Evaluation Management and Supervision Act

- Summary -

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Reference WODC: 2730

October 2017

INSTITUTE FOR COMPANY LAW

REFERENCE WODC: 2730

Report to the WODC by:
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Faculty of Law, University of Groningen

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Groningen, October 2017

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Summary

Introduction

On 1 January 2013 the Management and Supervision (adjustment) Regulations Act public and private limited companies (hereinafter referred to as the Act) came into effect. During the parliamentary debate in the Senate the Minister of Security and Justice had pledged that the Act including the amendments was to be evaluated after three years.[1] The reason for the evaluation was, in particular, the restriction of the number of supervisory positions carried out by *one* person, in public and private limited companies and foundations, adopted by way of amendment into the Act. At the request of the Ministry of Security and Justice, the Research and Documentation Centre (WODC) has commissioned the University of Groningen – in particular the Institute for Company Law Groningen/ Rotterdam (IVO) and the Institute for Governance and Organisational Responsibility (iGOR) – to carry out evaluation research into 'The effect of the new provisions of the Act'. The research was conducted in the period of 15 September 2016 to 1 September 2017. The research team comprised Prof. Hylda Boschma, Prof. Loes Lennarts, Prof. Hanny Schutte-Veenstra and Dr. Kees van Veen.

The Act has, in respect of diverse subjects, led to the implementation of new statutory provisions and to changes in existing statutory provisions. The evaluation research has, in particular, focused on three subjects:

(I) The one-tier board model;[2]
(II) Limitation of the number of supervisory positions for directors and supervisors;
(III) Target figure of 30% women on the boards of directors and supervisory boards.

Consequently, the evaluation research was split up into three parts. The research report gives account of each part. Each part concludes with conclusions and recommendations.

[1] Proceedings of the Senate 2010/2011, nr. 28/4.

[2] In addition to the one-tier board model attention is paid in part I to two other important changes brought about by the Act: (i) the changed provision in Article 2:9 Civil Code on division of tasks and directors' liability and (ii) the new provision of conflict of interests of directors and supervisors in Articles 2:129/2:239 para 6 and Articles 2:140/2:250 para 5 Civil Code.

Part I

The one-tier board model in practice

In part 1 of this research the focus lies on the one-tier board model where the board of a public limited company or a private limited company is made up of one or more executive directors and one or more non-executive directors. In the one-tier board model the executive and supervisory roles are united into one management structure. In the Act a statutory basis including a statutory provision for both public and private limited companies are introduced for the one-tier board model. The relevant statutory provisions in this context are: Articles 2:129a/2:239a, 2:132/2:242 para 1, 2:134/2:244 and 2:164a/2:274a Civil Code. One of the central questions of this part of the research is: how is the one-tier board applied in practice, more in particular: what is its structure and effect in practice? Is the use that is made of the one-tier board in practice in agreement with legal theory and have the intended objectives been achieved? To be able to answer these questions the researchers have first of all examined and described the parliamentary history, more in particular: which objectives were intended and what was the presumed effect of the above-mentioned statutory provisions? This shows that the regulation of the one-tier board in the Act was intended:

(i) to increase the efficiency of the legal form of both the public and private limited company in both national and international company relationships;

(ii) to increase legal certainty by putting responsibilities and the ensuing liabilities of directors who are part of a one-tier board on a statutory footing.

Next, the application, structure and effect of the one-tier board in practice were examined. To this end the researchers used two methods (whether or not combined). First of all, data were requested from the Chamber of Commerce concerning all public and private limited companies that had a one-tier board in March 2017 (*quantitative* data collection). These data were analysed in detail, after which the picture resulting from the Chamber of Commerce data on public and private limited companies is presented. According to the quantitative analysis the one-tier board does meet a need for 443 diverse companies in March 2017, subdivided into 58 public limited and 385 private limited companies. More than half of these companies (56.7%) had already been in existence before the Act came into effect, while the remaining companies (43.3%) were incorporated after 1 January 2013. Among the one-tier board companies large and medium, as well as small and micro companies are represented. Also, four structure companies (*structuurvennootschappen*) opted for a one-tier board. The data of the Chamber of Commerce specify 328 companies with a group relationship. Furthermore, the shares of 144 one-tier board companies are held by *one* shareholder.
There is not only variety concerning company size, but also concerning the nature of the activities carried out by the companies. It should be noted that 194 one-tier board

companies (more than 43%) have a Standard Industrial Classifications Code (SBI-code) pointing to the fact that these companies are financial holdings. The size of the one-tier board varies from *one* director holding office (eleven companies) to fourteen directors (*one* company). In terms of percentage the highest number of companies (23.3%/103 companies) has a board consisting of three directors. The Chamber of Commerce data concerning the relation between the number of executive directors and the non-executive directors show the following picture:
- in 226 companies (51%) the number of non-executive directors exceeds that of executive directors;
- in 110 companies (24.8%) the number of executive directors is equal to the number of non-executive directors;
- in 107 companies (24.2%) the number of executive directors exceeds the number of non-executive directors.

With respect to structure companies that are obliged by law to provide for supervision all four one-tier board structure companies were found to have a larger number of non-executive directors than executive directors.

Furthermore, information provided to the researchers by Eumedion shows that the one-tier board model enjoys a certain degree of popularity among listed companies. In July 2017 out of a total of 168 Dutch companies listed on a Dutch and/or foreign stock exchange 44 had a one-tier board. This represents a percentage of more than 26% of the total of Dutch listed companies.
In 40 of these one-tier listed companies (over 90%), according to the data of the Chamber of Commerce, the number of non-executive directors is higher than that of executive directors.

The second method employed concerns *qualitative* data collection: a number of ‘users’ of the one-tier board model selected for that purpose was asked about the choice of the one-tier model, the manner in which this model is structured and functions in their company. They were also asked about their experiences with the one-tier board model (advantages, disadvantages, side effects). A total of nine interviews were conducted with persons who either as executive director, non-executive director or as general counsel are connected with listed companies, companies with one or more private equity investors and family companies. The interviews took place in a semi-structured manner using a questionnaire drawn up by the research team in conjunction with the external monitoring committee.
The findings resulting from the interviews are reported by the researchers based on five subjects. The researchers note the caveat that the number of conducted interviews is insufficient to draw statistically justified conclusions. The interviews, above all, give an impression of the manner in which the one-tier board is structured and functions in the

companies concerned and of the experiences that the 'users' of the one-tier board model have gained.
The interviewed companies noticeably showed that the discretion in drafting the articles of association was mainly used to strengthen the position of the non-executive directors concerning decision-making by the board. Another common denominator was that decisions taken in board meetings were reached based on consensus. In just one company it happened occasionally that the board took a majority decision. It occurred in none of the companies that the executive respectively the non-executive directors collectively sided against each other.
The interviews, furthermore, showed that the advantage of the one-tier board model in practice lies especially in the informed and involved positions of the non-executive directors. In a number of companies being able to act (more) decisively in the one-tier board was felt to be an advantage.
The interviewed companies have not faced unexpected side effects, neither at the introduction of the one-tier board nor later. Also, the introduction of the one-tier board according to the interviewees has not led to an increase in the premium for professional liability insurance of (a) the non-executive directions in respect of supervisory board members and/or (b) the executive directors.
Of importance is the fact that none of the interviewees had any suggestions for the improvement or addition to the regulation of the one-tier board model. The statutory provisions of the one-tier board were experienced as adequate by them.

