The One-Tier Board
in the changing and converging world
of corporate governance

A comparative study of boards
in the UK, the US and the Netherlands
The One-Tier Board
in the Changing and Converging World of Corporate Governance

A comparative study of boards
in the UK, the US and the Netherlands

De One-Tier Board
(Monistisch Bestuur)
in de veranderende en convergerende wereld van corporate governance

Een vergelijkende studie van besturen
in het VK, de VS en Nederland

Proefschrift
ter verkrijging van de graad van doctor aan de Erasmus Universiteit Rotterdam
op gezag van de rector magnificus
Prof.dr. H.G. Schmidt
en volgens besluit van het College voor Promoties.

De openbare verdediging zal plaatsvinden op dinsdag 11 oktober 2011 om 16.00 uur

door

Willem Jacob Lodewijk Calkoen
geboren te Utrecht
Defence mechanisms maintained, 1987
In 1987 the Committee Van der Grinten\(^{899}\) came to the conclusion that defence mechanisms could be left as they were, but that the courts should intervene in extreme cases. In the same period Professor Maeijer spoke in favour of defence mechanisms, in his Silver Jubilee speech in 1987, as a way for the board to act in the “interest of the company.”\(^{900}\) This attracted attention at the time, because of the takeover battle between the publishing companies Kluwer and Elsevier. Elsevier wished to take over Kluwer, but Kluwer had defence mechanisms and successfully protected itself.

Discussions about defence mechanisms from 1989
From 1989 the “Vereniging voor de Effectenhandel”, the body running the “Beurs”, the Association of Stocktraders, supported by the Minister of Finance, Mr Onno Ruding, argued and negotiated for less defence mechanisms or at least less far reaching defence mechanisms. The old boys network of brokers and investment bankers at the top of the Amsterdam Stock Exchange had become less tight. The former, by now, thought that there would be higher volume of trade in a free market without boards that can impede takeovers of “their” companies. In these discussions the Association of Large Listed Companies (VEUO) opposed the Minister of Finance Ruding and his successors Kok and Zalm and the “Vereniging voor de Effectenhandel”. The discussion was settled by a compromise: the establishment of the Netherlands first corporate governance committee, the Committee Peters in 1997, which would give more rights to shareholders and lay down a number of obligations for supervisory directors.

Enterprise Chamber injunctions from 1994
In the same period shareholders and other stakeholders got the right to start Enterprise Chamber cases with immediate impact, because they could ask for preliminary injunctions. Asking for an investigation had been theoretically possible since the Companies Act of 1928. At the time Professor Mr E.J.J. van der Heyden was strongly opposed to this idea. He argued that it was against the interests of companies.\(^{901}\) In 1971, as mentioned above, the new Investigation Court, the Enterprise Chamber, was founded, giving shareholders, the prosecutor and unions the right to ask for an investigation. The first big case was \textit{OGEM}, a huge bankruptcy, where directors were found to have been guilty of serious mismanagement. The receiver in the

\(^{899}\) Van der Grinten was the most influential corporate law professor of that period; the \textit{Handbook for the NV and the BV}, Van der Grinten (1989) became the corporate law bible.

\(^{900}\) \textit{Naamloze Vennootschap 76/1}, January 1989.

\(^{901}\) E.J.J. van der Heyden, \textit{Het Wetsontwerp op de Naamloze Vennootschappen 1925} (1926), p. 69 (“Van der Heyden (1926)”), where he writes “Risum tenamus, don’t let us laugh”.

272
bankruptcy was the plaintiff and the case made the public aware, to much surprise, that respected directors of such a large public company could mismanage so badly. 902

In 1994 an important change was made in the Law of Investigation of Enterprises, "het Enquêterecht", introduced already in 1928 and amended in 1971. The new point was that plaintiffs could ask for immediate injunctions such as blocking decisions or agreements, appointment and dismissal of directors, etc. This led to a large volume of cases concerning smaller unlisted companies and some well published cases involving large listed ones. These large cases are explained in further detail in the section on duties of directors (in sub-section 4.6.4), but are described in summary here to show how effective this 1994 extension of the law was.

The first large case involving injunctive relief requests was the Gucci case of 1999, the handbag war where LVMH, Louis Vuitton Moët Hennessy, threatened Gucci NV by silently buying a large percentage of shares and Gucci defended itself by issuing shares to an employee benefit fund, giving it extra votes, in order to outvote LVMH. LVMH asked the court to order that Gucci could not use these extra votes and Gucci asked the court to order that LVMH would not be allowed to vote its recently acquired shares. First, the Enterprise Chamber ordered that none of the parties could vote with the extra shares. However, Gucci’s issue of shares to employees had been paid thanks to a huge loan from Gucci, which transaction was in the end, upon appeal, in 2000, declared as against the rules of financial assistance by the Supreme Court. 903

RNA, Rodamco North America N.V., case was the target in the next takeover defence case of 2003, where the target took temporary defence measures. The Enterprise Chamber ordered that these mechanisms could not be used, but in the end they were validated by the Supreme Court. 904

HBG, Hollandsche Beton Groep N.V., was the object of the first large shareholder rights case in 2001, where shareholders demanded the right of consultation with the management board on major strategic moves. 905 The shareholders got the Enterprise Chamber to order HBG not to enter into a large transaction, but the Supreme Court overturned this decision in 2003.

The subsequent shareholder rights case involved Stork N.V. in 2007, where shareholders wanted a say in strategy (in order to split the group). Shareholders asked for an order that an issue of shares by Stork to a friendly foundation could

not be used and Stork asked for an order, that shareholders could not vote out the supervisory board. The Enterprise Chamber found a middle way by deciding that parties had to negotiate and chose the solution of forcing parties to negotiate under the guidance of 3 super supervisory board members.\textsuperscript{906}

In the \textit{ABN AMRO in Sale LaSalle Bank} case of 2007 shareholders asked for the right of veto for the sale of LaSalle Bank by ABN AMRO – and the Enterprise Chamber, indeed, ordered a stay of the transaction, which decision was overturned by the Supreme Court.\textsuperscript{907}

In the \textit{ASMI} – a large semi conductor producer – case of 2009 in the Enterprise Chamber and the decision of the Supreme Court in 2010 shareholders wanted a say in strategy (wishing to split the group) and got half a victory in the Enterprise Chamber, which stayed all voting and again ordered parties to negotiate to find a solution. This decision, however, was overturned by the Supreme Court.\textsuperscript{908}

In the \textit{DSM N.V.} case of 2007 US shareholders asked the Enterprise Chamber to block a special clause in the articles of association of DSM in 2007 the purpose of which was to give higher dividends to shareholders who owned the shares for more than three years. The Enterprise Chamber blocked the arrangement that would have favoured long-term shareholders, but the Supreme Court overturned the decision.\textsuperscript{909}

Since 1994 the volume of Enterprise Chamber cases has grown to about 45 per annum. Most are joint venture cases and cases concerning unlisted closed companies, the Dutch “BVs”, comparable to British Ltd’s. In those smaller cases the Enterprise Chamber functions well in providing an orderly, third party forum for what would

\textsuperscript{906} \textit{Stork}, Enterprise Chamber, OK 17/1/2007, JOR 2007/42, the US investors Centaurus and Paulson, who acquired 31.4\% in Stork, demanded that Stork split itself into 3 divisions: aerospace, food systems and technical services and sell off the last two. The Stork board reacted stiffly. The communication was not good. Centaurus asked for a meeting with the chairman, who reacted that he did not deal with strategy and referred Centaurus to the CEO. Both Centaurus and Stork approached the Enterprise Chamber, which concluded that the communication between the boards and these two large shareholders was not good and that they were both at fault. The Enterprise Chamber ruled that the board could not use its defence mechanism outside a hostile takeover, merely to protect itself, and certainly not indefinitely, and that the supervisory board could not be dismissed by shareholders and it appointed three super-supervisory directors to be in charge of the negotiations of strategy.

\textsuperscript{907} \textit{ABN AMRO in Sale LaSalle Bank}, HR 13/7/2007, NJ 2007, 434, see note 928 below.

\textsuperscript{908} \textit{ASMI}, HR 9/7/2010, NJ 2010, 544. The \textit{ASMI} case is a long winded case that went in and out of the Enterprise Chamber three times. The shareholder activists were unhappy with the founder, CEO, 21\% shareholder Del Prado, who as they said ran the company as a family company, appointing his son as his successor and having the supervisory board appoint himself as advisor to that board. The Supreme Court confirmed again that the management board determines the strategy and that the supervisory board supervises strategy. They should be free to do so and decided importantly that the supervisory board does not have the obligation to mediate between shareholders and the managing board but can act as deemed fit, which was a point that the Enterprise Chamber had left rather vague in its \textit{Stork} and \textit{ASMI} decisions. The Supreme Court referred the case back to the Enterprise Chamber, which decided that the investigation would be stopped.

\textsuperscript{909} \textit{DSM}, HR 14/12/2007, NJ 2008, 105.
otherwise remain shareholder quarrels. There are about two large cases per annum concerning listed companies. There is some discussion about the way these cases are being handled, mainly because of the danger that the Enterprise Chamber might fall for the temptation to second-guess directors. Both the SER and a group of professors of the Groningen and Rotterdam Universities have published studies on this subject.\textsuperscript{910} The SER has offered several points of advice. It discussed the suggestion that the Enterprise Chamber follow the concept of the US Business Judgment Rule. It did not go so far, but generally agreed that the US practice of judges giving better motivated judgments with clear tests is a worthwhile example to follow. Mention is made by the SER of Assink’s (2007) (thesis),\textsuperscript{911} who argues for a Dutch Business Judgment Rule.

\textit{The Peters Code of 1997}

The idea of a code of best practices of corporate governance came from the UK, i.e. the Cadbury Code of 1992. The first Dutch code was the Peters Code of 1997. The committee, chaired by Jaap Peters, retired CEO of the large insurance company Aegon, made 40 recommendations. A summary is attached as Annex “Peters”. Many of the relevant points – 21 on the supervisory board, 4 on the management board, 8 on shareholders and 7 on compliance – were addressed as recommendations.\textsuperscript{912} Compliance was not swift but the report did result in lively discussions which formed the base for the Tabaksblat Code of 2004.

