back clause, providing the supervisory board with the power to recover from the management board members any variable remuneration awarded on the basis of incorrect financial or other data (best practice II.2.11). The Monitoring Commission explains that this power of the supervisory board relates both to situations where the remuneration has been awarded but not yet received by the management board member and to situations where the remuneration has already been received. Similar to the aforementioned provision, this power does not apply to new contracts only; the supervisory board also has a responsibility to endeavour to include such a provision in existing contracts as well.

4.5. Are there any restrictions on how payments are made?

Under Dutch law, there are no specific requirements as to methods of payment.

4.6 Are there any specific requirements for termination payments made on loss of office, whether through dismissal, retirement, on a takeover or otherwise?

Dutch statutory corporate law does not contain specific provisions with regard to compensation received by a management board member upon termination of their contract and/or resignation from office. Article 2:383c DCC merely requires that termination payments are disclosed in the explanatory notes to the annual accounts of the book year in which the payments have been made. In addition, if the management board member has an employment contract with the company (as opposed to a contract for services), the general rules of Dutch labour law as laid down in Book 7 of the DCC will apply. These rules can be of relevance in determining the amount of severance payment in case of termination of employment, provided that parties have not arranged for this in the employment contract itself.

The Code provides as both a principle of corporate governance (principle II.2 first part) as well as a specific best practice (II.2.9) that the remuneration a management board member receives upon loss of office – either voluntarily or through dismissal – should be limited to one year's pay of fixed salaries only. If this would be unreasonable in case of dismissal of a management board member in his first term of office, this amount could be raised to two years' worth of fixed salaries. These Code provisions were modified in the 2008 update. The 2003 Code only provided for a cap for involuntary dismissals. Furthermore, the Code provides that if a termination payment is made to a current- or former management board member, the remuneration report which covers the book year in which the payment has been made is to provide a separate explanatory statement with regard to that specific termination payment (best practice provision II.2.15).

As to takeover situations, the Dutch Public Offer Decree contains a set of disclosure requirements with regard to remuneration to be received by board members of both a target company as well as board members of the offeror company or a possible third party in the context of a successful takeover. These requirements have been described above under no. 2.6. In recent years, the Monitoring Committee has explored the possibility of specifically addressing executive remuneration which is typically triggered through contractual change of control clauses, but this issue has not been included in the 2008 updated Code.

4.7 Are there any specific requirements concerning directors' service contracts with respect to, for example, their duration and disclosure?

According to best practice provision I.1 of the Code, a management board member's tenure on the board of a Dutch listed company should be limited to a period of four years, with the possibility of re-election. It would appear from this provision that service contracts with management board members should be limited to a maximum of four years. Given the fact that there is still limited disclosure on this topic, it is unclear how this issue is dealt with in practice.

The Code contains a separate requirement with regard to disclosure of management board members' contracts. Upon execution thereof, the main elements of the contract are to be disclosed (best practice provision II.2.14). These elements include, among other things, descriptions of the fixed- and variable remuneration components and the applicable performance criteria, possible severance payment arrangements (if applicable), possible change of control clauses and other remuneration arrangements such as pension agreements.

5. Non-executive Directors' Remuneration

5.1 Are non-executive directors separately paid for their participation in committees of the board of directors? Do any restrictions apply to the payment of non-executive directors via stock options?

Given the fact that most Dutch listed companies have a two-tier board structure, in which the non-executive directors make up the separate body of the supervisory board, the answer to this question will address the position of the members of the supervisory board. General information with regard to remuneration of supervisory board members has been provided above under §. 3.1.

It is indeed possible to grant specific remuneration based on participation by a supervisory board member in one of the supervisory board's subcommittees, such as the audit committee. There are no statutory rules or Code provisions which specifically address these remuneration arrangements.

5.2 May a company make payments to non-executive directors, additional to their directors' fees, for services, such as legal or brokerage services, outside the usual scope of directors' duties?

Even though strictly speaking there are neither legal constraints nor constraints on the basis of specific best practices on the making of payments to supervisory board members for legal- or brokerage services, it would appear that making such payments would not be desirable. It could be argued that making supervisory board members dependent upon payments for additional services to the company could compromise their independence and possibly their integrity. It is not clear what the common market practice is in this respect.

As a final note on this subject, it is important to touch upon the fact that the Dutch government presented to the Lower House of the Dutch Parliament a bill containing rules for cases in which executive and non-executive directors form part of one board (one-tier board structure). This bill focuses on the amendment of Book 2 of the DCC in connection with the adjustment of the rules

governing management and supervision in public and private limited companies (Parliamentary Papers II 2008/09, 31 763, no. 2). A decision to this bill will be taken by the plenary meeting of the Dutch Parliament in June 2009.