The evaluation research (quantitative and qualitative analyses) shows that the one-tier board model has increased the usefulness of both the public and private limited company in both national and international business relations. Thus, the objective of the legislator described under (i) has been achieved. The researchers do observe that the choice of a one-tier board model in principle is not open to banks and insurers, because Article 3:19 para 1 of the Financial Supervision Act requires the establishment of a supervisory board. In this context, the researchers suggest to also offer the choice of a one-tier board model to banks and insurers. According to them there are no reasons to withhold this choice from banks and insurers.
In respect of the objective described under (ii) the researchers are of the opinion that in general terms it can be argued that by providing a legal framework for the division of tasks between executive and non-executive directors and the legal provisions of responsibilities and consequent liabilities of directors, legal certainty is increased.

In the present evaluation research it was furthermore investigated whether the one-tier board model in practice works as intended in accordance with the legal theory. Besides data obtained via the Chamber of Commerce and the interviews, academic literature and information from the media and from practice were included.

The researchers conclude that in practice the one-tier board model largely works as intended in accordance with the legal theory:
(i) the one-tier board model in practice meets a need and increases the efficiency of both the public and private limited company;
(ii) the one-tier board model meets – albeit a small one – a need of structure companies;
(iii) companies have not integrally replaced the two-tier board model by a one-tier board model;
(iv) in practice attracting foreign shareholders plays a role when choosing the one-tier board model;
(v) the decision-forming facility of Article 2:129a/2:239a para 3 Civil Code meets a need from practice;
(vi) in respect of the advantages of the one-tier board model as mentioned in the legal theory, the interviews evidence in particular the informed and involved position of the non-executive directors, also, - though to a lesser extent – the one-tier board being able to act (more) decisively;
(vii) when carrying out the present research the researchers did not find any indication that no balanced consideration of interests in the one-tier board companies took place.

In some respects concerning the composition and the functioning of the board the one-tier board model does not work in practice as intended by the legal theory:
(i) in the legal theory it was assumed that in practice the number of non-executive directors would often exceed the number of executive directors, whereas this as shown by the Chamber of Commerce data in 49% of the companies is not the case;
(ii) in the legal theory it was assumed that the task of the chairperson of the board was exclusively reserved for the non-executive director, whereas at least in respect of five Dutch listed companies in practice it was found that besides a formal non-executive director within the meaning of the law also an executive director/chairperson is functioning;
(iii) in the legal theory it was assumed that the board chairperson functions as the most important point of contact for the shareholders and other external contacts, while this was not the case for any of the interviewed companies.
The researchers see no need for the legislator to provide for complementary regulation in respect of the following points:
Ad (i): For listed companies and structure companies the one-tier model does work, in this respect, as intended by the legal theory. In more than 90% of the one-tier listed companies the number of non-executive directors exceeds the number of executive directors. In the category of structure companies that are obliged by law to provide for supervision all one-tier structure companies have a higher number of non-executive compared to executive directors. The companies where the non-executive directors, in terms of numbers, are not in a majority are in particular medium-sized, small and micro

companies. These companies have, on ‘a voluntary basis’ provided for supervision by opting for a one-tier board model. Also, the influence the non-executive directors have on the board not only depends on the circumstance whether or not they, in respect of the executive directors are a majority in terms of numbers. The (influential) position of non-executives is determined, in practice, by a range of factors. Would one want to put the position of the non-executive directors on a more specific legal footing – the researchers see no necessity to do this – then in addition to a numerical relation of executive/non executives one would also have to include rules about a multiple voting right, a tie in votes, etc.
Ad (ii): The researchers are of the opinion that the choice made by the legislator in 2013 that only a non-executive director can take up the role of chairperson, must be maintained. They are of the opinion that the reasoning provided during the legislative process still holds and so they see no reason, in the practice as developed by some listed companies, to change the law.
Ad (iii): In practice there can be good reasons for the CEO and/or the CFO being the most important point of contact for shareholders and other external contacts and not the chairperson of the board.

Finally, the researchers examined the assumption of the legislator that the new regulation of a one-tier board model encompasses adequate guarantees for a proper balance between management and supervision. In conducting the present evaluation research the researchers have not found any indication that the new legislation provides for insufficient guarantees for a proper balance between management and supervision in the one-tier board model. The researchers do note that the legislator has given a wide range of freedom to companies for the structuring of a one-tier board model. Whether, in practice, there is a proper balance between management and supervision, is especially dependent on the manner in which the company, in concreto, implements the one-tier board model, the persons who hold the position of executive or non-executive director and the manner in which they carry out their position. In this respect it is relevant that the non-executives in carrying out their supervisory task can, since 1 January 2013, independently petition the Enterprise Chamber of the Amsterdam Court of Appeal court to open enquiry proceedings, should this be necessary.

The new regulation of division of tasks and directors liability of Article 2:9 in practice

The statutory provision of the one-tier board model for public limited and private limited companies as introduced by the Act was the reason to recast Article 2:9 of the Civil Code. Article 2:9 para 1 (new) Civil Code lays down that the tasks of a director include all those tasks that are not by virtue of the law or the articles of association assigned to one or more of the other directors. A division of tasks does not prejudice the fact that each

director is responsible for the 'general course of business' (Article 2:9 para 2 Civil Code). In order to claim exculpation successfully, an individual director must show – taking also the division of tasks into consideration – that (i) no serious blame can be attributed to him *and* (ii) in addition he was not negligent in taking measures to avert the consequences of mismanagement.
The legal theory shows that the new provision of Article 2:9 Civil Code was intended to be in line with case law pursuant to Article 2:9 (old) Civil Code. In other words, with Article 2:9 (new) Civil Code a change in direction regarding the liability of the director was not intended.
A central question in Part 1 of the research was: how was the new Article 2:9 Civil Code applied in case law in the period 1 January 2013 to 31 December 2016? Are there any problem areas in practice?
Research into case law in the matter of the application of the new provision of Article 2:9 Civil Code shows a relatively smooth transition from Article 2:9 (old) Civil Code to Article 2:9 (new) Civil Code. The substantive application by the judiciary of the new Article 2:9 Civil Code does not seem to be different from that of Article 2:9 (old) Civil Code. The four decisions where the claim pursuant to Article 2:9 (new) Civil Code was awarded concerned activities by directors that would have, under the old statutory provision, also resulted in a decision of culpable mismanagement.
The previously mentioned research into case law does show that judicial bodies do not know of an unequivocal approach in respect of the application of (i) the transitional law and (ii) the obligation to complain about a defect in the performance of a contract under Article 6:89 Civil Code. The obligation to complain means that a creditor can no longer claim defect in the performance, if he has failed to inform the debtor of his protest in the matter within reasonable time after he has discovered the defect or after he should reasonably have discovered this defect.

