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Please find enclosed the response of the (i) Dutch Ministry of Finance, also on behalf of the Ministries of Justice, of Economic Affairs and of Social Affairs and Employment, (ii) De Nederlandsche Bank (“DNB”) and (iii) the Authority for the Financial Markets (“the AFM”) to the consultation on corporate governance in financial institutions and remuneration policies.

DIRECTOR FINANCIAL MARKETS POLICY,

Klaas Knot

The Netherlands welcomes the Commission's Green Paper "Corporate governance in financial institutions and remuneration policies" of 2 June 2010[1] and appreciates the opportunity provided by the Commission to exchange views in this respect. Good corporate governance is essential for the proper functioning of the financial markets.

Hereafter we will make some general remarks before elaborating on the specific questions of the Commission.

1. General remarks

In summary, our main points are:

<u>The concept of corporate governance</u>
The guiding corporate governance principle in the Netherlands is that a company is a long-term alliance between the various parties involved in the company. As the Commission states in the Green Paper, the relations between a company's stakeholders (executive and non executive directors, shareholders and other stakeholders such as employees and their representatives) are essential. A strong and clear role and position of all stakeholders helps to achieve effective corporate governance. The executive directors (management board in a two tier system) and non-executive directors (supervisory board in a two tier system) have overall responsibility for weighing up the interests of the various stakeholders, generally with a view to ensuring the continuity of the company, while the company endeavours to create long-term shareholder value. The questions and suggestions of the Commission are seen in this context.

<u>Need to strengthen corporate governance</u>
In general, the Netherlands can subscribe to the view of the Commission that there is a clear need to strengthen corporate governance in the financial sector on certain parts, specifically of financial institutions with a systemic relevance (and with a focus) on the role of their board of directors. In this respect, we note that corporate governance is primarily the responsibility of the institution itself and that supervision by supervisory authorities cannot be deemed to replace those responsibilities.

<u>Financial sector vs. other sectors</u>
The financial sector has specific features which make it necessary to distinguish it from other sectors. This in our opinion justifies a more intensive regulatory approach on certain parts of the financial sector with effective supervision by supervisory authorities. Cross-border aspects within the financial sector may justify action at the European level to create a level playing field or minimum corporate governance standards, e.g. regarding remuneration policies or the fit and proper test. The appropriate form of action may differ, whilst focusing on the goals to be achieved. Actions need to be necessary and effective.

<u>Fundamental question</u>
The Green Paper underlines the fundamental question whether or not the existing corporate governance regime is deficient and/or whether it has been poorly

[1] COM (2010) 284 final.

implemented. The Netherlands feels that a combination of both these elements describes the current state of corporate governance of financial institutions. And as such, both in the area of rules and (self) regulations and in the area of effective implementation, improvements are needed, not necessarily only by new rules, but also by better implementation of existing rules.

Consistency

Regarding the former area of improving (current) rules and regulations, the Netherlands would like to point out – and refer to – the ongoing initiatives of the Commission in relation to among others the technical draft of Solvency II, the Capital Requirements Directive (the CRD), AIFM, UCITS and to ongoing initiatives of, e.g., BCBS[2], IAIS, CEBS[3] and CEIOPS[4] in adjusting, strengthening and fine tuning both corporate and internal governance guidance, within the scope of their respective mandates.

We feel that several questions of the Commission in the Green Paper are already sufficiently addressed in these initiatives, but possibly in a slightly different manner. Inconsistencies between rules might undermine these rules and make them lose effect. It holds the risk that an institution is confronted with different rules on the same matter and it will not be able to comply with all of them (and might even not comply with either of them) which should be prevented by clear oversight of the different rules in a consistent manner.

In addition, the Netherlands draws attention to the to be distributed responses to the Green Paper of the Committee of European Banking Supervisors (CEBS), the Committee of European Insurance and Pension Fund Supervisors (CEIOPS) and the joint response of the three level three Committees (3L3, including the Committee of European Securities Supervisors, CESR).

Rule based vs. principle based

The Netherlands would like to stress that the current wording of the Green Paper is in general of a more prescriptive and rule based nature. The Netherlands feels that a combination of (principle based) regulation and self regulation by financial institutions, combined with a clear monitoring mechanism, constitutes the best basis for proper corporate governance. More so, as corporate governance largely deals with behavioural issues, which cannot solely be captured by rules and regulations.

Effective implementation of corporate governance principles

In order to be effective, compliance with corporate governance codes on the basis of "apply or explain" needs to be complemented by a system of effective monitoring. Dutch listed companies and Dutch banks are legally obliged to describe in their annual report whether or not they apply the principles and best practices of the Dutch Corporate Governance Code and/or the Dutch Banking Code respectively, or explain if they do not. On an annual basis, the compliance with the codes in the Netherlands is monitored by independent monitoring committees, nominated by the government. This mixed regime of law and codes leads to a flexible instrument with pressure to comply. In our opinion, this mixed regime is

[2] BCBS guidance "Enhancing corporate governance for banking organisations".
[3] CEBS "High level principles on risk management", "High level principles on remuneration policies".
[4] CEIOPS preparatory work on L3 guidance on Solvency II.

most effective at a national level, on grounds of subsidiarity and the direct involvement of all participants on a national level.

For the sake of completeness, we note that we support certain measures at a European level in the form of principle based regulation, such as regarding remuneration in the financial sector. However, we would like to draw attention to the risk that European measures which are less stringent than national self-regulatory measures may have a direct impact on the effectiveness of the Dutch mixed regime and the willingness to comply with self-regulation.

Transparency/prudential and behavioural aspects
Transparency by financial institutions is important to the stakeholders (regarding among others investor decisions) and contributes to the proper functioning of the financial markets. This might enable restoring trust. We would like to point out that good corporate governance is of great importance, not only from a prudential point of view (financial stability), but also from a behavioural point of view (duty of care and transparency).