\textit{Changes in favour of shareholders, 2004}

When the Euro was introduced in 1999 shareholder-ownership of Dutch companies rapidly became more international at the same time. Dutch shareholders started to spread their investments to other European companies. Pension funds have since 1996 been free to invest elsewhere. Dutch investors went through the Ahold and the World Online dramas, where boards were alleged to have grossly misinformed the public. In the aftermath Dutch shares were relatively cheap. US and UK investors raised their holdings of Dutch listed shares. While in 1995 37\% of Dutch listed shares were owned by foreigners, this jumped to 72\% in 2005 and also to 75\% in 2009. About half were held by North American and UK investors.\textsuperscript{913} Suddenly

\textsuperscript{910} SER advices \textit{Evenwichtig Ondernemingsbestuur} of 14 February 2008 (“SER (2008)”) and Prof. Dr. K. Cools, Mr P.F.A. Geerts, Prof. Mr M.J. Kroese and Mr Drs A.C.M. Pijls, \textit{Het recht van Enquête} (2009) (“Cools, Geerts, Kroese and Pijls (2009)”).

\textsuperscript{911} SER (2008), pp. 53-54.

\textsuperscript{912} See Annex Peters Code.

Dutch directors had a different shareholder base to deal with. The foreigners, often with strategic stakes, made it clear that they wanted more influence. In the same period the number of foreign board members of the largest Dutch companies grew to more than a third of all board members.

In 2004 important rules for corporate governance were introduced, the so-called Tabaksblat Code, which apart from describing duties of management and supervisory boards, gave shareholders more rights and supported the elimination or reduction of defence mechanisms.

Furthermore, in that year the Act on the change of the Structure Regime gave shareholders more rights as follows. Shareholders could now appoint and dismiss the board of supervisory directors. A 1% shareholder or a shareholder holding €50 million could submit an item for the agenda of a shareholders’ meeting. Shareholders received the right to veto major transactions that would change the enterprise; they were given say on pay and received the voting right on the share even if they only had a depository receipt (“certificaat”), and the right to start an inquiry procedure and ask for preliminary injunctions in the Enterprise Chamber were to be used more easily.

Since 1999 shareholder activists have been approaching boards of important companies, in some cases causing minor culture shocks. Boards were not used to communicate with critical shareholders, shielded as boards had been by defence mechanisms and by their protected position in structure regime companies, where supervisory boards co-opted themselves and appointed management and could afford to disregard the opinions of shareholders.914

Recent repercussions, 2008
Aggressive actions by shareholder activists and hedge funds, and takeovers of Dutch icons by private equity houses quite rapidly created a backlash and led to second thoughts about such unfettered power for shareholders. Since 2008, the government has proposed bills to increase the transparency concerning the identity of activist shareholders. These proposals include a reduction of the threshold for mandatory notification of ownership from 5% to 3% and a requirement for shareholders to notify the board if they want to object to the strategy set out by the board. The threshold for adding an item to the agenda of a general meeting is to be raised from 1% to 3%.915 The waiting period for a demand for an agenda point is extended from 60 to 180 days.916 Defence mechanisms will still be allowed. Draft laws

914 Couwenbergh and Haenen, Tabaksblat (2008), pp. 91-93.
915 Parliamentary Papers II 2008/09, 31763, Memorandum of Reply, 2 May 2011, p. 4.
916 Assink in Assink and Strik (2009), pp. 41-43.
limiting the maximum period during which a defence mechanism can be operative
to 6 months were shelved and a law restricting the use of certificates was mitigated.\textsuperscript{917}
In the implementation of the EU takeover directive (the 13\textsuperscript{th} European Directive)
the Netherlands opted out of many stipulations that would have limited protection
devices.\textsuperscript{918}

\textit{Monitoring of Code, New Frijs Code 2008}
The Tabaksblat Code was followed by monitoring reports, at least each year and the
Frijs Code of 2008, which did not deviate from the Tabaksblat Code but did add a
few points.\textsuperscript{919} Generally there is a high degree of compliance with these codes. Annex
Frijs gives a summary of the Frijs Code.

\textit{Complexity of powers in companies at present: outside influences}
The most recent development can be described as follows: the CEO has become
stronger. He stands above his executive colleagues and is not inclined to accept the
increasing influence of the supervisory board; the chairman of the supervisory board
on the other hand has not become much stronger so there is insufficient balance
vis-à-vis this strengthened CEO. This tends to weaken the power of the supervisory
board as a whole. This weaker position instead of contributing to the development of
strategy might result in supervisory directors limiting their task to monitoring and to
work less on strategy development. On the other hand the outside world in the shape
of shareholder activists, share vote advisers, politicians, civil servants and the media
are interferring more and more in company matters, which should be a reason for more
board discussion about strategy and more proactive participation of supervisory boards
in strategy development. Corporate governance has become more complicated.\textsuperscript{920}

\textbf{4.1.6 \textit{Features of Dutch Corporate Culture: consultation, plurality of interests,}
two-tier system, defence mechanisms}

Although British, US and Dutch culture have much in common, such as a crave for
the same Christian religions, rationality and independence, I would like to mention
four special aspects of Dutch corporate governance.

\textsuperscript{917} Couwenbergh and Haenen, \textit{Tabaksblat} (2008), p. 104.
\textsuperscript{918} Van Solinge and Nieuwe Weme (2009), pp. 746-774. See also SER (2008), p. 40, which mentions that
75\% of European countries did not opt out of the limits on defence mechanisms. One of the arguments
used in the Netherlands to maintain defence mechanisms is to keep a level playing-field with the US,
where defence mechanisms are allowed in reciprocity vis-à-vis the US (see Van Ginneken (2010), p. 86.
Another argument is the exceptionally vulnerable position of Dutch boards, see SER (2008), p. 37,
because of the low threshold for agenda additions and the easy access to preliminary injunctions in
the Enterprise Chamber.
\textsuperscript{919} See Annex Frijs Code available at http://www.commissiecorporategovernance.nl/page/downloads/
\textsuperscript{920} Prof. S. Schuit, \textit{The Chairman Makes or Breaks the Board} (2010), p. 33 ("Schuit (2010)").
CHAPTER 4 - SECTION 1

First the habit to hold discussions in an atmosphere of consultation always with the aim of reaching consensus, second, that all stakeholder interests are considered, third, the role of separate supervisory boards, and fourth, oligarchic features, which even into the 21st century give directors a feeling of being protected.

A Consultation and consensus

Consultation with the aim of reaching consensus
Dutch boards consult with the aim of reaching consensus. All those present are free to speak on an equal basis. This is the polder model.921 An important consequence is a “collegial” or “fraternal” board model as is described in 4.1.3 above.922 Boards find practical solutions and try to avoid having to discuss underlying principles. Hard basic questions are seldom asked. Criticism of a consensus through compromises is not appreciated. Board members deal with each other with less hierarchy923 and more informality in decision making than their colleagues in the UK and the US. In the Netherlands it is unusual to vote in board meetings. That fact that Dutch consultation can take a long time and that there is no hierarchy to speed up decision making, can be confusing for foreigners.

Education is technical and practical
Dutch engineers, economists and lawyers have a thorough rather technical, education.924 Graduates of liberal arts, such as history or sociology, which give broader general views of society, are seldom found among members of Dutch boards.925 This leads to practical thinking and a tendency for practical discussions.

Direct and frank
Members of Dutch boards, not only of companies but also of churches and societies, are used to speaking their mind. They expect their colleagues do the same and respect them for it. Often they come up with unexpected things to test the waters. This direct, open, frank and cost conscious Dutch attitude makes it natural for a Dutchman to ask challenging questions about practical matters.

923 Zahn (2005), p. 262.
But once a compromise is reached everybody agrees to act accordingly, confident that even if they have been straight forward, the others will not be upset. Dutch directness and uprightness is often experienced in other countries as aggressive, blunt and pushy.926

Many factors contribute to the mentality of consultation leading to consensus mentality
The threat of water and of surrounding superpowers, a ruling merchant oligarchy, a small country, social control within such an oligarchy backed by a critical Calvinist church, different religions, many political parties and more recently the interests of employees and environmental concerns have contributed to this spirit of and respect for compromise and consultation.

B Plurality of interests

Interests of others than shareholders
There is a tradition of taking more than just shareholder interests into consideration. Since the 1960s employee and environmental concerns play a larger role. In the 1960s employee rights even became a centrepiece of Dutch enterprise law with the Works Council Act and the Structure Regime Act. The Supreme Court has recently reconfirmed927 this concept of plurality of interests in the ABN AMRO928 case. That the interests of employees count is confirmed by article 2:347 DCC that gives trade unions the right to initiate a case in the Enterprise Chamber as was in the recent

927 The concept of plurality of interests had already been decided in Doetinchemse IJzergieterij, HR 1/4/1949, NJ 1949, 405, when the supervisory board used the term “interest of the company” in their defence against a threat of a takeover.
928 ABN AMRO in Sale LaSalle Bank, HR 13/7/2007, NJ 2007, 434. ABN AMRO was negotiating with Barclays Bank to merge. A consortium of Royal Bank of Scotland, Bank Santander and Fortis Bank announced that they would propose a higher tender offer. ABN AMRO went public with the decision to sell LaSalle Bank and to merge as equals with Barclays. The Dutch Association of Investors (VEB) objected to the sale of LaSalle arguing that this was a major transaction and needed shareholder consent. The VEB asked the Enterprise Chamber to block the sale. The Enterprise Chamber did so with arguments such as reasonability. The Supreme Court reversed that decision confirming that article 2:107a DCC defines major transactions as at least one third of the balance sheet total, which LaSalle was not. The Supreme Court stated clearly that this article should be interpreted restrictively, because of the need for legal clarity for the practice of boards and companies. In his conclusion, Advocate General Timmerman, discussed the Revlon argument, but counters with Unocal and QVC arguments as well as Delaware GCL § 271. He also referred to English law, which requires shareholders’ consent for important disposals. The UK had wished to put shareholders’ consent for large disposals in the 13th European directive, but found the Netherlands explicitly against such requirement. The Supreme Court stated clearly that the management board determines strategy and the supervisory board supervises strategy and that boards must act in the interest of all stakeholders.
case of 2010, where the Enterprise Chamber gave a judgment against management of the publishing house PCM and a private equity buyer at the request of unions.\textsuperscript{929}

Dutch law mentions in many places that all interests should be considered. A centrepiece of company law is article 2.8 DCC, which determines that the managing and supervisory directors and the shareholders are obliged to act in a reasonable manner towards each other. The requirement of reasonability is again a cornerstone of contract law. Although this is not directly relevant to corporate governance, Dutch literature\textsuperscript{930} on corporate law stresses the importance of the general principle of Dutch law for all parties are to take the interests of other parties into account.