In this matter the researchers have reached the following conclusions:
Ad (i): The problems of the transitional law should be put into perspective. As shown by the parliamentary history no change of direction was intended with Article 2:9 (new) Civil Code in respect of Article 2:9 (old) Civil Code. For the position of liability of directors, for that reason, it does not appear to make a difference whether the new or old Article 2:9 Civil Code is applied. The conducted research into case law confirms this point of view.

Ad (ii): The uncertainty about whether or not the obligation to complain under Article 6:89 Civil Code is applicable to Article 2:9 Civil Code was also previously an issue under Article 2:9 (old) Civil Code. Removing the uncertainty in this matter is desirable according to the researchers, taking into account the direct effect of the obligation to complain on the outcome of the liability claim instituted against the director under Article 2:9 Civil Code. The researchers are of the opinion – following Huizink and Kroeze – that there are solid arguments to not apply the obligation to complain under Article 6:89 Civil Code to

Article 2:9 Civil Code. The first-mentioned provision is not intended for the relationship between a corporate entity and a director. The limitation provision under Article 3:310 Civil Code suffices. Furthermore, in exceptional cases applying the restrictive effect of reasonableness and fairness may provide a solution. In this context, the researchers recommend that the legislator clarifies that the obligation to complain does not apply to Article 2:9 Civil Code. The parliamentary debate of the bill Management and Supervision legal entities including a provision for director's liability inserted into Article 2:9b provides an opportunity for such clarification.
On the subject of the new Article 2:9 para 2 Civil Code, which makes explicit that a division of tasks does not prejudice the fact that each director bears responsibility for the general course of business, the researchers note the following. If a matter belongs to 'the general course of the business' then an exculpation defence for an individual director will not stand. For directors it is, therefore, of importance to know what is covered by the term 'in the general course of business'. This is not indicated in the parliamentary history. In the literature it has been repeatedly stated that it is unclear what should be understood by 'the general course of business'.
In first instance, it is up to the (directors of) the company to determine what is meant by this term. Eventually, it is up to the court, in the context of Article 2:9 Civil Code to assess whether or not a matter should or should not come under 'the general course of business'. In the court decisions analysed the substance of the concept of 'the general course of business' was in fact not dealt with. A possible explanation is that in these procedures each time concrete behaviour by directors was the basis of a claim under Article 2:9 Civil Code.
The researchers are aware of the fact that it is difficult or undesirable to furnish the concept of 'the general course of business' with a definitive legal interpretation. However, it is, advisable, that some *guidance* is given by indicating that *at the very* least the strategic, financial and risk policies are included in the concept. The parliamentary debate of the previously mentioned bill does provide the opportunity to do so.

The new regulation on conflict of interests of directors and supervisors in practice

The statutory provision in respect of the one-tier board model introduced by the Act was seen by the legislator as an opportunity, par excellence, to reconsider the rules on conflict of interests, as these touch upon the relationship of directors, the board of directors and the supervisory board. The choice was made to replace the provision on representation of the company in the event of conflict of interests of Article 2:146/2:256 (old) Civil Code by Article 2:129/2:239 para 6 Civil Code, that concerns the process of adopting a board resolution in the event that a director has a conflict of interests. The ratio for this reform is that the conflict of interests issue concerns a standard of behaviour that before anything else touches upon the decision-making process involving management. In addition, the rule on conflict of interests of supervisors is laid down in the new Article 2:140/2:250 para 5 Civil Code.

The parliamentary history makes mention of the fact that an advantage of the decision-making process provision of Article 2:129/2:239 para 6 Civil Code is that legal certainty is served. Third parties are not confronted by vitiating factors of a transaction that they have entered into with the company due to a matter – the conflict of interests of a director – that primarily touches upon the relationships within the company.

As appears from case law prior to 1 January 2013 companies regularly invoked Article 2:256 (old) Civil Code. Moreover, the legal provision of Article 2:146/2:256 (old) Civil Code gave rise to a number of legal questions that were the subject of numerous legal procedures that more than once went all the way to the Supreme Court.

A central question in part 1 of this research was: how were the new Article 2:129/2:239 para 6 Civil Code or Article 2:140/2:250 para 5 Civil Code applied in case law in the period from 1 January 2013 till 31 December 2016. Were there any problem areas in practice? Only *one* court decision emerged in the case law study where a nullity/void declaration was invoked of board decisions due to non-compliance of the statutory provision of conflict of interests of Article 2:239 para Civil Code. According to the researchers, the most obvious explanation of this scarcity of application is that Article 2:129/2:239 para 6 Civil Code - unlike the representation provision of Article 2:146/2:256 (old) Civil Code - refers to an internal decision-making provision leaving intact the representative activities of director(s). In principle, the company remains bound by the legal act. The research into case law leads to the conclusion that the new provision of Article 2:129/2:239 para 6 Civil Code enhances legal certainty in commerce as intended by the legislator.

A study of the legal literature shows that a number of problems can occur in the practical application of the provision of Article 2:129/2:239 para 6 Civil Code. These problems have been identified and analysed. In this context the researchers recommend that the uncertainty in practice in the relation between Article 2:129/2:239 para 6 Civil Code and a clause in the articles of association providing for a replacement in the event of absence from office of any of the directors (*statutaire beletregeling*), the statutory approval provision of Article 2:216 para 2 Civil Code and the statutory delegation provision of Article 2:129a/2:239a para 3 Civil Code be removed.

Part II

Part II focuses on the limitation regulation for supervisory positions. Pursuant to this regulation – as laid down in Articles 2:132a, 2:142a, 2:242a, 2:252a, 2:297a and 2:297b Civil Code – *one* person can hold a maximum number of five supervisory positions. For this purpose, the chairmanship of a supervisory body counts as double. For (executive) directors the rule is a maximum number of two supervisory positions. In addition, a person who is chairperson of a supervisory body cannot be appointed to the position of (executive) director. An appointment that violates the limitation regulation is null and void, but it does not invalidate the decision making process in which the person concerned participates. The scope of application of the limitation regulation is restricted to large public and private limited companies and large commercial/semi-public foundations. The qualification 'large' is derived from the annual accounts criteria as laid down in Article 2:397 para 1 and 2 Civil Code.[3]

The central question in this part of the research concerns the background, objectives, effectiveness and possible side effects of the prescribed limitation of the number of supervisory positions to be fulfilled by *one* person. Eventually, the question as to which extent the introduction of the limitation regulation has achieved the intended objectives must be answered.