One tier board vs. two tier board
The wording of the Green Paper suggests (as does note 15, page 6) that the paper mostly focuses on one tier boards, and within those on the supervisory role of directors. The Netherlands feels that the clarity of topics dealt with in the paper can be improved by making a (sole) distinction between *executive directors* and *non-executive directors*, as different issues deal with only executive (e.g., regarding responsibility for day-to-day business), only with non-executive (e.g., regarding independence), or with both (e.g., regarding skills and diversity). In applying this distinction, the scope of the paper can be properly extended to dual structured financial institutions (which is the prevailing structure in the Netherlands).

Proportionality
The Netherlands requests explicit attention for proportionality of the system of governance to the nature, scale and complexity of the operations of financial institutions. In order to avoid unnecessary burdens for small and medium-sized financial institutions any requirements should be applied proportionately.

Proportionality, as described above, vis-à-vis the application of the principles of sound corporate governance is briefly described (page 3), but can be put into practice by referring to it in the context of the specific topic. E.g., in regard to issues of diversity (page 11) the principle of proportionality plays a less far stretching role than in regard to board size (page 12). The Netherlands feels this should be made clearer in the text.

Scope financial institutions in relation to pension funds
The Green Paper does not define 'financial institutions'. In particular it is not clear whether pension funds are considered to be financial institutions. We refer to the footnote on page 4 (English version) where reference is made to the OECD, Revised guidelines for pension fund governance, July 2002. Keeping the underlying goals of this Green Paper in mind, we find that the reason for strengthening the corporate governance of the financial sector is rooted in the financial crisis, with emphasis on the banking sector. Pension funds had no particular role in this. Also

considering the fact that a pension fund is an institution for occupational retirement provision (see also directive 2003/41/EC) which carries out activities directly arising from its purpose; providing retirement benefits on the basis of an (collective) agreement between the employer(s) and employee(s) or their respective representatives, underlines the assumption that they are not part of this Green Paper. In addition, a Green Paper on adequate, sustainable and safe European pension systems has also been published, which includes the governance of pension funds. As such, we would ask the Commission to clarify that pension funds do not fall within the scope of the Green Paper on corporate governance.

Other remarks

Finally, the Netherlands notes that several questions indicate that the Commission is still looking for possible proposals. If respondents propose other suggestions than the ones mentioned, the Netherlands would like to be given the opportunity to reflect on those other suggestions if the Commission considers them.

Although not explicitly part of this consultation we consider it crucial that oversight, supervision and regulation (supervision) is organised in a way that ensures the adequate and orderly functioning of the financial markets and eliminates possible regulatory arbitrage. Supervision should be European based considering the importance of a level playing field, e.g. regarding the fit and proper test for members of the management board and supervisory board.

Specific questions (1.6 till 1.9, 1.11 till 1.13, 2, 2.2 till 2.5, 4.1 and 4.2)

The Netherlands will not provide *detailed* reactions to all the questions asked by the Commission in the Green Paper. This applies to questions 1.6 till 1.9, 1.11 till 1.13, 2, 2.2 till 2.5, 4.1 and 4.2. One of the reasons is that there is ongoing work in other relevant organisations (as mentioned above) on corporate and internal governance principles and guidance for supervisors and institutions alike which might affect the Dutch response. We reserve our right to insert this in further discussions. Also, we would like to point out that in our opinion a number of questions cannot be answered by a simple "yes" or "no" since that depends on the specific situation. E.g., question 1.1. (Should the number of boards on which a director may sit be limited) might be answered with "yes", but the actual number itself depends on the specific situation. A director with a number of companies that are in a related industry, in a near geographical vicinity and of a limited size could be allowed more board seats than a director who lives abroad, has seats in companies across the country, in completely different industries and all of which are multinationals.

We will continue with elaborating on the specific questions of the Commission in the Green Paper.

1. Questions of the Commission

<u>Board of directors</u>

1.1
Should the number of boards on which a director may sit be limited (for example, no more than three at once)?

The Netherlands acknowledges the need to ensure the right balance between independence and skills within boards (both executive and non executive directors) of financial institutions. Provisions on independence and skills to this end are applicable in the Netherlands. DNB and the AFM play an important role in the composition of the boards of financial institutions through the fit and proper test. In that assessment, the number of boards is one of the factors to be taken into consideration. We refer to our response to question 4.3.

As regards the question whether the number of board memberships of directors of financial institutions should be limited, it is important first to establish what this measure aims to achieve and secondly, which effects this measure is likely to have in combination with other measures.

As mentioned in our general remarks, the answer to this question could be positive, but the actual number itself depends on the specific situation, for instance the geographical vicinity and the size of the institution. As such, the Netherlands does not consider it possible to provide a clear yes or no to this question.

At this stage, the Netherlands is not convinced that the limitation of the number of board memberships of directors of financial institutions should be addressed on a European level. We do not consider it necessary to harmonize rules regarding the composition of the board. In any case, a European arrangement should not be too strict. We feel that financial supervisors should take this into account through the fit and proper test of members of the board (with respect to among others the different nature, scale and complexity of the operations of the different financial institutions).

1.2
Should combining the functions of chairman of the board of directors and chief executive officer be prohibited in financial institutions?

The Netherlands is of the opinion that the combination of the functions of chair of the board and chief executive officer in financial institutions is undesirable because it could concentrate too much power in one person. Furthermore, it could cloud the difference between the executive and non-executive tasks of the board. Short term results can in this way prevail over long term objectives. The Netherlands therefore agrees with the suggestion to prohibit such a combination. This concurs with a legislative proposal currently under consideration of the Dutch Parliament.