A key decision of the Supreme Court in contract law is Baris-Riezenkamp of 1957.\textsuperscript{931} Baris sold a business, producing auxiliary engines for bicycles, to Riezenkamp, the buyer, who said it was essential that the production cost price would be Guilders 135 at maximum per engine. Baris, the seller, said that he had really investigated and according to him a cost price of Guilders 135 was possible. Then Riezenkamp raised his offer by 10%. The sale took place. Later, after the acquisition, Riezenkamp had a calculation made by experts, who concluded the cost price was Guilders 250. The Supreme Court concluded: buyer and seller have the obligation to seriously consider the interests of the other side when giving information.

Boards of companies must act in the interest of the company and its enterprise. This important rule, laid down in article 2:140 DCC, describing the obligations of board members, is to be interpreted that board members should take into account the interests of all concerned.\textsuperscript{932} This is further discussed in detail in 4.2.5 below.

C Supervisory boards, two-tier system

All through the centuries an important role has been reserved for outsiders, independent from day-to-day management. In the "polder" boards the "dijkgraaf" was an outside advisor as were the "influential" outside investors, who were attracted as sounding board and potential supporters. The "polders" had a commercial object as well as a communal aim. The same applies for the VOC, which had a

\textsuperscript{929} PCM, OK 27/05/2010, L.JN:BM 5928. The unions started the case. The Enterprise Chamber found that a major shareholder forced a sale of the shares in PCM, a publishing house of important newspapers, to a private equity group APAX, which highly leveraged this acquisition and caused a too heavy financial burden on PCM. The Enterprise Chamber found that management and supervisory boards of PCM and APAX had mismanaged, because they had not considered the totality of the enterprise, including the interests of the employees. There was no appeal in this case.

\textsuperscript{930} Maeijer (1989) and L. Timmerman, ‘Over de toekomst van het vennootschapsrecht’, \textit{RM Themis} 1999/2, pp. 43-51 ("Timmerman (1999)").

\textsuperscript{931} Baris-Riezenkamp, HR 15/11/1957, NJ 1958, 67.

\textsuperscript{932} Articles New (in the Act) 2.129/239, 4, 2.150/250, 2 DCC.
commercial object and a communal aim of colonisation and defence at sea. The *Heeren Zeventien* did not have any central government representative as "outsider" looking into governance, but they did consult with city representatives as outside sounding boards and supporters for their co-optation. The first formal committee, that was meant to advise and monitor management, was introduced in 1623 in the VOC. It represented the shareholders, but did not report back to shareholders and, in fact, kept shareholders at a distance. With the focus of enterprises purely on commercial aims, "commissarissen" were deemed to look after the interest of shareholders. In the 18th century, this sort of outside committees became known as "Raden van Commissarissen", supervisory boards. Supervisory boards were part of Dutch culture and were continued after the French *Code de Commerce* of 1813 and also contained this system, were reconfirmed in the acts of 1838, 1928 and 1971. These directors always had a certain supervisory role, which implied a role in the nomination of the directors, "seeing to it that there is good management". In 1971 the legislator added that supervisory boards should "monitor in the interest of the company and its enterprise" and "assist", "staat ter zijde", management with advice. In the same year the Structure Regime was introduced, which emphasized the role of the supervisory board as taking an independent stance and considering the interests of all involved and not only of shareholders. Most experienced Dutch directors, management and supervisory directors as well, give great value to this "independent stance" of supervisory directors. In the consideration of whether or not to change from a two-tier system with supervisory directors and to change to a one-tier board with non-executive directors and no supervisory directors, it is important to be cautious and develop a sensitive view. Supervisory boards are part of the Dutch software of the corporate governance mind.

D Oligarchic clauses, defence mechanisms

Oligarchic clauses and defence mechanisms in general
As we have seen, the Dutch developed the combination of private investors' capital with professional management of commercial enterprises, often mixed with public tasks, in a way which reflects a non-hierarchical spirit of governance characterized by frequent consultation, discussions and compromises. Part of this arrangement was that the participants, the boards and supervisors supported each other in their co-optation and in maintaining their positions, as "collegial" or "fraternal" board. For some centuries this had worked well, leading the country into its Golden Age. Peer pressure among the oligarchs within cities
and public criticism of excesses from pulpits and in pamphlets prevented this set-up for a long time from degenerating into a corrupt and self-seeking regime. The disastrous years around 1800 destroyed much of the fabric of this system, but the spirit revived in the 19th century together with the revival of commerce and industry. Only recently have challenges been mounted against this spirit of oligarchy bred into most supervisory board members and managers. At the same time the walls of protection against outside influences on the leaders of Dutch public companies are being undermined.

**Boards not used to outside pressure**
This cosy atmosphere was disturbed by the increase of foreign shareholders, many Enterprise Chamber cases, by new laws and the Code of 2004.

**Changes 2004 a culture shock**
One could call these changes of 2004 a culture shock for many Dutch board members. Those who were internationally trained had less problems. It can be expected that Dutch boards have now become more attentive to foreign corporate governance practices, behaviour of directors and expectations of foreign shareholders. Discussions among directors and top managers of corporations now have to deal with the question of how to adapt to the new rules and the new circumstances that bring demands from foreign shareholders, the media and government supervisors. This study aims to contribute to this discussion.

### 4.2 Who are the shareholders of public companies?

Traditionally shareholders in the Netherlands have less power than in the UK. It is often said that shareholders in the Netherlands also have less say than in the US. This is not true from a legal point of view. On paper US shareholders have fewer specific rights, such as calling meetings or taking resolutions that the company must issue shares or suspend or dismiss directors. However, through shareholder activism and class actions in securities cases the rights of shareholders in the US have become stronger in the last 20 years. US shareholders, indeed, regard the boards as their representatives. The importance of shareholder influence in the Netherlands is increasing, now there are many active US and UK shareholders of Dutch companies.

---

936 SER (2008), pp. 35-40.
939 *Financial Times*, Wednesday, 23 February 2011, in article about Apple and the fight of shareholders for majority voting, the proxy issue of the season of 2011.
4.2.1 Sources of finance

There are many smaller family companies which make up a large equity percentage of the national economy. Family companies have their own equity and have credit arrangements with banks. Larger companies raise money from banks in loans and from the capital markets.

4.2.2 Dutch banks do not use influence

In the Netherlands, as in the UK, banks do not have a large influence in the companies they finance. In the 1990s the Dutch government, including the then Minister of Finance, Mr W. Kok, promoted more correcting influence by financial institutions, but this never became a fact.\textsuperscript{940} Although Dutch banks and pension funds held considerable shareholdings, they did not use their voting power to wield influence. With the recent credit crisis and the resulting reduction of bank lending, there is no reason to expect a growing influence of banks on Dutch companies.

4.2.3 Stock exchange not so important for peer control

As we are focussing on publicly listed companies, a word about the Amsterdam Stock Exchange is necessary. Its roots go back to the informal but regular meetings of merchants and traders in or around buildings and bridges in the 16\textsuperscript{th} century. In 1602 a splendid building was inaugurated, specially designed for market activities. Besides commodities, insurance policies and letters of exchange, participations (shares) in the VOC and the WIC were traded. They were registered, but many creative manners were developed to transfer the shares or merely the economic rights. In the 17\textsuperscript{th} and 18\textsuperscript{th} century Amsterdam was the most important securities and money market in the world. In the 19\textsuperscript{th} century a formal stock exchange was established with listings of Dutch and foreign shares, the Amsterdam Stock Exchange. It has rarely tried to play an important role in corporate governance, although it is, of course, in the position to accept or veto listings. It is now part of Euronext (Paris, Brussels, Amsterdam), which is in turn part of NYSE Euronext and is now merging with the Franfurter Börse.

For a short active period in the late 1980s the Amsterdam Stock Exchange insisted that companies, wanting to list their shares, adopt rules of good governance with the aim of reducing defence mechanisms. The "Vereniging voor de Effectenhandel" wanted freer trade in listed shares and initiated discussions with the association of listed companies. This led to the setting up of the Peters Committee and resulted in the Peters Code.\textsuperscript{941}

\textsuperscript{940} Frentrop (2002), p. 385.
\textsuperscript{941} Willem J.L. Calkoen, 'De Commissie Corporate Governance "Peters" zwengelt discussie aan', TVVS (1996), no. 96/12, pp. 333-338 ("Calkoen (1996)").
4.2.4 Who are shareholders?

Share-ownership typically remained fragmented from the 1900s up to the 1980s, longer than in Britain. Then Dutch pension funds and financial institutions started to buy shares of Dutch listed companies on a greater scale. Some of the big banks had 5% shareholdings in each other, but did not try to influence the corporate governance or strategy of their investments.

In 1995, listed shares in the 25 largest Netherlands' companies were held as follows:
- 19% by Netherlands private individual shareholders
- 19% by Netherlands companies (cross participations)
- 24% by Netherlands institutional investors
- 37% by foreign investors
- 1% by the Dutch government.

