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Letter to the Monitoring Committee of the Dutch Corporate Governance Code

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Tilburg, 16 April 2022

Dear Monitoring Committee of the Dutch Corporate Governance Code,

First of all, we would like to thank the Monitoring Committee for giving us the opportunity to respond to the draft Dutch Corporate Governance Code (the Code) 2022. We appreciate all the efforts of the Committee to keep the Code up to date and to take into account national and international developments. We believe that the Code can take a leading role in addressing today's urgent societal challenges. In several reports, presentations and interviews it was stressed that a revised Code should incentivize companies to follow its best practices not only in letter, but also in the Code's intentions. The latest monitoring report (financial year 2020) highlights the almost perfect compliance rates of Dutch listed companies with the Code, but also shows that companies make use of boilerplate text and more substantive and meaningful reporting should be encouraged. We hope to witness that sustainability will be further embedded in the Code and that the Committee would take this opportunity to encourage companies to think along and participate in how sustainable corporate governance should be developed. This goal is not yet made explicit in the starting points for the update and we hope the Committee considers its inclusion. We would also strongly support that the proposed best practice that companies should formulate a(n) (integrated) ESG strategy is structured in a more ambitious way preventing the box-ticking approach and providing the needed guidance for companies. The recent legislative and case law developments at the national and European level (including the proposed Corporate Sustainability Due Diligence directive), show that important steps are being taken and we would encourage the proposed Code to serve as a European example in endorsing the corporate sustainability transition.

In addition to this, we would like to share a number of other suggestions and considerations for the new Code. Below, we outline our comments per topic.

1. Sustainability
As regards the terminology, we believe that 'corporate sustainability' could be considered as an alternative term for 'ESG', to align with the current regulatory initiatives at the European level. Moreover, whereas ESG may suggest that all three pillars are equally important, good corporate governance provides the basis for sound environmental and social initiatives. In addition, we believe that the use of the term 'long-term value creation' could be reconsidered. We recognize the strong anchoring of this term – which is related to the responsibility of the management board for the continuity of the company and its affiliated enterprise – within Dutch corporate law and corporate governance. However, there could be ambiguity as to the meaning of long-term. While sustainability and long-termism often go hand in hand, the time horizon should not be conflated with the problem of externalities. Long-term activities can still be harmful for people and the environment. We would like to suggest considering 'sustainable value creation' in the new Code instead, which could be described as value creation that is *environmentally* sustainable, *socially* sustainable, and *economically* sustainable.

2. The Role of Shareholders
Long-term value creation (or *sustainable* value creation, see under 1. of this response) may benefit from stability in the corporate decision-making processes fostering an effective dialogue with the shareholders whilst maintaining the exclusive prerogative of the board under the supervision of the supervisory board to initiate, determine and execute the corporate strategy and policy. We, therefore, support that the Code puts a larger focus on the role of shareholders. Here we appreciate that the Committee takes a broad perspective and not only includes institutional investors but all shareholders. The role of the shareholders in fostering the development of good corporate governance practices cannot be underestimated. At the same time, we question if and how shareholders, especially others than the institutional investors, can be held accountable for the provisions, especially provisions 1.1.5 and 4.3.1, as the Code is applicable to "listed" companies with registered offices in the Netherlands. Of course, companies should make

sufficient efforts to engage with (all) their shareholders. In this respect, the introduction of best practice provision 1.1.5 also raises the question of what the norm to recognize the importance of a strategy focused on long-term value creation entails for activist shareholders and in case of hostile take-overs.

Further, an important new best practice provision relates to the role of the shareholders, as presented by best practice provision 1.1.5 which stimulates shareholders to recognize the long-term value-creating strategy. This long-term value creation is considered to include stakeholder interests. We believe that shareholders are not necessarily always aware of all different stakeholder interests in a similar way as can be expected of the corporate board that must weigh these interests and shape the strategy of the company accordingly. In the proposed Code, the principles of reasonableness and fairness seem to be taken one step further for shareholders, e.g. the reasonableness and fairness should include the recognition of the importance of the long-term value-creating strategy. Also, this provision may impact trust offices who, according to best practice provision 4.4.5 are requested to be "guided primarily by the interests of the depositary receipt holders, …". It would be welcomed if the Committee could provide further guidance on how shareholders should read best practice provision 1.1.5.