1.3
Should recruitment policies specify the duties and profile of directors, including the chairman, ensure that directors have adequate skills, and ensure that the composition of the board of directors is suitably diverse? If so, how?

The Netherlands acknowledges the importance of clear duties and responsibilities of both executive and non-executive directors. Directors need to have adequate skills and the composition of the board should be suitably diverse. An adequate counterbalancing power of non-executive directors to the executive directors is one of the main features of a well-functioning supervisory board. There are several means to accomplish this. For instance through the fit and proper test, which can specify that directors should have appropriate knowledge, skills and professionalism to provide that corrective power. A suitable composition of the board is an important variable to achieve this. An explicit specification of the required knowledge, skills and professionalism of the board can provide the framework for the recruitment of directors. A profile of the board and of the individual directors may also be a useful instrument, as well as a (periodic external) board review process.

We do not consider it necessary to harmonize rules regarding the composition of the board. The Netherlands supports the steps the Commission has taken in this respect through among others the technical draft of Solvency II.

1.4
Do you agree that including more women and individuals with different backgrounds in the board of directors could improve the functioning and efficiency of boards of directors?

The Netherlands supports the aim to improve the functioning of boards of directors of financial institutions. A diverse board may increase the independence of the non-executive directors and improve the overall quality of decision-making within the board. As to how to achieve the improvement of the functioning of the board, consideration should be given to among others: a) the appropriate level of diversity may differ from company to company and b) not only gender or educational/occupational backgrounds, but also other aspects of diversity should be taken into account such as experience, cultural background, and age.

It should be noted that diversity is not a means on its own. Individual directors should still be attuned to one another, and to the group as a whole as well as to the fit and proper requirements and their individual job profile. This also needs to be taken into account when judging if and to what extent a board should be more diverse.

At this stage, we are not convinced that the diversity of the board of directors should be addressed on a European level. We do not consider it necessary to harmonize rules regarding the composition of the board. The financial supervisors should take this into account through the fit and proper test of executive and non-executive directors by allocating sufficient weight to the composition and functioning of the board when assessing a (new) member. On this point, flexibility for the financial institution is necessary.

1.5
Should a compulsory evaluation of the functioning of the board of directors, carried out by an external evaluator, be put in place? Should the result of this evaluation be made available to supervisory authorities and shareholders?

The Netherlands is of the opinion that an evaluation by non-executive directors of their functioning and that of the executive directors can be a useful instrument to enhance the quality of the board's performance, as is the case in the Netherlands.

The Netherlands acknowledges that the involvement of an external advisor can have certain advantages and may improve the process of evaluation. Nevertheless, the non-executive directors are and should remain responsible for the way the evaluation is carried out and for the conclusions which are drawn from the evaluation. Moreover, the level of external involvement should, as mentioned in our general remarks, be proportionate to the supervised institution. Furthermore, we see certain possible risks, such as multiple layers of supervision and operations that add no value nor contribute to managing risks. This needs to be further examined. Therefore, we have reservations with regard to proposals to regulate the compulsory evaluation by an external evaluator for the (entire) financial sector on a European level.

We support that an evaluation of the functioning of the board should be made available to the supervisory authorities. In our opinion a brief statement on the result of the evaluation, as is the case in the Netherlands, is preferable (as opposed to publishing the results in full).

1.6
Should it be compulsory to set up a risk committee within the board of directors and establish rules regarding the composition and functioning of this committee?

An adequate (= comprehensive, independent from operational units and capable) risk function within a financial institution is in the opinion of the Netherlands of the utmost importance. Risks have to be controlled, addressed and assessed properly. This does not necessarily have to be done by a (risk) committee. Nevertheless, in all financial institutions a person should be appointed that is responsible for the risk management function across the entire organisation. In general, we feel that this has been tackled for banks and insurance companies in the steps the Commission has (recently) taken through the technical draft of Solvency II and the Capital Requirements Directive (the CRD).

1.7
Should it be compulsory for one or more members of the audit committee to be part of the risk committee and vice versa?

We refer to our response to question 1.6, regarding the necessity of a risk committee. Nevertheless, when a financial institution has a risk committee, it does make sense for some members to also be on the audit committee, since exchange of useful information can be enhanced.

1.8
Should the chairman of the risk committee report to the general meeting?

In general the Netherlands supports transparency of financial institutions towards stakeholders, such as shareholders. It is important that the general meeting of a financial institution receives the information necessary to exercise its rights and hence will be able to contribute to the checks and balances of the company. In general the executive directors will account for the companies results, activities etc. The company should inform the shareholders and other stakeholders in its annual report.

The board (both executives and non-executives) has to provide the general meeting with the information that it needs to exercise its rights, including risk related information. In our opinion, a separate mandatory report (from the chairman of the risk committee) is not necessary. In fact, this would be somewhat contradictory with the corporate governance principle as the board of executive directors is responsible for risk management.

1.9
What should be the role of the board of directors in a financial institution's risk profile and strategy?

According to the Netherlands the executive directors are responsible for the strategy of the financial institution – including setting the institution's risk appetite and risk tolerance - and for managing the risks associated with its activities (by adopting, implementing, monitoring and, where necessary, adjusting its risk profile), taking into account the information provided by the risk management function. The non-executive directors on their turn have to supervise the strategy and the risk policy pursued by the executive directors.

According to the Netherlands these roles are being sufficiently shaped further by the initiative of the Commission concerning among others the technical draft of Solvency II.

1.10
Should a risk control declaration be put in place and published?

The Netherlands supports that a financial institution is transparent about its risk profile. We interpret the Commission's question as whether a risk statement by the executive directors is to be put in place and approved by the non-executive directors.