In 2005, the picture had changed. The percentage of shares held in the top 25 listed companies by foreigners had doubled from 37% to 75%. The percentage of Dutch private investors had been reduced to a mere 5%, cross participations by Dutch companies to 9%, institutional investors (10%) and the government (1%), bringing the total shares in Dutch hands to 25% only.942

In 2006, the percentages held in different countries of the total of listed AEX companies were:
- 21% in the Netherlands (total individual, companies and pension funds)
- 25% in the US/Canada
- 21% in the UK and Ireland
- 26% in the continent of Europe
- 7% in other places.943

Foreigners held 79% of all listed Dutch companies. Only two years later, in 2008, the percentage of foreign held shares in all companies listed on the Amsterdam Stock Exchange had risen to 85%.944

Such big shifts had several causes. In 1999 the Euro giro system was introduced, which meant that Dutch investors were advised and facilitated to invest all over Europe. Dutch pension funds were only allowed to invest in foreign shares after 1996. In 2001 the Netherlands suffered from the Ahold and World Online scandals with a depressing effect on the Dutch stock market. Foreigners started buying when they

942 Abma (2006/B), pp. 11-12.
943 Monitoring Committee Corporate Governance Code of 3 August 2006, p. 10.

284
WHO ARE THE SHAREHOLDERS

perceived that Dutch shares were undervalued. No other European stock market has such a high percentage of foreign held shares as the Amsterdam Stock Exchange.

Among these foreigners US and UK activists in particular elicited discussions with Dutch boards, initiatives to which Dutch directors had not been accustomed. The Dutch Association of Investors ("VEB") plays an important role in these discussions. The VEB has started litigation on corporate governance matters, such as in the ABN AMRO case.945 Foreigners did not restrict themselves to initiatory discussions with boards of Dutch companies. Dutch pension funds, organized in an association, called Eumedion, usually combine their comments at shareholders meetings.946 US shareholder activists started action against both ABN AMRO in 2007 and Stork in 2006,947 which ended up in litigation in the Enterprise Chamber. Hedge funds and the UK pension fund Hermes have started Enterprise Chamber proceedings against ASMI in 2010.948

In the same period many boards of Dutch listed companies attracted foreign board members. As mentioned before, by 2006 more than a third of the total of management and supervisory board members of Dutch listed companies were foreigners.949 This has changed the atmosphere of the Dutch board dynamics substantially.950

4.2.5 Convergence: adaptation of Dutch legal concepts to foreign ones

In this section – "who are the shareholders?" – this sub-section 4.2.5 on adaptation of Dutch legal concepts to foreign concepts is a side step. As will be seen it is an important point of the Dutch legal culture. The reason for the adaptation is amongst others to favour the wishes of the foreign investors, who represent more than 70%

945 See for description of the ABN AMRO case, note 928.
946 When Eumedion – the Dutch Association of Pension Fund Investors – writes to give its views it sometimes also writes in the name of CalPERS, which in June 2008 had € 1.2 billion invested in the Netherlands, e.g. the letter of 28-09-2009 of Eumedion.
947 See for description of the ABN AMRO case, note 928, the whole merger development and necessity for ABN AMRO to make strategic moves had been triggered by a “dear chairman letter” of the US investor TCI. The Stork case is described in 4.4.2.2 where structure regime companies are described.
948 ASMI, HR 9/7/2010, NJ 2010, 544, see note 908 in 4.1.5.
949 Fennema and Heemskerk (2008), p. 186. This is still the case in 2010. On all AEX companies there are 101 Dutch supervisory directors and 64 foreign supervisory directors, see the Monitoring Committee Report of 2010, p. 44.
950 Prof. J.A. van Manen, in his thesis of 1999, Monitor in het belang van de vennootschap. Een analyse van de functie van commissarissen ("Van Manen (1999)"), has quoted various opinions of Dutch supervisory directors among which we find the view that foreign board members help to change the tendency amongst Dutch directors to protect each other, p. 292. I have also been informed by a supervisory board member of a major Dutch listed company that the foreign members of that supervisory board asked the board to consider a change to a one-tier board system.
of the shareholders in Dutch listed companies. Dutch company law in many ways meets special wishes of foreign investors. First, exemptions were introduced in company law in the 1970s and 1980s, for certain holding companies from a variety of legal requirements for Structure Regime companies as well as exceptions from obligations regarding the consolidation and publication of accounts. Many of the changes introduced by the Tabaksblat Code and the subsequent changes in company law of 2004 can be seen as an adaptation to UK practices. Second, in December 2009 the Act on the alternative of a one-tier board system and the draft act on a more flexible BV law was accepted by the second house of representatives, “de Tweede Kamer”, and the Act has been approved by the Senate, the “Eerste Kamer” on 6 June 2011. Third, several legal concepts, such as the interpretation of agreements, good faith in negotiations and the interest of the company, connected with the stakeholder model, are in some cases being interpreted by the Dutch courts in the light of English-American jurisprudence and international trade practices.

First, exceptions for foreign holding companies

The Act on Structure Regime Companies, introduced in 1971, required large companies with more than 100 employees and an equity of €16 million or more, to have a supervisory board. Such a board was given the right to co-opt itself, to veto important transactions and to appoint the managing directors. Such a structure regime is unattractive to foreign investors; it reduces shareholder influence to the extent that even a majority shareholder does not have control over the company. At the request of the Dutch Association of Entrepreneurs exemptions were added in the 1971 Act on Structure Regime Companies to mitigate this regime for Dutch companies with more employees outside the Netherlands than in the country. In such cases shareholders appoint and dismiss the managing directors. Furthermore holding companies that only have the function of financing a group of companies and again have more employees outside the Netherlands than in the country, are exempt from all the legal requirements of the structure regime. The reasoning is that the Netherlands has employee participation rules, but that these rules only apply to the territory of the Netherlands. One of the reasons for these exemptions was to facilitate foreign investors. This still applies, as was reconfirmed by an advice of 2008 of the Social Economic Council, Sociaal Economische Raad (SER), the forum for consensus discussions between government, employees and entrepreneurs.

951 See for a further explanation 4.4.2 below.
954 SER (2008), pp. 24, 28 and 41.
WHO ARE THE SHAREHOLDERS

Other facilities for foreign and Dutch international concerns that have intermediate holding companies in the Netherlands are: first, that the intermediate holding company does not have to consolidate its accounts with its subsidiaries, second, that it does not have to have its accounts publicly registered if its European top parent company has consolidated this intermediate holding into its accounts and has filed a statement that it guarantees all obligations of the intermediate holding company. These are special Dutch facilities for intermediate holding companies that the Netherlands wishes to attract. There are many intermediate holding companies in the Netherlands, because of the many double tax treaties and the tax exemption for income and capital gains from a subsidiary, called the participation exemption and a dependable ruling system to go with it. This participation exemption differs from the tax credit system known in most other countries and can be considered as further evidence of the Dutch international trading tradition.

Many aspects of the Tabaksblat Code of 2004, such as the mentioning of the possibility of a one-tier board system are to be seen in the light of adapting to foreign business practices. The same applies to the Act on changes to the Structure Regime of 2004, including changes such as appointment of the supervisory board by shareholders and a say for shareholders on important transactions.

Second, draft laws on the One-Tier Board and on the Flexible BV

Since the introduction of the BV (limited company) in 1971, comparable with the UK Ltd., the German GmbH and the French Sarl, the Dutch BV law was nearly the same as the NV law and rather rigid. In December 2009, the second House of Parliament, "de Tweede Kamer", accepted a draft for a law on the BV very different from the NV law. The draft contains many provisions facilitating foreign investors. The law is called the Act on the Flexible BV with pliable rules for calling general meetings, the possibility to hold general meetings outside the Netherlands, and to adopt shareholders' resolutions in writing outside a meeting, the creation of shares of various classes with different votes and profit rights, with flexibility for the appointment of directors, feasible qualitative requirements for directors, the possibility for shareholders to give binding instructions to directors, the exclusion of transferability of shares and the deletion of capital protection requirements, such as the elimination of financial assistance rules for BVs. In the same month of December 2009, the draft law on the possibility of a one-tier board as an


957 See sub-section 4.1.5.
alternative to the existing two-tier board system for NVs and BVs was accepted by the “Tweede Kamer” and has been confirmed by the “Eerste Kamer” on 6 June 2011. These initiatives indicate the willingness of the Dutch government and even the trade unions, who supported these bills, to further adapt Dutch corporate laws to Anglo-American practices. The fact that there has been an increase of foreign shareholding in Dutch listed companies from 37% in 1995 to 85% in 2008 shows that the Netherlands has been an attractive centre for foreign investors.

Third, adaptation of legal concepts

The judiciary too has contributed to this internationalisation of Dutch company law, in two areas: interpretation of agreements and negotiating parties not bound.

Interpretation of agreements: intent or text.

In the 1980s and 1990s the Supreme Court seemed to let the supposed intent of the parties and the principle of reasonability prevail over the literal text of written agreements. The cases Haviltex of 1981 and Hoog Catherijne of 1995 are examples of this type of interpretations.

This created confusion among English and American parties who are used to extensive and exhaustive documents. Recent decisions of the Supreme Court indicate that an unambiguous and clear contractual clause has to be interpreted according to its obvious literal meaning, especially if both parties are experienced

---

959 Haviltex, HR 13/03/1981, NJ 1981, 635.
Haviltex of 1981 was an important case of interpretation of contracts. Haviltex had bought a foam cutting machine. There was a short clause in the agreement, giving Haviltex the right to return the machine before the end of that year. Further details of this clause were worked out in later letters, which could be said to deviate slightly from the literal text of the clause. Haviltex, arguing that the further details in the letters should be used for the interpretation of the intent of the parties, won in all courts and the Supreme Court said that the text of an agreement should not only be interpreted according to the literal text, but also in accordance with the intent of the parties.

Hoog Catherijne of 1995. ABP (Algemeen Burgerlijk Pensioenfonds), the largest Dutch pension fund for public officials bought a real estate project in Utrecht from HC BV, a joint venture of two large Dutch real estate investors. In the acquisition agreement HC BV had warranted that its balance sheet was correct. ABP did a thorough due diligence with expert advisers. ABP, referring to the warranty of HC BV of its balance sheet, which did not show two debts of a total of Hfl 7.5 million, claimed damages, i.e. these higher debts from HC BV. ABP won in the district court, but lost in the Appellate Court and the Supreme Court. The highest courts argued that ABP, notwithstanding the clear warranty, should have asked more questions and should have had a closer look at documents it received at the last moment. The higher courts use the argument of “reasonability”. The judgment made parties in M&A transactions insecure about obligations of the seller and the buyer, when a due diligence exercise takes place.
and have been advised by legal and financial experts and certainly if the agreement contained an “entire agreement clause”\(^{961}\) of 2007 is an example.