Intended objectives of the limitation regulation

The limitation regulation is based on an amendment by Member of Parliament Mr. Irrgang. From the explanatory notes to the amendment it can be gleaned that the limitation regulation aims to achieve three objectives:
(i) Guaranteeing the quality of management and supervision of large entities.
The argument is that persons who acquire large portfolios of supervisory positions are not able to actually supervise due to lack of time and attention for each entity. Due to inadequate supervision corporate scandals can present themselves with huge social consequences.
(ii) Contributing to breaking up the so-called 'old boys network'.
For a (very) long time the notion has existed that a very small elite has taken up a multitude of important (economic) positions. This so-called 'old-boys-network' is often viewed as an undesirable concentration of economic power in the hands of a small group of persons. In addition, this network has a closed character because the network

[3] A public or private limited company or a foundation is qualified as 'large' if on two consecutive balance sheet dates, without interruption thereafter, at least two of the following three criteria apply: (i) the value of the assets according to the balance sheet with explanatory notes exceeds € 20 million (based on the acquisition or manufacturing price); (ii) the net turnover (foundation: total of revenues respectively total of benefits) exceeds € 40 million; and (iii) the average number of employees is at least 250.

perpetuates itself via co-optation as a result of which other groups in society are denied access to these positions.
(iii) The prevention of conflict of interests.
The above (see ii) mentioned concentration carries the risk (of apparent) conflict of interest. Because a small group of persons combines a large number of positions the possibility of conflict of interest is deemed to be larger. This reasoning is a derivative of the 'old-boys-network' argument.

Scope of the limitation regulation

The scope of the limitation regulation is limited to both the public and private limited company and the commercial/semi-public foundation and only covers those entities that qualify as 'large'. In respect of the limited scope it is noted in the legislative history of the act that the problems concerning the quality of management and supervision have been identified not only in the private sector but also in the semi-public sector. Furthermore, the limitation regulation was intended to bring about an improvement in quality for large entities. For that reason it only applies to large public and private limited companies and foundations. A reason for limiting the quality enhancement to large entities is either not at all or not explicitly provided for in the legislative history. Possibly the reason can be found in the large social impact of these entities or an assumed larger amount of time spent by persons fulfilling supervisory positions in large entities.

The research into the criteria relating to size yielded no specific problems. Because the existing criteria as laid down in the provisions on annual accounts were adopted in the limitation regulation, both the effects of these criteria and possible problems were known. The researchers only recommend a minor change, i.e. that the provision laid down in Article 2:398 Civil Code is affirmed to be of equal application. As a result it will no longer be possible for a recently founded legal person to qualify as large in terms of the legal requirements relating to the annual accounts, whereas in respect of the limitation regulation this qualification for the first two years of its existence is not applicable to this legal entity. The researchers have not found a valid reason to exclude recently founded large legal entities from the scope of the limitation regulation.

The researchers have investigated which consequences a possible expansion of the scope of the limitation regulation were to have if applied to other large legal entities: cooperatives, formal associations and mutual insurance associations. Research only yielded a small number of large cooperatives, formal associations and mutual insurance associations at the reference dates in both 2012 and 2017 and a consequential modest number of supervisory positions. Moreover, these legal entities hardly show multiple supervisory positions (a maximum of two). From the foregoing the researchers conclude that a concentration of supervisory positions in the hands of a small group of supervisors is absent and thus that the phenomenon of the 'old boys network' in large cooperatives, formal associations and mutual insurance associations is also absent. In view of the negligible multiplicity of positions a possible expansion of the scope of the limitation regulation to these legal forms will not have an effect on the labour market for supervisors and directors.

General and sectoral limitation regulations

Besides the general limitation regulation in Book 2 of the Civil Code there are sectoral limitation regulations for, on the one hand, pension funds and, on the other hand, for significant credit institutions and investment firms. A sectoral limitation regulation for pension funds was introduced, because it enabled the legislator to distinguish between large (managed assets of more than € 10 billion) and small pension funds (managed assets of less than € 10 billion). Moreover, contrary to the general provision, a limitation could be put on the number of directorships that can be combined, having regard to the fact that it is quite common in the pension sector for *one* person to combine several directorships. The starting point of the limitation regulation for pension funds is that a director or a member of the supervisory board can take up no more than *one* full-time equivalent (fte) in directorship and supervisory positions. In that respect, each directorship and supervisory position in a large or small pension fund is given a certain weight.

The limitation regulation for significant credit institutions and investment firms is based on European legislation, in particular Article 91 para 2-6 CRD IV. There are seven significant credit institutions in the Netherlands: ABN Amro, SNS bank, Rabobank, ING Bank, Bank Nederlandse Gemeenten (BNG), Nederlandse Waterschapsbank (NWB) and RBS NV. Upon inquiry from the Netherlands Authority for the Financial Markets (AFM) it appeared that (as yet) no investment firms have been designated as significant. The CRD IV-limitation provision lays down that one person shall not hold more than *one* of the following combinations of directorships at the same time: *one* executive directorship with two non-executive directorships or four non-executive directorships. The researchers recommend not only to refer to CRD IV in the national legislation, but to elaborate the limitation provisions so that some uncertainties can be removed, for instance the one about whether or not membership of a supervisory body is to be included.

The concurrence of general and sectoral limitation regulations has advantages and disadvantages. One obvious advantage of a sectoral limitation regulation is that it is tailored to the entities of this sector. A disadvantage is that for persons who aspire to take up directorships or supervisory positions in various sectors with different limitation regulations the concurrence between the diverse limitation regulations can be a complicated puzzle.

Structure of the limitation regulation

The researchers examined whether the limitation regulation can be structured differently by fully or partially switching to an 'apply-or-explain' provision. An important difference between a mandatory legal provision and an 'apply-or-explain' provision is that in the case of the latter there is compliance, if an entity applies it or appropriately justifies non-compliance. In addition, there is also a difference in respect of enforcement. A direct sanction, such as an invalid appointment, is lacking in an 'apply-or-explain' provision. It is the GM that assesses material compliance and that may possibly attach consequences to incorrect compliance with such a provision. Some points of attention in the role of the GM must be noted. These points range from possible passivity and lack of interest of shareholders in (certain) subjects of corporate governance to the GM only being able to deploy far reaching remedies to induce the board of directors (and possibly the supervisory board) to change choices made in the area of corporate governance.

The researchers, taking into account the results of the quantitative and qualitative analysis of the effects of the limitation regulation, have concluded that, in general, the limitation regulation seems to have been accepted. There is a development that fits within a broader professionalization of supervision that has been going on longer. The fact that a limit is set on the number of supervisory positions that can be held by one person is generally recognised in 'the land of corporate governance'. The limitation regulation is well adhered to, so that it seems appropriate to uphold the legislative provision and, only if necessary, to change parts of it.