In this respect we support the efforts of the Commission on including a risk statement in among others the technical draft of Solvency II[5] and the CRD, in addition to other European and national legislation. We currently have no indications that additional measures on European level are required.

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[5] Article 51 of the technical draft of Solvency II-directive and article 4 of the Implementing Measures concerning Public Disclosure (2009/138/EG, 25 November 2009).

1.11
Should an approval procedure be established for the board of directors to approve new financial products?

It may not be effective to require the board of directors to approve every new financial product. However, we are in favour of applying product approval procedures in the development of new financial products and significant changes in the features of existing products in the financial sector.

The product approval procedure can be an effective instrument for involving the board or directors in the development of financial products.

The responsibility for introducing new financial products on the market is primarily a part of the executive strategy of the company and should in our opinion preferably lie with the executive directors, not with the non-executive directors. The risk management function and the duty of care towards clients are crucial elements in this approval process and should have the overview of the approval processes across different business lines and portfolios.

In their turn, non-executive directors should be able to review whether the product approval procedure is being accurately followed and whether the executive directors are familiar with the overall workings and risks involved with new products. In order for the non-executives to be able to perform their task, they should be entitled to receive information on the development and results of the procedure. This contributes to the checks and balances within the company. The in-house auditor should check if a product approval process is present, and whether it has been designed properly and is working effectively, and shall then inform the board - including the relevant supervisory board committee (risk committee or similar committee) - about the results.

1.12
Should an obligation be established for the board of directors to inform the supervisory authorities of any material risks they are aware of?

Supervisory authorities should be able to supervise whether a financial institution has an adequate corporate governance structure and in that respect be able to receive/retrieve the information necessary.

According to the Netherlands there are already a number of ways for the supervisory authorities to retrieve information if necessary. Financial institutions (and external auditors and actuaries) in the Netherlands have a number of legal notification duties in relation to (i) signalling likely breach of solvability and liquidity requirements, (ii) integrity incidents and (iii) licensing. This derives from European directives. This should in our opinion be sufficient. Besides, if the Commission refers to an obligation for the non-executive directors to inform the supervisory authorities, this might infringe on the respective responsibilities of the executive and non-executive directors and might make the executive directors more reluctant to share all the information with the non-executive directors necessary for their internal supervision.

1.13
Should a specific duty be established for the board of directors to take into account the interests of depositors and other stakeholders during the decision-making procedure ('duty of care')?

We understand that in the Green Paper the Commission refers to a general duty of care of the board of directors to acknowledge the interest of the depositors and creditors as stakeholders of the financial institution.

In the Netherlands the board of directors is already obligated to take into account the interests of all stakeholders in its management in order to guarantee the continuity of the business (the so-called 'stakeholder' model). Therefore, we are in favour of the principle of such a general duty of care. However, we agree with the Commission that such a duty of care would require careful examination of the existing legal regimes in the different Member States.

<u>Risk-related functions</u>

2
Interested parties are invited to express whether they are in favour of the proposed solutions regarding the risk management function, and to indicate any other measures they believe would be necessary.

The Netherlands supports the Commission's attention for proper risk management. Supervisory authorities should be able to take appropriate action when the risk management function is not functioning properly and when the executive directors do not meet the requirements to safeguard controlled and sound business operations.

In general, we are of the opinion no additional measures are necessary that go further than the current initiatives of the Commission, such as the technical draft for Solvency II and the AIFM. More so, as effective risk management depends to a considerable degree on the (risk)culture within a financial institution and not only on organisational and procedural aspects.

Furthermore, we support the analysis in the Green Paper of the Commission that it is advisable that financial institutions (that is, at least banks) carry out an evaluation of the underlying risks and other relevant factors as the duty of care towards the client before developing and introducing new financial products or significantly changing the features of an existing product. We refer to our response to question 1.11.

2.1
How can the status of the chief risk officer be enhanced? Should the status of the chief risk officer be at least equivalent to that of the chief financial officer?

It is primarily the responsibility of the board of directors to ensure that rules regarding internal processes and risk management are applied in order to safeguard controlled and sound business operations. Financial institutions must have an independent, comprehensive and capable risk management function. The risk management function should cover all risk types, business lines and relevant

risks and should fall under the direct responsibility of the Chief Risk Officer (the CRO), or the senior management if a CRO is not appointed following the principle of proportionality.

We question whether extensive rules focusing on the status/person of CRO help to achieve better risk management. The risk management function as a whole should function correctly and the governance of risk management should be documented and updated as appropriate. It is of the utmost importance that the (management) board as a whole feels responsible for risk management.

The internal corporate culture with an independent role for the risk management function is important for a proper functioning of risk management. In this respect, we see an important role for the executive directors to set the "tone at the top" by converting their vision, mission and targets concerning risk management into a structured organisation of the risk management function within the company, and for the non-executive directors to hold supervision in this respect.

One way in which the board can decide to further strengthen the role of the risk management function, is to appoint the CRO as member of the board (when the proportionality, as described in our general remarks, does not oppose this). In any case, the risk management function should always be independent from operational units.

2.2
How can the communication system between the risk management function and the board of directors be improved? Should a procedure for referring conflicts/problems to the hierarchy for resolution be set up?

We refer to our response to question 2.1. Such a procedure can be set up within the institution upon the discretion of the board to achieve the goal of an independent and correct functioning risk management.

2.3
Should the chief risk officer be able to report directly to the board of directors, including the risk committee?

In the Netherlands, the risk management function is legally required to report at least on a yearly basis to the board. In practice this would enable the CRO, or the senior management if a CRO is not appointed, to report directly to the board, which should prevent information asymmetry. This is also addressed in amongst others the technical draft for Solvency II. We currently have no indications that additional measures on EU level are required.

2.4
Should IT tools be upgraded in order to improve the quality and speed at which information concerning significant risks is transmitted to the board of directors?