**Negotiating parties bound by their intent, unless they explicitly confirmed an opt out**

In the 1980s there were several judgments, e.g. *Plas/Valburg* of 1982,\(^{962}\) which made clear that if parties negotiated and showed an intent to continue the negotiation, one party could not suddenly terminate the negotiations without incurring liability. There was a so called pre-contractual good faith obligation to continue the negotiations or conclude them in an orderly fashion. This caused problems for UK and US parties, in mergers and acquisitions negotiations. They were used to having an easy way out, by stipulating in their letter of intent that all offers are “subject to contract”. Judgments of the 1990s made it clear that if a letter of intent contained a “subject to contract” clause, parties could make use of this literal text: *Van Engen/Mirror* of 1995 and *De Ruyter/MBO* of 1997.\(^{963}\) This is another example of Dutch jurisprudence adapting to international business practices.

**The interest of the company, stakeholder or pluralist model; is there a tendency to pay more heed to the long term shareholders’ interest?**

One of the principles of Dutch company law is that directors act in “the interest of the company and its enterprise”, in Dutch “belang van de vennootschap en de met haar verbonden onderneming”. This is the “pluralist” or “stakeholder” approach. The question is: is the tendency of convergence and adaptation to international trends as described above in this sub-paragraph a reason for demanding more attention to long-term shareholder interests?

The term the “interest of the company” was already used as an argument by the supervisory board in their defence against a threat of a takeover in the case of the *Doetinchemse IJzergieterij*, as early 1949.\(^{964}\)

In 1971 the DCC introduced the obligation for supervisory directors that they should execute their duties in the interest of the company and its enterprise (article 2:140/250 DCC). The addition of the words “and its enterprise” was meant to stress


In a typical M&A negotiation about a Share Purchase Agreement, SPA, there was a tax indemnity in which the seller indemnified the purchaser and the target for all tax consequences. The clause mentions an exception for the period “as of the date of the running financial year”. The buyer argued that the literal final text should apply, especially because there was an “entire agreement clause”, unless the seller can prove that parties “meant something else”. The Appellate Court and the Supreme Court followed the buyer’s argumentation: the literal text should apply but a party may prove that “parties meant differently”.


\(^{964}\) *Doetinchemse IJzergieterij*, HR 1/4/1949, NJ 1949, 405.
the point that all factors should be taken into account, including the interest of subsidiary companies.965

In the Netherlands some authors, including Maeijer, argue that the “interest of the company” is one single concept of the continuity of the enterprise while others, including Van Solinge and Nieuwe Weme, Van der Grinten and Van Schilfgaarde and Winter see it as a mix of various interests. Those who see it as a mix of various interests go on to say that the directors should weigh the interests and decide according to the “upshot”, in Dutch “resultante”.

In my view directors must consider all the interests and may then decide as they deem fit. I do not think the words “weigh”, “upshot” or “resultant” are realistic. Entrepreneurial directors’ decisions are not based on arithmetical weighing of interests with one answer. In many situations more than one decision can be a reasonable decision. Then there is not one and only one correct decision. I would like to add that in the last decade communication has become more important in recent years. Directors must inform all interested parties in time. I would summarize my view as: consider all interests, freedom of entrepreneurial decision, proper and timely information to interested parties; in other words a business judgment rule with proper information to all parties as an additional element.

Strangely enough, the concept of “the interest of the company” was not mentioned in the articles of the 1971 DCC, dealing with the specific task of the management directors. Most authors, however, agreed that managing directors too have to be guided by “the interest of the company”. These words have been included in the task description for all directors, both management and supervisory, in article 2:129/239, paragraph 5 DCC of the Act.

It is important to discuss this principle, because first, it is seen by many as the beacon or the compass for all directors (supervisory, managing, non-executive and executive directors), second, it is broad enough to apply in different situations, third, it is sufficiently vague to allow for the development of an interpretation based on case law, and fourth, it is comparable with the UK Common Law principle of the “interest of the company”, updated in section 172 of the Companies Act 2006 to the “success of the company” or “enlightened shareholder value”. It also tallies with the US concept that the directors have fiduciary duties of loyalty to the company in combination with the business judgment rule to act in the interest of the company.

What does the duty to act in “the interest of the company and its enterprise” mean? Under Dutch law, as in UK and US law, the trend seems to be that directors,

965 Van Solinge and Nieuwe Weme (2009), pp. 479-480 and Assink (2010), p. 38, describe the discussion between Maeijer, and others about the “interest of the company”.
When making a decision, should consider all factors and interests, i.e. the interest of shareholders (long-term, short-term, large, small, minority, etc.), managers, employees, creditors, the community, e.g. the environment, associated companies and other constituencies. As long as all those interests are running in tandem, there is no problem, but what if there is a conflict?

Professor L. Timmerman wonders whether all these interests should carry equal weight or whether there should be a hierarchy, and if so, should the long-term shareholders carry the heaviest weight?

Timmerman refers to the Tabaksblat (2004) and Frijns (2008) Codes, especially to preamble no. 7 to the Frijns Code: “The code is based on the principle accepted in the Netherlands that a company is a long-term alliance between the various parties involved in a company. The stakeholders are the groups and individuals who, directly or indirectly, influence or are influenced by the attainment of the company’s objectives, i.e. employees, shareholders and other lenders, suppliers, customers, the public sector and civil society. The management board and supervisory board have overall responsibility for weighing up all these interests, generally with a view to ensuring the continuity of the enterprise, while the company endeavours to create long term shareholder value”. Furthermore he refers to section 172 of the UK Companies Act 2006 with its concept of the “success of the company” and “the enlightened shareholder value”.

The “interest of the company” has been a subject for many corporate law authors in the last few years.
CHAPTER 4 - SECTION 2

Professor Alexander Rinnoy Kan, Chairman of the SER, has said “the supervisory board should be accountable to stakeholders once per year, at least to the prime shareholders and employees”.968

What can the Dutch learn from the English and American concept of “interest of the company”? The “interest of the company” is an old, well-known term in UK Common Law. Section 172 of the Companies Act 2006 – and especially the relevant debate about it – builds on the vague text “interest of the company” the modern term “the success of the company”, which appears in the text of this section 172. The accepted interpretation rejects a “pluralist” approach (in the UK the term “pluralism” means equal treatment of all factors making up the “interest” or the “success” of the company) and imposes on a director the obligation “to have regard” to all factors, many of which are defined, including the meaning of “long-term”. His basic duty is to promote the purposes of the company “for the benefit of its members as a whole”. This may go contrary to the aims of short-term shareholders.969 It is up to the directors, in good faith to determine what policies the success of the company demands.970 Directors are, in the UK, expected to make business judgments and decisions in good faith, and courts are generally reluctant to second guess those judgments and decisions.971

The Attorney General, Lord Peter Goldsmith, said in Parliament in 2006972: “under the duty to promote the ‘success of the company’ the weight to be given to any factor is a matter for good faith judgment of the directors. Importantly, his decision is not subject to a reasonableness test, and, as now, the courts will not apply a reasonableness test to directors’ business decisions.” I call this: “the director is free to decide” and I add: “as entrepreneur”. With respect to “entrepreneurship” I refer to the words “entrepreneurial leadership” in A1 supporting principal of the UK Corporate Governance Code, discussed in 2.5.3 above.

Communication is also important. In the Netherlands information to shareholders should be developed further than up to now.

A recent UK study973 discusses categories of shareholders: founders, families, foundations, employees, engaged shareholders, unengaged shareholders, such as some investment institutions and sovereign wealth funds, traders and speculators,

968 Chairman of the Social Economic Council, “SER”, the forum of discussions between government, employers and employees in his speech to company lawyers on 14 November 2008; Bestuur en Toezicht, uitgave vanwege het Instituut voor Ondernemingsrecht, RUG, no. 67.
973 Goyder (2008/A) and (2008/B).
such as hedge funds, and says that without saying that any particular category is good or bad the first are logically interested in long-term strategy or "stewardship", while others play in a "casino economy" and are useful for liquidity of the market. The study finds indicators that shareholders who are not interested in stewardship may be on the increase and globalization of capital markets could make communication between boards and shareholders more difficult. It concludes with the opinion that directors should focus their dialogue on the stewardship shareholders which would require them to obtain a clearer picture of whom and where such shareholders are.

In the US boards do not have to follow shareholder instructions. Shareholders have the right to elect directors, but not to give them binding instructions. The directors must take their own decisions, but with requirements of due process. US judges apply the business judgment rule. There is no reasonableness test, but alternatives and the interests of the company and all concerned must have been considered. A decision may in no way be disloyal to the company, i.e. no self-interest: loyalty to the long-term shareholder interests, not plurality, is the US bright-line.

US practice makes a distinction between shareholders, from "traders" to "strategic investors (like Buffet and Monk)". It is also held advisable to communicate directly with these long-term shareholders.974

On the other hand, Netherlands' jurisprudence, for example ABN AMRO of 2007 and ASMf975 of 2010, supports pluralism in the Dutch sense. Boards should consider all interests involved. This could lead to several alternatives, resulting in several acceptable business judgments.

Now we come back to the question of hierarchy when considering the interests and the influence of shareholders. Dutch, like their US and UK colleagues, do not have to follow instructions from shareholders.976 Traditionally, Dutch boards could even behave remotely towards shareholders. As we have seen (vide preamble 7 of the Frijns Code above and the laws of 2004 in favour of shareholders), a growing influence of shareholders has been acknowledged in Dutch corporate culture. There is a strong current in UK and US literature that recommends boards to communicate with those shareholders who are interested in long-term stewardship.977

For the Netherlands I would like to refer to the Verenigde Bootlieden case of 1994, where the Supreme Court said that there can be reasons to deal with different

975 See notes 928 and 908 above.
976 Forumbank, HR 21/1/1955, NJ 1959, 43.
977 Goyder (2008/A) and (2008/B) and Brancato (1997).
shareholders in different ways and to the DSM case of 2007 and especially in the conclusion to that case of the advocate general. 978 In the Netherlands the literature on one-on-one meetings of directors with shareholders started with Eisma 979 who realized in 1998 that the Dutch should adapt to the UK and US practice, but concluded that he was basically against one-on-ones, because he found two dangers: such contacts could be in contravention of the principle of the equality of shareholders expressed article 2:92, paragraphs 1 and 2 DCC and could lead to insider trading prohibited by the then Fondsenreglement 28h. Professor Vletter-Van Dort 980 in her thesis deals with these aspects in detail and basically agrees with Eisma, but does find examples of exceptions for the equality of shareholders and concludes, along the lines of the Verenigde Bootlieden judgment, that if it is in the interest of the company to make an exception to this principle, the court should allow it. I would argue that it can be in the interest of the company to have one-on-ones with shareholders, who have a long-term interest and with any shareholder who expresses the wish to have a one-on-one with the board. I do realize the danger of spreading insider knowledge which article 28h of the former Fondsenreglement intended to avoid and which prohibition is now laid down in articles 5.25i and 5.27 of the Act on Financial Supervision (Wet Financieel Toezicht).