According to the proposed amendment to best practice provision 4.3.1, how the shareholder votes the shares should no longer only be based on the way the shareholder considers fit, but also on an informed basis. We welcome an explanation what the Committee considers an informed vote. More urging is the question what the behavior of the shareholder should be in case the shareholder has reasons to believe that he is not informed (which could be due to reasons related to the shareholder itself or, other, external reasons). Should the shareholder not participate in such a vote, and eventually not participate in the general meeting if he considers himself uninformed as regards all voting items? In the latter situation, this shareholder cannot make use of the other shareholder rights, like the question right. Another option is to participate in the meeting and abstain from voting (the latter in many jurisdictions often being considered as a "non-vote"). These different actions can, under certain circumstances, make a major difference, not only for the voting result, but even for reaching the quorum of the meeting (like for increasing or decreasing the capital as provided in article 2:121a DCC).

With respect to the introduction of rules pertaining to the engagement policy for institutional investors, best practice provisions 4.3.5 and 4.3.6 are amended. It seems odd that the provisions related to the engagement policy are placed under 'Principle 4.3 casting votes', whereas it is widely recognized that institutional investor engagement is more than voting *per se*: shareholders can (and should) enter into dialogues with the company in private conversations, send letters, ask their questions at the general meeting, can table their own shareholder proposal, and can collaborate with other shareholders in their engagements, etc. The Dutch Stewardship Code recognizes that "engagement is conducting a meaningful dialogue with listed companies on these aspects as well as on issues that are the subject of votes at general meetings" (Preamble, paragraph 2). In contrast, best practice provision 4.3.6, including the explanatory notes to this principle, with respect of the engagement policy, only requires reporting on the voting behavior, significant votes and the use of voting advisors. Here, the Monitoring Committee seems to take a narrow perspective on investor engagement. Moreover, it could be considered to not only address the publication of the engagement policy (4.3.5) and reporting on its implementation (4.3.6) in the Code, but also referring to *reviewing* the policy, *assuring* the processes and *assessing* the effectiveness of the activities as is included in the UK Stewardship Code 2020 (Principle 5).

Also, best practice provision 4.3.7 recommends shareholders to "abstain from voting if their short position in the company is larger than their long position". While this provision is clear, it can raise the question how the shareholder should behave in the opposite case the short position is smaller than the long position. Can a shareholder participate in voting for all the shares, including the number of "shorted" shares, or only with the remainder of the shares that are not involved in any financial transaction? Similarly, best practice provision 4.3.8 recommends recalling the lent shares in case an important item

will be voted at a general meeting. In the explanatory notes it is argued that an important item includes an item of which the shareholder opines the "voting outcome is anticipated to be uncertain or controversial" (see also the reporting requirements of institutional investors in best practice provision 4.3.6). Estimating *ex ante* whether a voting item's outcome is to be considered uncertain or controversial can be difficult. It could be helpful for the shareholders if companies indicate these controversial or uncertain topics (like Eumedion does for the Dutch Stewardship Code), for example based on the (substantial) opposition rates of recurring voting items (based on previous general meetings).