Timely access to relevant information concerning significant risks would in practice be a condition for the management board in order to perform its responsibility to safeguard controlled and sound business operations. The institution should ensure

a good functioning of its risk management function, upgrading IT tools could be part of this.

The Dutch Banking Code states that the management board shall ensure that risk management is arranged adequately so that the board is aware in good time of any material risks run by the bank so that these risks can be managed properly. The financial supervisors can take this into account when assessing whether controlled and sound business operations are safeguarded within the institution. This is also addressed in among others the technical draft for Solvency II. We currently have no indications that additional measures on EU level are required.

2.5
Should executives be required to approve a report on the adequacy of internal control systems?

Executives should ensure an adequate risk management function and the risk management function should report on a yearly basis to the board. We refer to our response to question 2.3. The risk management policy as a whole is the responsibility of the executive directors. A separate report on the adequacy of internal control can be a part of this integral responsibility. This is also addressed in among others the technical draft for Solvency II. We currently have no indications that additional measures on EU level are required.

<u>External auditors</u>

3.1
Should cooperation between external auditors and supervisory authorities be deepened? If so, how?

The Netherlands is of the opinion that the requirement laid down in Directive 2006/48/EC, for auditors of financial institutions to alert the competent authorities wherever they become aware of certain facts which are liable to have a serious effect on the financial situation of an institution, is a clear requirement for external auditors to report promptly. The Netherlands is not in favour of broadening this requirement. Inquiries in the Netherlands have revealed that the quality of audits is not always up to standards, and that the culture of audit firms needs to improve. The Netherlands is of the opinion that these shortcomings should be addressed through better enforcement of existing regulations.

The Netherlands supports the enforcement of existing regulations through initiatives taken by supervisory authorities, auditors and financial institutions among other things, but sees no reason for extending the reporting scheme that already exists on a European level.

3.2
Should their duty of information towards the board of directors and/or supervisory authorities on possible serious matters discovered in the performance of their duties be increased?

As far as the duty of information from external auditors towards the supervisory authorities is concerned, the Netherlands refers to the answer on the preceding

question. With respect to the duty of information towards the board of directors, the Netherlands refers to the requirement laid down in Directive 2006/43/EC, for external auditors to report to the audit committee on key matters arising from the statutory audit and in particular on material weaknesses in internal control in relation to the financial reporting process. As far as the duty of information is concerned, the Netherlands pleads for better enforcement of existing regulations instead of further increasing the duty of information. In this field the consistent application of auditing standards within the Community and the implementation of the Clarified ISAs (e.g. ISA 260 and 265 regarding the requirements for the auditor to report possible serious matters) could be helpful.

3.3
Should external auditors' control be extended to risk-related financial information?

The Netherlands is of the opinion that it would first be necessary to establish a clear understanding of the term "risk related financial information".[6]

The Netherlands notes that financial statements based on IFRS already should contain a vast amount of risk-related information. Financial reports have to contain a description of the principal risks and uncertainties faced by the company involved among other things. External auditors have to assess the annual accounts as well as all the other information which accompanies the financial statement of a company. Additionally, external auditors certify the prudential returns to the supervisor, which in essence are made up of risk-related financial information. If the Commission suggests to extend the auditor's control of risk-related financial information beyond IRFS, it should be carefully verified whether the auditor is able to give an opinion about this information. Also, a cost-benefit analysis should be made.

In the view of the Netherlands it is important that all parties involved can have confidence in audited financial statements and certified prudential returns. It is therefore important that auditors remain focused on delivering high quality audits of financial statements. According to the Netherlands it would reach too far to decide on the expansion of the role of the external auditors as yet for reasons mentioned in the previous paragraph (definition of risk-related information, auditor's ability, cost/benefit analysis). Furthermore, auditors can still focus on improving the quality of the audit of financial statements, including the already existing risk-related information.

<u>Supervisory authorities</u>

4.1
Should the role of supervisory authorities in the internal governance of financial institutions be redefined and strengthened?

Corporate governance is primarily the responsibility of the company itself. The executive and non-executive directors and the shareholders each have their own responsibilities and accountabilities (system of checks and balances).

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[6] In the working document accompanying the Green paper examples are given of risk related financial information (SEC (2010) 669, p. 35). The term "risk related financial information" could however also comprise other information, as it is a non-defined term.

In the opinion of the Netherlands financial supervisors should be able to supervise whether a financial institution has an adequate corporate governance structure. The financial supervisor should be able to act or intervene when there's an imbalanced corporate governance structure within the financial institution which might cause prudential risks or behavioural problems (with respect to the responsibilities and accountabilities of the (internal organs of the) company).

We support the steps recently taken by the Commission to strengthen the role of supervisory authorities in the internal governance of financial institutions through among others technical drafts of Solvency II and the CRD[7] amendments.

We support steps to align the scope and to enhance a European level playing field. We question whether the Commission has to take further action that affects banks and insurance companies than already taken, such as through the technical draft of Solvency II and the CRD. In addition, we refer to the 3L3 activities as mentioned in our general remarks.

4.2
Should supervisory authorities be given the power and duty to check the correct functioning of the board of directors and the risk management function? How can this be put into practice?

We refer to our response to question 4.1. The Netherlands holds the opinion that financial supervisors should be able to supervise whether a financial institution has an adequate corporate governance structure with respect to the responsibilities and accountabilities of the (internal organs of the) company. In other words, corporate governance is primarily the responsibility of the company itself and supervision by supervisory authorities should not transfer this responsibility of the company itself to the financial supervisor or replace this responsibility of the company.