Generally institutional investors in the UK have larger percentages of shares than Dutch investors have. This would seem to decrease the Dutch interest in one-on-ones. However, 56% of the Dutch listed companies report to have more than 12 one-on-ones per year and 34% report to have more than 50 one-on-ones per year. 981

Boards should sound out long-term shareholders and listen. A good base of long-term shareholders is important and worth cultivating. Because shareholders fall in different categories, boards should be free to choose with which sort of shareholders they communicate. They must make their communication policy public on their website. 982 Thoughtful communication should be established with all “stakeholders” as this is usually directly or indirectly in the interest of long-term shareholders.

981 Aandeelhouders Rapport Nijenrode (2010), p. 80. One-on-ones also called one-to-ones.
982 Frijns Code requires to do this, IV.3.13, but hardly any listed company in the Netherlands has followed up on this, yet. Philips N.V., which in my view does communicate excellently, does mention its policy in its annual accounts and refers to its website, but the website does not yet contain such policy. The Monitoring Report of the Committee Streppel of 2010 complains about the lack of this follow-up.

294
WHO ARE THE SHAREHOLDERS

Boards should communicate with relevant stakeholders in specific cases, but in all cases with shareholders. The UK practice is in favour of one-on-ones, also called one-to-ones. The UK FSA has issued a guideline for this. In the US the Securities and Exchange Commission (SEC), and in the Netherlands the Autoriteit Financiële Markten (AFM), have set up websites with question and answer programmes on the subject of one-on-one meetings between representatives of a board and individual shareholders. Both authorities confirm that one-on-ones are permitted. They emphasize that boards in such one-on-ones must not give sensitive information, that is not available to others.983 In the Netherlands, the AFM has, after one of its directors said he was against one-to-ones, issued a Q&A – comparable with the SEC's Q&A – confirming that one-to-ones are permissible with caveats for sensitive information. Sometimes lock-up and secrecy agreements will be necessary.984 The UK Stewardship Code of 2010 also emphasizes that representatives of institutional investors should meet with board members. This Code advises at the same time that institutional investors should avoid becoming insiders.985 One-on-ones with selected shareholders are usually held by the CEO and CFO, sometimes in the presence of the chairman of the supervisory board or of the one-tier board. In some cases of one-on-ones it may be necessary to agree to lock-ups restricting trade in shares of the company for a specific period.986 The Frijns Code, too, deals with this subject, vide preambles 9 and 10: “the greater the interest, which the shareholder has in a company, the greater is his responsibility to the company . . .” (see 9) and “good relations between the various stakeholders are of great importance in this connection, particularly through a continuous and constructive dialogue” (see 10). Dutch boards could and should have one-on-ones with stewardship shareholders, follow the UK example of listening, and publish their policy in this matter on their website.

The UK and US examples teach us that classifying shareholders in different categories and ranging these groups into an order of priority is a worthwhile effort. “Hierarchy”, according to UK and US ideas, does mean that in all their decisions the boards must think of the long-term shareholders. If there are no shareholders

985 The UK Stewardship Code of July 2010 made by the Financial Reporting Council describes visits with board members in principles 1, 2 and 3.
986 See also Prof. Dr. A.W.A. Boot and Prof. Dr. K. Cools R.A. in their advice to the Royal Association for Country Policy, ‘Private Equity and aandeelhouders activisme’ (2007). They promote (a) more transparency with and among shareholders, market manipulation, (b) lock-ups for shareholders that have one-on-ones, (c) use of transparency defence mechanisms and (d) quorums for dismissal of directors.
that express a view it would be the imaginary long-term shareholder and if there is a shareholder who expresses a long-term view, boards must consider these views. They must take time and energy to explain their thought process to shareholders. It is important for the board to manage its relationship with shareholders. The board must make clear what its strategy is, what growth it is aiming for and what acquisition strategy it has. If an opportunity comes about to buy a company, it should go ahead without asking shareholders and explain immediately after the acquisition how it fitted in the strategy. If it does not give this information, it will have a problem.987

The same applies to closing a factory. Communication in advance with the works council and later with shareholders as well is vital. Boards should be free in their good faith business decisions and free from a reasonableness test,988 but they should take time to explain to shareholders. This implies that I am in favour of giving long-term shareholders a higher position on the ladder of information obligations, because they are always concerned.

4.3 Formal acts and informal codes

Dutch corporate governance law is based on Book 2 DCC and the Frijns Code of 2008 on best practice, which succeeded the Tabaksblat Code of 2004. The DCC is discussed at the end of sub-section 4.1.5 and in sub-section 4.6.2. The Tabaksblat and Frijns Codes are discussed at the end of sub-section 4.1.5 and in sub-sections 4.5.2 and 4.5.3. The Netherlands is a civil law country and has detailed legislation on NVs and BVs in Book 2 DCC, which contains a large number of stipulations, many of which are mandatory law and some of which are optional. In addition, corporate governance is influenced to a large extent by the Frijns Code, which is regarded as soft law in the “comply or explain” tradition, taken over from the UK system of codes of best practices. In the same way in the UK listing rules, there is an obligation in the Netherlands to report about deviations from the Frijns Code in the annual report of the company.989

988 In connection with “hierarchy” it is interesting to mention Van Manen (1999), pp. 256-261. He asked 45 supervisory directors whether they would consent to a mass dismissal of employees, if this would (a) cause substantially more profitability, (b) cause the enterprise to at least make a minimal profitability instead of losses and (c) protect its continuity, i.e. avoid bankruptcy. In all cases, the majority and in the last case 100% of the supervisory directors responded that they would favour a decision for mass dismissal. Of course, the supervisory board would require proper communication with shareholders, the works council and unions.
989 Article 2.391, 5 DCC.
WHO ARE THE SHAREHOLDERS, FORMAL ACTS

4.4 Composition of Dutch boards, division of tasks

4.4.1 Introduction

The UK and the US have only a one governance system, i.e. the one-tier board system. The compositions of UK and US average boards were alike up to the 1980s. They had a CEO, who was also chairman, about 3 other executive directors and 4 or 5 outside directors. Since 1993 the UK made changes to separate the functions of CEO and chairman, maintaining the 3 other executive directors and the 4 or 5 outside or non-executive directors in order to have a balanced board. In the US changes were different. There was a focus in the 1990s, and certainly from 2002, on a strong majority of independent directors. The typical board is composed of a CEO, who in most cases is also chairman and about 7 to 8 independent directors, who are typically led by a lead director to create counterbalance. The other executives, officers apart from the CEO, are not on the board, but do attend meetings. Since 2002 many US companies have instituted executive sessions of independent directors meeting alone and are gradually going over to appointing a separate non-CEO chairman.

We see that the UK and the US have one and the same basic system with large flexibility and that the composition has changed in the last 20 years in different directions.

The law in the Netherlands specifies two possible systems: a simple management board or a two-tier board. The institution of a supervisory board is optional in the Netherlands, but for larger companies it is the norm. Most larger companies have a management board of about 3 or 4 and a supervisory board of about 6 members. Furthermore there are special large companies, the Structure Regime companies, that must have a supervisory board with specific powers. Then the Act of 6 June 2011, which is expected to be effective on 1 January 2012, makes the one-tier board a possible alternative for all companies, next to the two-tier system, whether in a Structure Regime company or not. This means that from the date that the Act has become effective, there will be five alternative compositions of boards: first, the simple monistic management board system, used for many small companies and a few larger ones, second, the two-tier board system used in most large companies, third, the two-tier board Structure Regime companies for even larger companies, fourth, the one-tier board companies and, fifth, the one-tier board Structure Regime companies. These compositions will be discussed hereafter in section 4.4.

As in the UK and the US, Dutch companies too should have (i) a purpose, (ii) a strategy, (iii) policies, (iv) risk management, (v) succession, (vi) evaluation systems, and (vii) a policy for communication with shareholders and other interested parties, such as employees, customers, suppliers and society.
All these elements must be developed, implemented and monitored. The members of two-tier boards or of one-tier boards have to work together to fulfil these tasks. The question is what best practice for the composition of the board can be developed in the Netherlands to fulfil all these elements and roles in the most efficient way and to avoid inefficiencies brought about by risks such as the "imperial CEO", "group think", loafing in acceptable sub-optimal work, lack of teamwork, continuing disputes and/or lack of communication.

This section (4.4) describes the various practices in the Netherlands for the composition of the board. First it describes the legal basis of the normal Dutch two-tier board system, the structure regime, examples of the use of the one-tier board system under present law and the description of the new Act on the alternative of a one-tier board (4.4.2); followed, second, by a description of the composition of what average boards look like in the usual two-tier boards, the present one-tier boards and expected future one-tier boards under the Act (4.4.3); and the changes in board composition brought about by the codes, and creation of committees (4.4.4); as well as the element of non-executives being in the majority on the future one-tier board (4.4.5) and size (4.4.6). These aspects are followed by a summary concerning composition of boards in the Netherlands (4.4.7). This section 4.4 on the composition of the board(s) will be followed by a section describing the role of each type of director in the different compositions (section 4.5), followed by sections on duties (section 4.6) and liabilities of directors (section 4.7).