Next, the researchers examined if and if so to what extent, an exception to the limitation regulation must be included in the provision in respect of the chairperson, respectively the professional supervisor. To take the last one first: the researchers see no reason for making an exception to the limitation provision for the professional supervisor. A professional supervisor can be defined as someone with no principal position whose business it is to take up supervisory positions. Only a questionnaire prepared by the National Register and filled out by its affiliated supervisors shows that there might be some need to relax the norm of no more than five supervisory positions for the professional supervisor. The researchers view this as a rather narrow base for an exception clause. This conclusion is reinforced as, according to the available Chamber of Commerce data, only twelve persons on the reference date in 2017 held the maximum number of five supervisory positions and the norm was not exceeded. A final argument that can be put forward is that the professional supervisor can still expand his area of work by holding supervisory positions at legal entities that are not covered by the limitation regulation.

The researchers are of the opinion that there is some reason to relax the limitation regulation in respect of the position of the chairperson. It can be concluded from the

interviews conducted with experts in the executive search sector that a double counting leads to some, however, no acute recruitment problems in filling chairmanship vacancies. By the way, these recruitment problems only seem to occur in a small part of the market, i.e. the largest entities. The limitation regulation seems to be one of the relevant factors in this respect. Another factor that plays a role is that the person who is to take up the position of chairperson must meet a large number of requirements. Especially, the requirement that this person must have extensive and recent experience as a (n executive) director at a high level, combined with the requirement of proven experience in supervisory positions, results in few people qualifying for such a position.
Taking note of the fact that there is general consensus about the considerable workload and consequent time involved in fulfilling a chairperson position, the researchers see no reason in above-mentioned recruitment problems to apply the same weighting factor of the position of an ordinary member to that of the chairperson of a supervisory body.

To create some space to solve the possible recruitment problems one could think of reducing the weighting factor from 2 to 1.5, thus enabling a combination of three chairmanships (at the expense of the extra supervisory position). It could be argued that counting the position of chairperson twice has already been the norm of the (largest) listed companies for a longer period of time. Not only does, since 2003, the chairpersonship count as two positions in the Dutch Corporate Governance Code, but this rule is also used by the so-called 'proxy advisors' (voting advisory firms) when nominating candidates for the position of chairperson of listed companies. These arguments lose strength due to the following two circumstances. In the first place the Corporate Governance Code allowed for exceptions to the 'chairpersonship-counts-as-two'-rule, provided these were appropriately justified in the directors' report ('apply-or-explain'). Secondly, this provision in the Corporate Governance Code did not apply to the very largest entities in the semi-public sector; in this sector the advice by the 'proxy advisors' does not play a role either.
Weighing up all arguments the researchers are of the opinion that reducing the weighting factor from 2 to 1.5 in specific situations can create more space when appointing a chairperson. Thus, a person can combine three chairmanships. For these persons there is no opportunity to fulfil an additional supervisory position at a large public limited company, private limited company or commercial/semi-public foundation (after all three chairmanships equal 4.5 supervisory positions).

Furthermore, the researchers are of the opinion that the legal text should clearly state that the combination of fulfilling a (n executive) directorship with that of chairmanship of a supervisory body – both positions are fulfilled in a large public limited company, private limited company or a commercial/semi-public foundation – is permitted. A (n executive) directorship can, however, not be combined with more than *one* chairmanship of a supervisory body. The background to this proposed adjustment is that, taking note of the

present formulation the sequence of the appointment of the chairperson respectively the director is decisive for the question whether such an appointment can be invalid or not due to a violation of the limitation regulation. It is unlikely that this consequence was intended at that time. In both situations the time spent by the person who combines the positions is equal after all; both situations should for that reason also be treated equally for the purpose of the limitation regulation. The researchers deem adjustment appropriate also because the legal formulation has led to undesirable confusion in practice about the possibility of combining a directorship in one legal entity with a chairmanship of a supervisory body in another legal entity.
Also, adjusting the legal text is appropriate in the sense that a (n executive) directorship at a large public limited company, private limited company or a commercial/semi-public foundation can be combined with a maximum of two 'ordinary' supervisory positions at such legal entities. Likewise, on this point the sequence of the various appointments should no longer play a role.

Quality of supervision

To answer the research question whether the effect of the limitation regulation meets the intended objectives the researchers have examined to what extent the limitation regulation has limited the 'old-boys-network' and the derived conflict of interests, and the extent to which this has had an effect on the quality of supervision. For this research two approaches were chosen.

(i) In the first place the concentration of positions of persons as a result of the limitation regulation was examined. To this end quantitative data of the Chamber of Commerce were used on the staffing of directorship and supervisory positions in large public limited companies, private limited companies and commercial/semi-public foundations. Here the researchers focused on the changes in the staffing of the supervisory bodies as a consequence of the limitation regulation.

The quantitative analyses of the effects of the limitation regulation on the staffing of supervisory positions show that at the time when the legal limitation regulation was introduced it confirmed an already existing development. At the reference date in 2012 a concentration of large numbers of supervisory positions was barely visible; only thirteen persons exceeded the (fictitious) maximum number of five supervisory positions. In the nearly five years since the implementation of the limitation regulation the small group of persons with a large portfolio of supervisory positions has shrunk further. In other words, the density of the 'old-boys-network' was even in 2012 not that big anymore, and has reduced even further in the period 2012-2017. The researchers conclude that the legal limitation regulation seems to have stimulated in a sense an existing trend that had already been going on for years. The possible occurrence of conflicts of interests due to the concentration of supervisory positions has obviously also been reduced.

The quantitative analyses have some limitations. For instance, the data of chairmanships of supervisory bodies are not available and for that reason they are not included in the analyses. Furthermore, it turned out to be impossible to analyse supervisory positions within groups of legal entities. The presented figures can for that reason either show a (slight) underestimation or a (slight) overestimation of the actual numbers of supervisory positions per person. Finally, it is possible that persons hold supervisory positions in legal entities that are not covered by the limitation regulation and that they, as a consequence, still combine many supervisory positions.

(ii) In the second place the researchers conducted research into possible changes in the recruitment processes as a result of the implementation of the limitation regulation. To do this the researchers have held a series of semi-structured interviews with experts from the executive search branch.

The qualitative analysis of the effects of the limitation regulation on staffing of supervisory positions clearly shows a trend of professionalization of the supervisory position. The time spent by the individual supervisor has become an integral part not only in the recruitment of new members for the supervisory bodies but also for the self-evaluations of these bodies. The limitation regulation has thus functioned as an indicator and placed more emphasis on the limits of the possibilities of the individual supervisor. Supervisory bodies and candidates for these bodies appear, in outline, to subscribe to the standards of the limitation regulation. It must be noted that the standard in incidental cases has a counter-productive effect, especially at the top end of the market. There are examples where persons are able to take on more supervisory positions but are forced, due to the limitation regulation, to take on fewer positions. This, however, concerns a very small group of persons.