3. The Statutory Reflection Period

According to the explanatory note to best practice principle 4.1.7. on the stipulation of the response time, the statutory reflection period can be regarded as a partial codification of the response time of the Code. The Code's intention is to avoid overlap and conflicts with existing regulations. To avoid the overlap, the monitoring committee proposes a technical adjustment of best practice principle 4.1.7. with the underlaying principle that the response time can only be stipulated once for any given general meeting and should not apply to an item for which a response time has been earlier stipulated, or a statutory reflection period was used. The latter regards the situation in which first the reflection period was used and subsequently the response time. It is, however, not clear whether this also applies to the situation in which the statutory reflection period has ended by a decision of the Enterprise Chamber of the Court of Appeal Amsterdam on the basis of art. 2:114b(4). In this case, also the question arises whether the days of the reflection period already used are to be deducted from the days of the response time, following the same principle in the explanatory note to best practice principle 4.1.7 in the case that first the response time is used and subsequently the statutory reflection period. However, the deduction of the days already used in the response time is not laid down as such in article 2:114b DCC and depends, in any case, on a decision of the Enterprise Chamber on request of shareholders.

4. D&I Provisions

We warmly welcome the mission of the Code to be 'current, future-oriented and relevant' portrayed throughout the proposed revisions. We are highly supportive of the proposed D&I provisions. Particularly, we welcome the explicit recognition that gender is non-binary and diversity goes beyond gender. However, we would like to propose to ensure that companies are advised how to disclose this information in accordance with the GDPR.

5. Sustainability Committee

Although we are hesitant to further pack the Code with additional best practices that only increase its legal function instead of stimulating a sound and pro-active attitude towards corporate sustainability, we still would like to consider the best practice to install a sustainability committee. We feel that some subcommittees of the (supervisory) board can have great value in creating awareness and add value. In some jurisdictions, like South Africa, such a committee is already part of the legislative framework and in some European member states the sustainability committee is also present in the corporate governance codes. For instance, the Spanish Code indicates that the task of supervising compliance with sustainability policies should be assigned to a pre-existing committee (such as the audit or nomination committee) or to a designated CSR or sustainability committee, while the Luxembourg Code recommends the board to set up a specialized committee to deal with corporate sustainability aspects. Recent research suggests that a sustainability committee may indeed stimulate sustainability performance, but careful consideration of requirements for and embedding of such a committee (including its expertise) is key to avoid an ineffective symbolic act.

6. Corporate Sustainability Due Diligence

We recognize that the proposal for the Code was published before the EC's proposal for a corporate sustainability due diligence (CSDD) directive, however, we would like to ask the Committee to anticipate a further integration of these duties in the Code. Here, we welcome Provision 1.1.1(7) that

states that attention should be paid to "the ESG-related impact of the company and its affiliated enterprise, throughout the entire production and value chain" when developing the strategy. We would, however, suggest replacing this sentence with "the company's duties to identify, prevent, mitigate and account for the adverse corporate sustainability impacts of the company and its affiliated enterprise, throughout the entire global value chain", to align with the standard terminology in the UNGPs. We would welcome the Committee to consider a further embedding of CSDD in the Code, since good corporate governance, including the pro-active role of the (management) board, is key to integrate the CSDD process into the corporate strategy.

Related to this, we would warmly welcome the Monitoring Committee to take account of the importance of sustainability risks with an inside-out perspective. The Global Risk Reports of the World Economic Forum clearly indicate that sustainability risks, rather than the more traditional economic risks, now dominate the risk landscape. The importance of managing and disclosing sustainability risks is supported by empirical research and practice showing that these risks are financially material. While the Code generally mentions strategic, operational, compliance and reporting risks as principal risks (see best practice provision 1.4.2), the corporate governance codes of some other Member States do address sustainability risks in a more explicit manner, such as the Spanish Code (Recommendation 45), German Code (Recommendation A.3), and the Luxembourg Code (Recommendation 9.3).

7. Board expertise
Finally, cyber security and data science have become essential elements in corporate governance and risk management. We would like to kindly invite the Committee to further consider best practice provision 2.1.4, for instance to set further requirements to stimulate digital expertise of (supervisory) board members.

We would like to thank the Monitoring Committee for inviting us to provide in comments and we are looking forward to the publication of the 2022 Code.

Of course, we are at your disposal for any necessary clarifications.

Yours sincerely,

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