4.4.2 Dutch board composition, present and future

4.4.2.1 Dutch board composition, usually two-tier board

Dutch company law is described in Book 2 DCC. Every Dutch NV must have a management board. A supervisory board is optional. Most companies, that are listed or have more than one shareholder, have two boards. Having a two-tier board system, is part of Dutch corporate culture. As described before, throughout the centuries Dutch companies have had separate supervisory boards with functionaries, who were not part of the management board and had an independent role in looking after the interests of the shareholders and others involved with the enterprise and sometimes in providing support for management. The background of this culture is described in 4.1.6C and D above. The early "polder" enterprises were commercial project development enterprises, that also had as aim to create and run the villages and churches in the "polders". The VOC had the aim of trading for profit and at the same time had a colonial and a naval defensive role. Most 17th century enterprises had dual commercial and communal objects. This meant that it was logical to ask for outsiders in a supervisory role to check and support management in connection with these other interests. In this atmosphere the committees that had a monitoring role in the name of shareholders, such as in the VOC from 1623 did so independently without reporting to the shareholders. These committees, from 1720 called supervisory boards, always functioned in a limited advisory and non-

---

Van der Grinten (1955) and (1989), pp. 4-5.

298
directive role. At the same time these independent functionaries were to advise management independently about other interests connected with the enterprise and these distant functionaries also often had a direct or indirect role in the nomination and appointment process of board members, from the city chambers in the VOC to the binding nominations in Royal Dutch Petroleum, to the structure regime. It is with this background that Dutch company law describes the role of the supervisory board as supervising and standing by the management board with advice, taking all interests into account.991

4.4.2.2 Structure regime supervisory boards
In the 1970s worker participation became important. The Netherlands chose for a different two-tier board system from Germany. In Germany supervisory boards of large companies had to make nearly 50% of the seats available for representatives of trade unions. In the Netherlands this option was not chosen, because neither the unions nor the enterprises wanted union members or employees on the supervisory board. Most UK and US literature dealing with two-tier boards looks at the German system.992

The two-tier system of Germany has a history and culture of its own since the Allgemeine Deutsches Handelsgesetzbuch of 1861, of the period following the unification of Germany. Since the Aktienrechtsnovelle of 1870 larger companies had a mandatory supervisory board, "Aufsichtsrat", of shareholder representatives. The Aktienrechtsnovelle of 1884 made it possible for non-shareholders to be supervisory board members. They could supervise especially, because of their qualities. The law gave a further description of the supervision function. Further reforms were introduced with the employee participation rules of 1920, 1931 and 1937. There were further changes in 1951, 1952 and 1976, which reform describes that AGs with more than 2,000 employees just below half of its supervisory board members had to be employee representatives.993

In the international arena the Dutch were able to develop a two-tier system that on the one hand gives some influence to works councils, at least for consultation and good communication and maybe even in some cases for sounding out the employee base for strategic decisions, and on the other hand does maintain the possibility for the management board to continue its management function with limited outside interference and in harmonious consultation with a supervisory board. This system

991 Article 2:140/250, 2 DCC.
was laid down in the 1971 Act on Structure Regime Companies, which perpetuated the time-honoured tradition of a supervisory board with substantial powers and independent, not special interest, director. Employees got their say in another way than through their own directors.

The Dutch did introduce works councils with the Works Council Act of 1971. Every company with more than 50 employees must have a works council. The works council is a body of representatives of the employees of the company. It must be consulted by management to give advice on important decisions, such as acquisitions or disposal of shares or enterprises, large loans, mass dismissals or a change in management structure. For example, if a company would contemplate a change from a two-tier system to a one-tier system, the works council would have to be consulted. Its advice must, by law, be taken into account by management before it takes its decisions on these major matters. If the works council gives a negative advice on the proposed decision of management, management must wait for a month to give the works council the possibility to lodge an appeal with the Enterprise Chamber.

The essential novel part of the Dutch worker participation system is the so-called “Structure Regime” arrangement for large companies laid down in the Structure Regime Act of 1971. Large companies, for the Structure Regime, are companies with more than € 16 million equity (paid-up capital plus reserves), with at least 100 employees and a works council that has been active in its group of companies for more than three years. These large companies must have a supervisory board, which is independent from shareholders and management and considers the interests of the company and its enterprise, i.e. all stakeholders. A supervisory board in a structure regime company is powerful, because it appoints, suspends and dismisses the management board and can veto all important decisions of management, such as the acquisition of disposal of shares, large loans and mass dismissals. To provide for this independence of the supervisory board the act initially stipulated that it co-opted itself, with some rights of shareholders and the works council to propose

994 Prof. Huub Willems, former chairman of the Enterprise Chamber, ‘It Needs Three Tiers to Tango’, Ars Aequi (September 2010), p. 651, in which he also refers to an interview of Fritz Frölich, former CFO of AKZO, who is on many German and French boards and who is very complimentary of the Dutch system.
995 Article 25(e) Works Council Act.
996 Articles 24 and 25 Works Council Act.
997 This number is adapted regularly with inflation by Royal Decree.
998 Article 2.153/263, 2 DCC.
999 Article 2.162/272 DCC, there are exceptions for subsidiaries of foreign groups.
candidates and to object against nominations. As mentioned in 4.2.5 above this appointment procedure was changed in 2004.\textsuperscript{1000}

Since the changes in the Law on Structure Regime Companies in 2004, the shareholders’ meeting appoints and dismisses the supervisory directors. There must be at least 3 supervisory directors. The rule is still valid that supervisory directors nominate their successors with some influence from the works council in these nominations, but the shareholders have the right to refuse to follow the nomination. The influence of the works council rests on its right to pre-nominate one-third of the nominations of the supervisory board. The fact that shareholders may dismiss the complete supervisory board was shown to be an important power of shareholders in the \textit{Stork} case.

The \textit{Stork}\textsuperscript{1001} case of 2007 involved a shareholder activist dispute between US hedge funds, Centaurus and Paulson, who together owned 31.4\% of the shares, and management. The activists typically demanded a split up of Stork, Netherlands’ oldest industrial conglomerate of 1883. Management was opposed to a split. The hedge funds wished to discuss this with management, but the shareholders were not very open with their arguments. The activists asked to discuss strategy with the chairman of the supervisory board. He referred the shareholders to management, saying that the supervisory board does not deal with strategy. The shareholders put the dismissal of the whole supervisory board on the agenda for the shareholders’ meeting. Management, supported by the supervisory board, issued shares to a friendly foundation to outvote the shareholders. The communication was so bad that the matter ended up in the Enterprise Chamber.

The Enterprise Chamber decided before the shareholders meeting with a compromise by blocking the dismissal of the supervisory board and blocking the vote with the issued shares, and at the same time appointing 3 “super” supervisory directors, who would have 6 months to guide parties to a solution of the dispute on strategy. The court said that the supervisory directors should in such cases have a mediation role between shareholders and management or at least should not escalate the discussion. This point was later corrected by the Supreme Court in the \textit{ASMI} decision of 2010. Since this decision the law is that supervisory directors do not necessarily have to mediate.

An example of the decision power and independence from shareholders of a supervisory board under the structure regime was the \textit{Corus} case of 2003, which was rather a surprise to the international business community.\textsuperscript{1002}

\textsuperscript{1000} Change of Structure Regime Act, which gave more rights to shareholders, 1 October 2004.


In 1999 British Steel and Koninklijke Hoogovens merged and created Corus Group Plc, which owned 100% of the shares in Corus Netherlands, which in turn owned an aluminium producer. Corus Group Plc was in need of cash and wished to sell off the aluminium producer. Because this involved the sale of an important enterprise of Corus Netherlands, the works council and the supervisory board had their right of say concerning the sale. They said they resisted the sale, or would at least want some guarantees that the proceeds of the sale would be ring fenced for Corus Netherlands and not only be used for the financing problems of Corus UK. The works council gave a negative advice. The supervisory board gave consent under the condition of a ring fencing agreement, which Corus Group Plc did not want to accept. Corus Group Plc took the matter to the Enterprise Chamber, which said that the supervisory board had acted in the interest of the company and had acted reasonably. In the end the aluminium plant was sold, but only after a ring fencing agreement was signed.

A comparable case is the recent Organon case of 2010, where the US pharmaceutical group Merck Corporation, had some years before acquired 100% of the shares of Organon NV. Merck had decided on mass dismissals at Organon. The works council of Organon had not been asked to give advice and the supervisory board announced it would veto any proposal for mass dismissals. The works council put the case to the Enterprise Chamber. The hearing was planned for 2 September 2010. On 1 September 2010 parties settled the matter by Merck Corporation promising to postpone its plans for dismissals by 5 months. After 12 months parties settled. The result was that not 50% of the employees but only 25% were dismissed.

These cases show how independent supervisory boards in Structure Regime companies are and how little power shareholders have. The lesson for these and other shareholders would be to communicate well in advance in an open and informative way about their plans with the supervisory board and the works council in which case their chances of success would be better. This is a consequence of the consultation culture of the Netherlands. The shareholder or director, who omits one of the consultation obligations usually runs into problems.

The fact that the supervisory board in a Structure Regime company appoints and dismisses management directors is very important for its power. In the majority of regular classical Dutch companies the supervisory board does not have this power. There the shareholders’ meeting appoints and dismisses management and supervisory board members, which means that those supervisors have less power vis-à-vis the management board. In practice, however, they usually do nominate management directors or at least influence these nominations.

1003 Financieele Dagblad, 3 September 2010, pp. 1 and 11.
4.4.2.3 One-tier boards under present law

As mentioned above, a Dutch company that is not a structure regime company does not have to have a supervisory board. These companies can have a single or “monistic” board. The basic idea is that there are only managing board members. This legal possibility has given creative enterprises and lawyers the possibility to have one-tier boards with day-to-day, “inside”, directors and “outside” directors, who only have an advisory and monitoring role. Generally, the Dutch one-tier boards under present law have “inside” directors who have the right to represent and sign for the company – and are registered as such in the trade register – and “outside” directors who cannot represent the company and have more of a monitoring role. The articles of association (in Dutch “statuten”) describe this and can also give further colour to the roles of the different directors. A board regulation can give further detail. There are quite a number of private – not public – companies that operate in this creative one-tier board fashion.