To be able to supervise in an adequate manner the supervisory authorities should have sufficient instruments to intervene if the corporate governance structure within the institution is unbalanced. One of these means is supervision by the authorities on remuneration policies of the financial institutions (in which aspects of governance are addressed). Another one of these means is the fit and proper assessment of members of the board. This assessment should not be limited to experience and skills of the individual but should also take into account the experiences and skills of the board as a whole. This implies that the supervisor has to take into account the functioning of the board. In our opinion this does not mean being present at the meetings of the specific board. However, as stated before, it should in our opinion be ensured that the supervisory authority will not take the role of the company's selecting committee and (hence) take the responsibility for the company's management.

We support steps to align the scope and to enhance a European level playing field. We question whether the Commission has to take further action that affects banks

[7] For instance stipulations concerning robust governance arrangements for banks in article 22 and annex V of the CRD (2006/48/EG).

and insurance companies, as the measures that are already taken, such as the technical draft of Solvency II and the CRD, are sufficient in our opinion.

4.3
Should the eligibility criteria ('fit and proper test') be extended to cover the technical and professional skills, as well as the individual qualities, of future directors? How can this be achieved in practice?

The Netherlands holds the opinion that both executive and non-executive directors within the financial institutions should be suitable for the tasks entrusted upon them. It is the responsibility of the financial institution to demonstrate that its board members are fit and proper at all times. This should cover a combination of knowledge, skills and professional conduct (including integrity) of the directors. This integrates both the individual qualities of the director, including the way he or she will be able to function within the board, previous management experience, sector specific experience, etc. and the functioning and composition of the board as a whole. Also, the director's future position, the type of company and the company's size, complexity and risk profile should be taken into account. Regulators should review individual directors on this basis before they take their seat on the board.

To ensure the director's suitability is not only theoretical, the supervisory authorities could re-examine the director's suitability (on an ongoing basis) if they think there is a reasonable cause to do so. A reasonable cause could be for example a change in the board composition, doubts about the functioning of a director, a specific situation (such as mergers and acquisitions or the development of new products) or structural failure to comply (in time) with supervisory authorities' information requests. The actual behaviour/functioning of a director is the crux of a re-examination. Notwithstanding this, the basic principle remains that financial institutions are primarily responsible for hiring and retaining suitable supervisors/directors.

<u>Shareholders</u>

5
Interested parties are invited to express their view on whether they consider that shareholder control of financial institutions is still realistic. If so, how in their opinion would it be possible to improve shareholder engagement in practice?

The Netherlands is of the opinion that good corporate governance requires the active involvement of the shareholders. The Netherlands supports the aim to improve shareholder engagement. Long-term engagement by shareholders may contribute to the continuity of the company. Shareholder engagement is something that primarily should be left to the company itself. The Netherlands believes that shareholder engagement in financial institutions might be encouraged by a constructive dialogue between companies and their shareholders. However, the anonymity of the shareholders might be an obstacle to the establishment of that dialogue. Therefore the Netherlands believes that identification of shareholders should be facilitated. We also refer to our response to question 5.3.

5.1.
Should disclosure of institutional investors' voting practices and policies be compulsory? How often?

The Netherlands believes that information on institutional investors' voting practices and policies is useful to financial institutions, shareholders and other market participants. In the Netherlands institutional investors are already obliged to publish their policy on the exercise of the voting rights for shares they hold in listed companies and to report how they have voted as shareholders at the general meeting.

The Netherlands is of the opinion that the benefit of disclosure of voting practices and policies should outweigh the costs of such a requirement (to prevent for example an excessive administrative burden). The Dutch transparency obligations for institutional investors meet these criteria[8].

5.2.
Should institutional investors be obliged to adhere to a code of best practice (national or international) such as, for example, the code of the International Corporate Governance Network (ICGN)? This code requires signatories to develop and publish their investment and voting policies, to take measures to avoid conflicts of interest and to use their voting rights in a responsible way.

The Netherlands takes a positive view of initiatives by institutional investors to adhere to a code of best practices. The Netherlands has not defined a final position yet on the issue whether institutional investors should be obliged to adhere to a code of best practices. Before answering this question we would like to note that institutional investors have to act primarily in the interests of the ultimate beneficiaries or investors and have a responsibility to them and the companies in which they invest. Whether institutional investors should be obliged to adhere to a code of best practices depends on among others the public support of the code from the institutional investors, their beneficiaries, the companies they invest in and other interested parties and the way compliance with the code is monitored.

5.3.
Should the identification of shareholders be facilitated in order to encourage dialogue between companies and their shareholders and reduce the risk of abuse connected to 'empty voting'?

The Netherlands believes that shareholder engagement in financial institutions can be encouraged by a constructive dialogue between companies and their shareholders. However, the anonymity of the shareholders might be an obstacle to the establishment of that dialogue. Therefore the Netherlands believes that identification of shareholders should be facilitated. Due to the cross border nature of shareholdership the Netherlands welcomes an EU wide approach of the identification of shareholders. Currently, in the Netherlands a legislative proposal

[8] Under the Dutch corporate governance code institutional investors shall publish annually, in any event on their website, their policy on the exercise of the voting rights for shares they hold in listed companies. Furthermore institutional investors shall report at least once a quarter, on their website, whether and, if so, how they have voted as shareholders at the general meeting.

has been submitted to the House of Representatives which provides for the identification of investors.

We believe that the framework of the current work of the Commission on the legislation on legal certainty of securities holding and disposition might be useful in the facilitation of the identification of shareholders. For example, account providers could be obliged to pass on the identification information through the chain of intermediaries. The above mentioned obligation for account providers could make feasible the dialogue between companies and their shareholders. We would like to ask the Commission to consider and investigate the possibilities for such an approach.