It is not possible to find out whether or not the limitation regulation has actually changed the time spent by persons to fulfil the tasks inherent in each supervisory position they hold. This, however, seems unlikely in view of the fact that the time spent is determined by a multitude of factors and it is not easy to relate to the limitation regulation directly. There are numerous differences in personal circumstances, experience, qualities and capacity to be distinguished that determine the amount of available time of a supervisor. Also, the opportunities to take on (supervisory) positions at other legal entities than those covered by the limitation regulation are considerable. The limitation regulation excludes some combinations of positions, but not others. Finally, the available time is not the only indicator for delivered quality. There are more factors. For instance, the complementary composition of a supervisory body as a whole is probably more important for the quality of supervision than the exact time spent by each individual supervisor.

Part III

The statutory target figure

Part III of the research concerns target figure of Article 2:166/2:276 Civil Code.[4] This provision intends to achieve a balanced distribution of seats on the boards of directors and supervisory boards of 'large' public and private limited companies between women and men. A balanced distribution is achieved if at least 30% of the seats are occupied by women and at least 30% by men. 'Large' companies must, when drawing up the supervisory board's profile and when nominating and appointing directors and supervisors take the target figure of 30% into account as much as possible. Pursuant to Article 2:391 para 7 Civil Code they must publish their gender diversity policy for as long as they have not complied with the target figure ('apply-or-explain').

This part of the research concerns the background and the objectives of the target figure and also the practical problems in its application, compliance and effectivity. The research is not only aimed at answering the question to which extent the intended objectives of the introduction of the target figure were met. The objective of the research is also to find out how compliance and effectivity of the target figure regulation can be improved. To answer the question whether or not the intended objectives were met use has been made of the results of earlier qualitative and quantitative research, the most important source being the Business Monitor (*Bedrijvenmonitor*), the official monitor of the target figure. In addition, the researchers have analysed data obtained from the Chamber of Commerce and held a number of interviews with stakeholders. To answer the question how effectivity and compliance of the target figure can be improved research was carried out into the design and effectivity of statutory provisions aimed at achieving an equal distribution of board seats among men and women in Belgium, Germany, France and Italy. In addition, the proposal for a target figure directive by the European Commission was analysed.
Listed companies are not only subject to the target figure but also to provisions relating to the diversity policy by virtue of the Corporate Governance Code 2016 and the recently implemented decree on the publication of diversity policy (*Besluit bekendmaking diversiteitsbeleid*). These regulations have been analysed to examine to what extent they reinforce the effect of the target figure regulation.
The target figure applies only to large public and private limited companies, not to other large legal entities. During the parliamentary debate of the bill the question was asked whether or not the regulation should also apply to other legal entities. To answer this question, also part of this research, the researchers have examined the percentage of

[4] This provision was repealed on 1 January 2016. On 13 April 2016 the act came into effect extending the effect of the target figure provision till 1 January 2020 (Bulletin of Acts and Degrees (Stb.) 2017, 9).

women represented on the boards of directors and the supervisory boards of large (semi) public organisations (based on the Business Monitor 2016) and – more specifically – the percentage of women represented on the boards of directors and supervisory boards of large foundations (on the basis of data obtained from the Chamber of Commerce).

Policy theory of target figure regulation

The target figure is based on an amendment by the Members of Parliament Kalma, Van Vroonhoven-Kok and Weekers. From an analysis of the scant parliamentary history it appears to follow that the policy theory is that a percentage of at least 30% women (and men) on the boards of directors and supervisory boards of large public and private limited companies could be achieved by means of a temporary legal basis of the target figure regulation on the principle of 'appy-or-explain' (initially till 1 January 2016 and after prolongation of the regulation till 1 January 2020). The starting point stated by the government is that via encouraging self-regulation the desired objective can be achieved. In 2019 a review will be conducted to find out whether there has been a sufficient increase in the number of women at the top. The parliamentary records do not indicate why a target figure of 30% was chosen nor why the regulation is restricted to large public and private limited companies (and why it does not apply to other large legal entities). Neither is it clear why the scope of the regulation is limited to public and private limited companies that qualify as ' large' based on criteria as laid down in the provisions on annual accounts. Presumably, these criteria were chosen because they are also used to demarcate the scope of the limitation regulation introduced by virtue of the same act. The legislative history fails to answer the question how large public and private limited companies must 'as much as is possible take into account' a balanced distribution of male/female. It is unclear to what extent a 'positive action' policy is permitted to achieve the 30% target. The legislative history does show when in the eyes of the legislator there is non-compliance with the regulation. This is the case when a company fails to comply with the legal target figure *and* fails to provide an adequate explanation in the directors' report.

Lack of clarity and points of attention in the application of the target figure

The researchers conclude on the basis of the research into the legislative history and the relevant legal literature that the statutory provisions in respect of the target figure are unclear on a number of points. This conclusion is confirmed by the empirical research carried out in the context of the various editions of the Business Monitor and the findings from interviews with stakeholders conducted by the researchers themselves.
In the first place it is not clear how the target figure is to be applied to a board of directors or a supervisory board consisting of *one* person. As a gender-balanced distributon of board seats is impossible if the company has only *one* director or *one*

supervisor the researchers recommend clarification that in this case the legal obligation to explain does not have to be complied with.
Secondly, it is unclear how the target figure is to be applied to a one-tier board. The researchers are of the opinion that the ratio of the target figure is best served by applying the target figure of 30% of women and men separately to the non-executive positions respectively the executive positions on a one-tier board.
Thirdly, it is also unclear how the target figure must be applied in respect of the recommendation made by the works council for a supervisory board position in a 'structure' company. The researchers assume that the supervisory board cannot reject such a recommendation for the reason that the target figure has not yet been achieved and that for that reason a candidate of the underrepresented gender should have been recommended.
In the fourth place, there is lack of clarity in relation to the question as to the figure to be achieved of the underrepresented gender if application of the percentage of 30% results in a fractured number. To illustrate the point: in the case of four supervisors if rounding down is permitted, the target figure has been complied with upon the appointment of *one* person of the underrepresented gender. If rounding down is not permitted, then two persons of the underrepresented gender should be aimed for. The researchers recommend using a table to clarify when the target figure has been complied with. Consideration might be given to allowing rounding down.

Finally, it is unclear as to what extent large public and private limited companies may pursue a 'positive action' policy to achieve the target figure. The majority point of view in the legal literature is that on the basis of case law of the European Court of Justice in relation to the right of equal treatment only in the case of ‘equal suitability’ priority may be given to a candidate of the underrepresented gender. However, opposing views are expressed. The researchers ask attention for the fact that uncertainty in relation to the lawfulness of 'positive action' policy can hinder companies in their ambition of achieving the target figure.