The main concern of “outside” directors in one-tier boards under present and future law is that their liability is increased when they become non-executive directors in a one-tier board instead of supervisory directors in a two-tier system.\(^\text{1004}\) The possibility of exoneration or disculpation, because of their “outside role”, is deemed not to be sufficiently certain.\(^\text{1005}\) The answer of the Minister of Safety and Justice to the Senate repeats that while there is joint and several liability for all directors,\(^\text{1006}\) a director is only liable in case of serious blame depending on all facts as confirmed in the decision \textit{Staleman v. Van de Ven}, HR 10/1/1997, NJ 1997, 360.\(^\text{1007}\) Because there are not many one-tier boards, this aspect whether a non-executive director would be excused to a lesser extent than a supervisory director has not been tested in court and creates insecurity.\(^\text{1008}\)


\(^{1006}\) Parliamentary Papers 2011, 31763, Memorandum of Reply to the First Chamber, 2 May 2011, p. 6.

\(^{1007}\) Parliamentary Papers 2011, 31763, Memorandum of Reply to the First Chamber, 2 May 2011, p. 16.

Examples of well known big companies with a one-tier board under present law are:

(1) Unilever NV, which was not a Structure Regime company, because it benefited from the holding company exception, had a board of “inside” directors, who could appoint “advisory” members to the board, who did meet with the “inside” directors in one board, but had no vote or veto and were not registered in the trade register as directors. In 2004 Unilever NV, referring to the Code Tabaksblat, which mentioned the possibility of having a one-tier board, and to a European Directive on the European Company, which gives the alternatives of a one- and two-tier board, changed its board structure. Now the board has 2 executive directors (CEO and CFO) and 12 non-executive directors. One of the non-executives is chairman. This is very close to the UK model. In fact, the directors of Unilever NV are the same persons as the directors of Unilever Plc.\(^{1009}\)

(2) Reed Elsevier NV uses the “combined board” model. It is a structure regime company with a management and a supervisory board. This looks like a two-tier board system. However, it has been creative and has made use of the Dutch stipulation that the joint meeting of the management board and supervisory board is the “combined board” and is a legal organ, just like the legal organs the management board, the supervisory board and the shareholders meeting are.\(^{1010}\) The combined board meets often. All managing board members and supervisory board members are present. Actually this is not very different from the usual practice in a Netherlands supervisory board where members usually meet in the presence of the management board members. But in most companies the supervisory directors discuss decisions that have been planned by the management board members. In most companies the supervisory board members have a monitoring role. In Reed Elsevier NV the arrangements are different. For a long list of important decisions a positive decision of the combined board is necessary. So in practice the combined board, as a whole, makes all the important decisions and is involved in the development of the decisions as well. This special aspect of Reed Elsevier NV is laid down in a “governing agreement” and special stipulations in the “statuten” that describe the powers of the “combined board”.\(^{1011}\) The members of these boards of Reed Elsevier NV are the same persons – plus one extra – as the ones on the one-tier board of Reed Elsevier Plc. It is probable that the one extra person of the Reed Elsevier NV supervisory board member is the member nominated by the works council.

One could conclude that the Netherlands needs no new Act for One-tier Boards, because practice creates enough possibilities to be flexible. Although there are examples as mentioned above, there are only a few listed companies with a one-tier board: in 2003 only 7 one-tier board companies were listed on Euronext, of which some are foreign and in 2008 only 10 on Euronext, but the increase is due to 3 new listings of foreign companies.\(^{1012}\)

\(^{1009}\) Strik (2010), pp. 108-109 and Couwenbergh and Haenen, Tabaksblat (2008), p. 143 et seq. in which Morris Tabaksblat, as interviewed, very interestingly explains to his interviewers Couwenbergh and Haenen that peaceful changes in structures can take 10 years.


\(^{1012}\) Strik (2010), p. 105.
COMPOSITION OF BOARDS

One could also argue that the Act is unnecessary, because supervisory directors are becoming so active that the Dutch already have a one-and-a-half-tier board in which the tasks of supervisory directors have increased, without any structural change.

Professor Sven Dumoulin, then inhouse counsel of Unilver NV and now of Akzo Nobel NV, made clear that there are some reasons why a simple short act would be useful. He does so by identifying 18 differences between supervisory directors and non-executive directors in companies, such as Unilever NV.1013 His article has been inspirational for our minister of justice, when preparing a Draft Act or Bill on One-tier Boards.

4.4.2.4 Act on One-tier Boards
On 8 December 2009 the second house of parliament, “Tweede Kamer”, and subsequently the first house of parliament, “Eerste Kamer” on 6 June 2011 accepted the One-tier Board Act, which is called “Wijziging van Boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen”, freely translated as “changes of Book 2 of DCC in connection with directing and supervising NVs and BVs”, hereafter referred to as the “Act” or “the One-tier Board Act”.

The reasons for the Dutch government to introduce this Act were the desire for more flexibility of Dutch company law, adaptability to foreign business practices and the European Law on the European Company.1014 An important ground was the admission of the fact that the majority of shareholders of Dutch listed companies are from the US and the UK. An important reason of the Act is the improvement of the investment climate.1015 Here we see a continuation of the Dutch trader’s tradition adapting to foreign commercial opportunities.

The English summarized translation of the Act and the text of the Act in Dutch are attached hereto as Annexes 6.4 and 6.5.

The Act proposes that as an alternative to the two-tier system a one-tier system can be laid down in the articles of association by describing the different functions of the members of the board of a one-tier company (executive and non-executive members). The tasks of monitoring and nominating board members, the remuneration of the executive members and the position of the chairman can be fulfilled only by the non-executive directors. Under the Act, in companies with a one-tier structure

1013 Dumoulin (2005), pp. 1-11. The 18 differences and the reasons for the Act are described below in 4.5.7.
the positions of CEO and chairman must be separate. The special two-tier board rules which are mandatory in the Netherlands for large companies falling under the structure regime with substantial powers for supervisory board members and the way they are nominated and appointed are applicable mutatis mutandis to the non-executive directors of a one-tier board of a Structure Regime company. This last point has the support of the unions.

When the Tweede Kamer accepted the Bill on 8 December 2009 a few last minute amendments were added upon the proposal of members of parliament who wanted to "score" popular points. They are the non-cumulation article (not more than 5 supervisory or non-executive directorships per person, where being chairman counts double) and the diversity article (at least 30% ladies in the board as a comply or explain basis). These two points are discussed below at the end of 4.4.3. Also an amendment was added to the effect that a managing director may not have an employment contract, thereby limiting their right to demand large amounts in indemnities if they are dismissed. At first this seemed to cause administrative problems because of extra social security formalities for non-employees who work fulltime. This problem is being solved by the Ministry of Social Affairs, which has determined that non-employee fulltime workers fall under the social premium and pension regulations as if they were employees.

The Act was pending in the Senate for one and a half year. The main point of discussion was the non-cumulative article. The Act was accepted on 6 June 2011 and will probably become effective on 1 January 2012.

No One-Tier Board for Banks
A point that is rarely discussed is that the Act on Financial Supervision (Wft) determines explicitly in article 3.19 that the banks and insurance companies must have a supervisory board of at least three members and that the Netherlands Bank

1016 The centrepiece article is article 2.129/239(a) DCC. One-tier Board:

1. The articles of association may provide that the duties of the board are to be divided between one or more non-executive directors and one or more executive directors. The task of supervising the performance of the duties of the directors cannot be withdrawn from the non-executive directors. Nor may responsibility for chairing the board, nominating persons for appointment to the board and determining the remuneration of executive directors be allocated to executive directors. Non-executive directors must always be natural persons.

2. The executive directors may not take part in decisions on their own remuneration.

3. The articles of association may directly or indirectly provide that one or more directors can validly decide on matters that come within their remit. Any such provision indirectly by way of the articles must be in writing.


1018 Parliamentary Papers 2011, 31763, replies to First Chamber, p. 13.
may only give dispensation for cases of a missing supervisory director or so. Theoretically one could argue that the Netherlands Bank could give dispensation for a one-tier board with three monitoring non-executive directors, but because the Ministry of Finance knowingly maintained article 3.19 Wft I am of the view that the Netherlands Bank cannot do this in practice. The maintaining of article 3.19 Wft is remarkable, because on 5 December 2008 the then Minister of Finance publicly declared that he would prefer the financial institutions to have one-tier boards. There are a number of other relevant people who think that banks should have a one-tier board, because of the requirement for banks to have knowledgeable and well involved outside directors.

Proposal: it should be possible for banks to have a one-tier board

For this reason I propose that this article 3.19 Wft should be changed to the effect that banks and insurance companies should at least have a supervisory board with 3 members or a one-tier board with at least 3 non-executive board members.

4.4.3 Composition of the average boards

In general, the number of directors in Netherlands’ boardrooms is not different from that of the US and the UK boards: on average in all these countries there are about 4 to 5 “inside” directors and 5 to 6 “outside” directors. The difference is that they have different “name tags” and by consequence have different tasks.

In the UK there are about 4 to 5 executive directors, a chairman and an average of 5 to 6 non-executive directors (NEDs). In the US the CEO is usually also the chairman. He is the only executive board member. The other officers, about 3 or 4 are not board members but do usually attend board meetings. These US boards are further filled with 6 to 7 independent directors, including a lead director – who often meet separately in executive sessions. In 30% of the listed companies there is a separate non-CEO chairman instead of a lead director.

In the Netherlands there is a management board of about 4 to 5 and a supervisory board of about 5 to 6 and they usually meet together.

1019 The translation of article 3.19 Wft is:
1. A clearing institution or credit institution vested in the Netherlands, which is an NV or BV, or an insurer vested in the Netherlands, which is an NV or BV, has at least a supervisory board with three members, as meant in articles 140 and 250 of Book 2 DCC.
2. A clearing institution or credit institution vested in the Netherlands which is not an NV or BV has a body comparable with a supervisory board of at least three members.
3. The Netherlands Bank can upon request give dispensation in whole or in part and for limited or indefinite period of the above paragraphs 1 or 2 if the requiren shows that it cannot reasonably fulfil the stipulation and that the aims of this article can be fulfilled otherwise.