The Netherlands is of the opinion that the issue of empty voting can best be addressed at an international level, due to the cross-border nature of capital movements. The Netherlands therefore supports an EU wide approach of empty voting. The phrasing of the question in the Green Paper seems to imply that the encouragement of the dialogue between companies and their shareholders will decrease the risk of empty voting. The Netherlands doubts whether this will be the case.

5.4.
Which other measures could encourage shareholders to engage in financial institutions' corporate governance?

We refer to our response to questions 5 and 5.3.

<u>Effective implementation of corporate governance principles</u>

6
Interested parties are invited to express their opinion on which methods would be effective in strengthening implementation of corporate governance principles?

In the Netherlands the implementation of corporate governance principles in the financial sector is an interaction between regulation and self regulation. Besides regulation by law, such as the supervision by the DNB and the AFM of controlled and sound business operations and remuneration policies, the Dutch Corporate Governance Code for listed companies and the Dutch Banking Code for banks (both self regulation) are legally embedded, as mentioned in our general remarks[9]. In order to be effective, compliance with corporate governance codes on the basis of "apply or explain" needs to be complemented by a system of effective monitoring (at a national level). This mixed regime leads to a flexible instrument with pressure to comply.

6.1
Is it necessary to increase the accountability of members of the board of directors?

The Netherlands acknowledges the importance of the accountability of board members for the implementation of corporate governance principles. Based on the

[9] Dutch listed companies and Dutch banks are legally obliged to describe in their annual report whether or not they apply the principles and best practices of the Dutch corporate governance code and/or the Dutch Banking Code respectively, or explain why they do not.

legal collective responsibility of the board to fulfil its duty, all members will be responsible for the implementation of the corporate governance principles in the Dutch Corporate Governance Code and the Dutch Banking Code. However, the Netherlands is of the opinion that the implementation of the current corporate governance principles needs to be enhanced by an effective system of monitoring at a national level, as described in the introduction. We refer to our response to question 6.

6.2
Should the civil and criminal liability of directors be reinforced in mind that the rules governing criminal proceedings are not harmonised at European level?

As concerns the liability of executive directors, each director is liable for improper management. An individual director can be exempted from liability if the shortcoming is not attributable to the director and he hasn't been negligent in taking measures to prevent the consequences. While managing a company, it is unavoidable that certain risks are taken. There should be a right balance between taking risks to run a business and the risks to be held liable for excessive risk taking. Throughout the EU the legislation on liability diverges. That is of no great matter as long as directors in all Member States can be held liable in case of unacceptable risk taking.

The Netherlands is of the opinion that matters of civil and criminal liability of directors of financial institutions are best regulated at a national level, given the differences in legal systems and the interdependence with other forms of liability, which also relates to the specific legal system. We prefer strengthening, if necessary, the powers of the regulatory authorities (in administrative law), such as through the fit and proper test.

Remuneration

7
Interested parties are invited to express their views on how to enhance the consistency and effectiveness of EU action on remuneration for directors of listed companies.

As regards the remuneration in the financial sector, specific regulation is justified due to the influence of financial institutions on financial stability and their duty of care. This subject is addressed in CRD III, which will be implemented in the Netherlands.

The justification for specific regulation regarding remuneration for the financial sector has less meaning for listed companies in general. The Netherlands is of the opinion that for remuneration of directors of listed companies in general self-regulation should be the starting point, as designed in the Dutch Corporate Governance Code (with the legal obligation to "apply or explain"). In that respect an effective monitoring system and transparency is of the utmost importance. For that reason the compliance with the Corporate Governance Code (and for listed banks also the Banking Code) are closely monitored by independent monitoring committees.

Certain elements regarding remuneration of directors of listed companies in general should in our opinion be covered by regulation. For example, in the Netherlands the shareholders already have a legal right to vote on the remuneration policy of directors of listed companies. Furthermore, the Dutch government will introduce a legal basis for claw back. This new Act is supposed to come into force on 1 January 2011. And as from July 1st the Works Council has a legal right to give its point of view on the proposed remuneration policy that will be voted upon in the general meeting.

7.1
What could be the content and form, binding or non-binding, of possible additional measures at EU level on remuneration for directors of listed companies?

The recommendations of the Commission regarding remuneration for directors of listed companies already contain important useful principles regarding this issue. Implementation by the Member States of the recommendations of the Commission and an effective monitoring system and transparency is of the utmost importance. For that reason priority should in our opinion be given to compliance and effective implementation throughout Member States and creating an effective system of monitoring rather than additional (legal) measures. However, European regulation of the before mentioned claw back and the enhanced involvement of employees in the establishment of the remuneration policy, as described in our response to question 7.4, can be supported.

7.2
Do you consider that problems related to directors' stock options should be addressed? If so, how? Is it necessary to regulate at Community level, or even prohibit the granting of stock options?

As stated in the response to questions 7 and 7.1, the remuneration policy of directors of listed companies is primarily the responsibility of the company itself (executive directors, non executive directors and shareholders). Therefore we do not favour (detailed) regulation of specific forms of remuneration.

The Netherlands acknowledges that stock options may lead to short-termism of directors. However, it should be noted that stock options may also be a useful remuneration tool, for example for start-up companies. A careful balance should be struck to mitigate the risks of stock options. We are of the opinion that prohibiting stock options is not proportionate. Furthermore, there is a risk that prohibiting the granting of stock option might heighten the fixed part of the remuneration (without strengthening the link between pay and performance).

The Dutch Corporate Governance Code indicates important instruments to prevent possible negative risks of stock options. For example if options are granted, they shall, in any event, not be exercised in the first three years after the date of granting. The number of options to be granted shall be dependent on the achievement of targets specified beforehand. At this rate the director will be encouraged to raise the long-term share value which also promotes the interests of the company.