A second point the researchers draw attention to is the restriction of the target figure regulation to the board of directors and the supervisory board. This could lead to circumvention of the regulation, for instance, by appointing a male only management team and appointment of just *one (executive)* director.
Apart from the above-mentioned possibility of circumvention of the regulation it is increasingly common for (listed) companies for organisational reasons to also have a so-called executive committee (ExCo) in addition to the board of directors. In this case the board of directors (in the case of a two-tier board company) consists as a rule of only two persons, which renders it difficult to apply the target figure.
This point of attention does raise the question whether or not the scope of the target figure should be extended to certain senior management functions. The researchers do

not recommend this because it will be difficult to determine exactly which senior management functions come under the scope of the provision.

The lack of clarity found by the researchers make a correct application of the target figure difficult for the companies covered by it. The researchers consider it desirable that it is clarified to the companies covered by the target figure exactly which requirements they must meet. They recommend that the Ministry of Security and Justice creates a website, where, in plain language answers are given to questions such as:
- why does the target figure exist (explain explicitly that gender diversity contributes to the quality of the decision-making process in boards of directors and supervisory boards;
- when do I as a 'large' public or private limited company have to comply with the target figure;
- to which positions does the target figure apply;
- what is the effect of the application of the target figure, related to the size of my board of directors/supervisory board (explained by using a table or examples);
- what measures can the company take to reach the target figure (including guidelines for drafting a profile for the supervisory board, the settting up of a transparent recruitment and selection process and an explanation of the 'positive action' policy)?

Sanctions and compliance

If the target figure has not been achieved but there is no explanation in the directors' report as to why this is and what the company will do after all to reach the target figure then the accountant must record this in his report. In case the required explanation is lacking the directors' report does not comply with the statutory provisions on annual accounts. This is, in principle, a ground for any person with a legitimate interest, to initiate legal proceedings against the company for not complying with the law on annual accounts.
The Business Monitor 2016 shows that many 'large' companies that have not achieved the target figure have not yet complied with the requirement to explain at all. The accountant should point this out, but that mechanism turns out still not to be working properly in practice. This finding was confirmed by the stakeholder interviews that were conducted by the researchers.
Besides companies that fail to fully comply with the requirement of explanation there are those that provide only scant explanation. From the stakeholder interviews it emerged that this – and the total lack of explanation – especially is a problem of non-listed large companies. Because the auditing accountant does not have a legal framework against which he should test the m/f diversity policy either carried out or to be carried out, the accountant is unable to enforce improvement of the explanation.
The role of the GM as the enforcer of the target figure regulation depends on the answer to the question how much importance the GM – in any case its influential members – attaches to gender diversity at board level. On this issue there are large differences

among the more than 5,000 large companies covered by the target figure provision. In respect of listed companies the trend is visible that institutional investors increasingly attach importance to diversity at the top of the company as in their view this contributes to appropriate decision-making. Gender diversity is, however, only one aspect of the diversity that institutional investors find important –albeit an important aspect. Moreover, institutional investors scrutinize the required competencies that a nominated candidate contributes to a board of directors or a supervisory board. In the case of non-listed companies it will also depend on the nature of the business and the composition of the GM to which extent importance is attached to gender diversity in the board of directors and the supervisory board.

Effectiveness of the statutory target figure

The Business Monitor 2016 shows that the majority of companies has not as yet achieved a gender-balanced distribution of seats on the boards of directors and the supervisory boards. Out of the top 200 companies on 31 May 2016 4.2% for both the board of directors and the supervisory boards complied with the target figure. The Female Board Index 2016 – that consists of 83 companies listed at Euronext Amsterdam - shows that mid 2016 two of these 83 listed companies had boards of directors and supervisors with a balanced composition; that is 2.4%. The Business Monitor 2016 shows that a large number of companies still do not have a single female director and/or supervisor. This also includes 23 listed companies included in the Female Board Index 2016. All figures – also the quantitative findings based on the data that the researchers obtained from the Chamber of Commerce (the CoC-dataset) – show that the percentage of women is much larger in the supervisory boards than in the boards of directors. The general trend is that the percentages for both directors and supervisors are on the increase, but growth is sluggish. The CoC-dataset furthermore shows that the average percentages of women and men on boards of directors or supervisory boards of 'large' private limited companies clearly lag behind compared to 'large' public limited companies.

Enlarging the scope of the target figure regulation to other 'large' legal entities, in particular 'large' foundations?

The main conclusion from the monitor research among 'large' organisations in the public sector carried out within the framework of the Business Monitor 2016 is that many of these have many more female directors and supervisors compared to 'large' limited companies. At the end of 2015 on average 27.9% of the directors and 33.4% of the supervisors of public organisations were women. On 31 May 2016 these percentages had gone up to respectively 29.1% and 34%.
From the analysis of the CoC-dataset 2012-2017 it follows that the 'large' foundations in 2012 had on average 13.14% female directors and 2.08% female supervisors, compared to

respectively, on average, 23.27% and 34.49% in 2017. On average, the 'large' foundations more than adequately achieved the target figure in respect of their supervisory boards. Taking note of the achieved progress in relation to a balanced m/f distribution expanding the target figure to 'large' foundation does not seem necessary. However, it should be borne in mind that the presented data are about averages. Moreover, the 'large' foundations, although showing a rapid increase, on average, have not yet achieved the target figure of 30% for their boards of directors. For that reason it should be recommended to extend the target figure regulation to 'large' foundations and also to 'large' cooperatives and mutual insurance associations. The latter two legal forms are covered by the law on annual accounts as laid down in Title 9 of Book 2 Civil Code, so that by adjusting Article 2:391 para 7 Civil Code the 'apply-or-explain' mechanism also applies to them. In the case of a foundation this is more complicated as only foundations that maintain one or more enterprises come under Title 9 and moreover, foundations that, by law, must draw up annual accounts equal to annual accounts as per Title 9 are exempt from the scope of that title. Examples of the latter category are care institutions, housing corporations and educational institutions. In the sectoral regulations applicable to these institutions , however, Title 9 of Book 2 Civil Code is quite often held to be applicable. In this context the fact that the Regulation governing reporting WTZi (Entry requirements care institutions Act) since 1 January 2015 no longer refers to Article 2:391 Civil Code merits attention. Consequently, care institutions, by virtue of the sectoral reporting regulations do not need to draw up a directors' report. The researchers recommend that a reference to Article 2:391 Civil Code is laid down again in the Regulation governing reporting WTZi.

Improvement of compliance and effectivity of the statutory target figure?