7.3
Whilst respecting Member States' competence where relevant, do you think that the favourable tax treatment of stock options and other similar remuneration existing in certain Member States helps encourage excessive risk-taking? If so, should this issue be discussed at EU level?

It could be possible that favourable tax treatment could encourage excessive risk taking, but that is not the primary cause according to the first reaction of the Netherlands. It probably would smooth the process and therefore be a minor cause at the most. Therefore, in our opinion excessive risk taking should best be addressed by focusing on other more important areas, such as the incentives implicit in the remuneration policy. However, if the Commission could ascertain there is a strong connection between a favourable tax treatment and excessive risk taking the Netherlands is willing to consider this issue as a topic to be discussed at EU level.

7.4
Do you think that the role of shareholders, and also that of employees and their representatives, should be strengthened in establishing remuneration policy?

In the Netherlands, the shareholders play an important role in the establishment of the remuneration policy. According to the Dutch Civil Code, the general meeting of shareholders of a public limited liability company has the right to vote on the remuneration policy.

Recently, the role of the employees with regard to the remuneration policy has been strengthened. The Works Council can give its opinion on the remuneration policy, before the shareholders meeting decides on it. The proposed remuneration policy is sent to the Works Council in time before the convocation of the shareholders meeting. The Works Council can form an opinion on the draft and make this opinion available to the shareholders at the convocation. In that way, the shareholders who will vote on the remuneration policy will be able to take the opinion of the Works Council into consideration.

The Netherlands supports a European approach with regard to the shareholders' right to vote on the remuneration policy and to involve the employees in the establishment of this policy along the lines of the Dutch provisions.

7.5
What is your opinion of severance packages (so-called 'golden parachutes')? Is it necessary to regulate at Community level, or even prohibit the granting of such packages? If so, how? Should they be awarded only to remunerate effective performance of directors?

The remuneration policy of directors of listed companies, including severance packages, is primarily the responsibility of the company itself (executive directors, non-executive directors and shareholders). According to the Dutch Corporate Governance Code (and the Banking Code) the severance payment in the event of dismissal may not exceed one year's salary (the fixed' remuneration component). If the maximum of one year's salary would be manifestly unreasonable for an executive director who is dismissed during his first term of office, the executive

shall be eligible for severance pay not exceeding twice the annual salary. "Failing" performance should not be rewarded upon termination of the employment.

The topic is already covered by a recommendation of the Commission[10]. As we stated before, we are of the opinion that for now self regulation will work for remuneration of directors of listed companies rather than additional (legal) measures but feel that a system of monitoring (at a national level, like in the Netherlands) should be in place.

7a
Interested parties are also invited to express their views on whether additional measures are needed with regard to the structure and governance of remuneration policies in the financial services. If so, what could be the content of these measures?

The crisis has shown that changes in the financial sector are needed, to regain stability and trust in the sector. The Netherlands has recently announced new reforms in the financial sector. Remuneration issues are an important element of those reforms. For example, the Dutch government will introduce a legal basis for claw back/malus arrangements (for both financial institutions and (other) listed companies). For financial institutions, compliance with international regulation and national implementation is monitored by the Dutch supervisory authorities (DNB and the AFM). In addition, compliance by banks with the Banking Code, the code that amongst others limits variable pay, is closely monitored by the Monitoring Committee Banking Code.

To make a real change in the corporate culture of financial institutions, an international, coordinated approach is needed. We fully endorse the recent FSB recommendations regarding the implementation of the FSB Principles for Sound Compensation Practices and the Capital Requirement Directive. These should ensure that the remuneration policy of financial institutions does not contain incentives that encourage excessive risk taking or neglecting duty of care. Institutions should also analyse these risks, develop policies to mitigate these risks, and execute their remuneration policy in such a way that appropriate behaviour is encouraged. This should be applicable for the remuneration policy of directors and other employees of the institution. Furthermore, the initiatives of the BCBS and the IASIS to strengthen the supervisory processes on remuneration are needed to ensure this implementation.

7.6
Do you think that the variable component of remuneration in financial institutions which have received public funding should be reduced or suspended?

We think it is more important that financial institutions (this is not limited to those who have received public funding) develop a sustainable remuneration policy in which among others, but not solely, the variable component of remuneration is addressed.

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[10] Commission Recommendation of 30 April 2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies, L 120/28, article 3.5.

In the Netherlands the executive directors of the financial institutions which have received public funding have renounced the right to their variable component of remuneration in the year the company received public funding. Furthermore, no variable remuneration can be granted to the executives until these institutions have established a new, sustainable remuneration policy in line with national and European/international standards and principles.

All aspects of the remuneration policy of financial institutions (and not solely the variable component) should be sustainable. It is thus important that financial institutions take all requirements as included in the CRD III into account, e.g. incentives in all forms of remuneration such as the criteria by which remuneration is awarded. These criteria should not contain incentives for the directors and employees to take excessive risks or detract from the institutions duty of care. Furthermore, the emphasis should not be restricted to mainly prudential risks, but also on the duty of care.

Conflicts of interests

8.1/8.2
What could be the content of possible additional measures at EU level to reinforce the combating and prevention of conflicts of interest in the financial services sector? / Do you agree with the view that, while taking into account the different existing legal and economic models, it is necessary to harmonise the content and detail of Community rules on conflict of interest to ensure that the various financial institutions are subject to similar rules, in accordance with which they must apply the provisions of MiFID, the CRD, the UCITS Directive or Solvency 2?

The Netherlands agrees with the Commission's observation that surveillance of conflicts of interest by the market alone is not always possible or effective. We therefore favour the Commission's suggestion to harmonise the content and detail of Community rules on conflicts of interest to ensure that the various financial institutions are subject to similar rules (taking into account the different legal and economic models). As to the content of such rules, it would favour a principle-based model along the lines of the MiFID conflict of interest rules.