To improve compliance with the requirement to explain the gender diversity policy that has been carried out or is to be carried out, one could think of the possibility of imposing a fine on the directors and supervisors in case of a breach of this requirement by the company. Some of the countries involved in the comparative law study (Belgium and Germany) have chosen this type of enforcement of the transparency requirements in relation to the gender diversity policy. The researchers were unable to find out to what extent personal fines in these countries have actually contributed to compliance with the transparency requirements. Moreover, it must be borne in mind that in the absence of guidelines setting out the requirements a diversity policy must meet, the possibility of imposing a fine, at best, will be able to improve the formal compliance of the transparency requirements. The researchers, for that reason, refrain from making a recommendation to introduce an enforcement mechanism in the shape of personal fines. The researchers have looked into the possibility of strengthening the role of the accountant by including an assessment framework into the target figure. They doubt whether this step should be taken. The introduction of legal requirements in respect of the gender diversity policy will be experienced by companies as a hefty intervention into their freedom of policy. Moreover, it is doubtful whether the task of assessing the gender diversity policy lies with the accountant. If the act prescribes that long list should contain a 'sufficient' number of women, how should an accountant assess whether a 'sufficient' number is included in the longlist? Finally, there is a danger that enforcing transparency via the accountant merely leads to 'box-ticking'.

The researchers fail to see possibilities to improve the role of the GM in the enforcement of the target figure. It is inherent to the 'apply-or-explain' character of the target figure that the GM is free to decide whether or not it can live with a given explanation. The researchers recommend to also give the works council a role in addition to the GM in the enforcement of the target figure regulation by introducing a right for the works council to elucidate its point of view on the subject of gender diversity policy at board level at the GM. Because the target figure is not only a matter of corporate governance, but also serves the objective of emancipation it can, according to the researchers, be strongly argued that also employees get to have a say in the participation of women at board level. The role of the works council could be strengthened by making it compulsory for companies covered by the target figure to also report on the current numbers of men and women represented in senior management and the entire workforce. The companies covered by the scope of the target figure can use the published numbers on representation of men and women in the various layers of the business organisation to account for (the results of) their gender diversity policy in respect of the boards of directors and supervisors. It will be more difficult to explain that no women are appointed at board level if they can be found in the layers immediately below this level. In addition, a visible lack of a balanced distribution of men and women in the layers directly below the top can also generate a discussion on this very topic and this could lead to the company approaching the gender diversity policy in respect of the talent pool' for board positions more seriously.

A different approach: flexible target figures or binding quota?

Improving compliance with and effectivity of the target figure is a tall order. Part of the companies covered by the regulation, in particular a number of listed companies, is taking this very seriously and also propagates that they find gender diversity at board important. They are encouraged in this as they are more in the public eye and because (institutional) shareholders draw attention to this subject. Moreover, they regard the issue of a balanced distribution of women and men at board level as one of the aspects that can contribute to better corporate governance. There is, however, also a large group of 'large' companies, including even listed companies, that apparently feel less responsibility in respect of achieving a more balanced distribution of men and women in their boards of directors and supervisors. Many of these companies have only one director. Even if they have a supervisory board, then as a rule this is (much) smaller than in the case of listed companies. On top of that there is the problem that some companies operate in a sector where female staff members traditionally are rare. Notwithstanding the observed

differences, the companies covered by the target figure are all subjected to the same fixed target figure of 30%, solely on the basis of the size-criterion. Finally, it is problematic that from the very beginning it has not been clear, whether and if so, within which period this target figure actually should be achieved. The factors mentioned explain, according to the researchers, that a part of the 'large' companies has difficulty with the target figure or even does not take it seriously.
The flexible statutory target figure that was introduced in Germany is interesting in this respect. This serves as an incentive for roughly 3,500 companies covered by this regulation to take responsibility to attain a better gender diversity at the top by setting their own target figure and target date. If this approach turns out tobe effective – which is not clear at this time – then it could be considered to allow 'large' non-listed companies in the Netherlands set their own target figure and date.

The researchers have investigated four binding quota regulations in EU member states. These regulations provide that an appointments contrary to the legally laid down quota are null and void respectively voidable. An analysis of the monitoring research in the countries investigated shows that these regulations are effective in so far as they apply to listed companies. The experiences in France – where the quota also apply to non-listed companies – show that the non-listed companies clearly lag behind the listed companies. It must be noted, moreover, that the quota regulations examined by the researchers do not cover all positions at board level. Roughly speaking, the highest executive positions either fully or partly fall outside the scope of the quota regulations. The representation of women in executive positions not covered by the regulations in the countries investigated clearly lags behind the representation of women in positions that are covered by the quota.
The researchers have doubts about imposing binding quota on the more than 5,000 companies that currently are covered by the target figure. Binding quota will be met with considerable resistance from companies with smaller boards of directors and supervisors that have more difficulty complying with the quota. Also larger family companies are expected to voice objections in respect of binding quota. The infringement that binding quota make on the freedom of enterprise could be restricted by limiting the scope in terms of positions – for the Dutch situation – to members of the supervisory board (and/or the non-executive directors in a one-tier board model). This would be in line with the four examined national quota regulations and the EU draft directive. It could be considered to introduce binding quota in respect of all large public and private limited companies only for members of a supervisory board respectively non-executive directors. These quota should only apply in as far as a company has three or more supervisors or non-executive directors. In addition, for the members of a board of directors respectively executive directors the target figure could continue to apply.
The researchers point to the fact that a binding quota regulation *forces* companies to adopt a 'positive action' policy, raising the question as to which extent this is compatible

with the (European) right to equal treatment of men and women. The infringement of this right by binding quota can be limited by including procedural rules in the quota regulation that the 'positive action' policy must comply with.

The infringement of a binding quota regulation on both the freedom of enterprise and the right to equal treatment could be restricted by:

- allowing the companies covered by the binding quota regulation sufficient time to accommodate the quota (making a distinction between the various categories of companies);
- limiting the period of time during which the binding quota regulation is in force (by inserting a sunset clause in the act).

The researchers wonder if the introduction of a nullity sanction for all companies that are now covered by the target figure regulation will have the desired effect. One could point at the high number of companies in compliance with the limitation regulation, that is also enforced through a nullity sanction and covers all large public and private limited companies (and commercial/semi-public foundations). It could thus be concluded that a nullity sanction enhances compliance with the act – not only for companies with a large circle of shareholders. It is, however, according to the researchers questionable whether this conclusion can be drawn just like that. After all, part II of this research shows that the concentration of supervisory positions prohibited by the limitation regulation was already felt to be undesirable. Thus, the compliance with the limitation regulation cannot simply be credited to the nullity sanction. Definitely of equal importance is the fact that stakeholders themselves do not accept that a large number of supervisory positions at large public and private limited companies, and commercial semi-public foundations is taken up by one person. Stakeholders' research shows that in respect of gender diversity at board level no consensus has (yet) been reached. There are companies that lead the way and that have achieved the target figures for both the board of directors and the supervisory board. However, among the over 5,000 companies covered by the target figure regulation a considerable number of companies can be found that is nowhere near the target figures. Viewed in this light it cannot simply be assumed that all large public and private limited companies will comply with a binding quota regulation.