

## Exchange of good practices on gender equality

### Women in economic decision making

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## Comments paper – The Netherlands

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# The Dutch approach: A temporary target law

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## 1. Introduction

### 1.1 Policy context

The Dutch economy is one of the strongest economies in the EU today. Unemployment is one of the lowest (4.9%)<sup>1</sup> and women's participation in the labour market (69.3%)<sup>2</sup> one of the highest. Until recently The Netherlands relied on **self-regulation** (see 2.3) by the industry through **corporate governance codes** and **voluntary multiparty initiatives** (see 2.5) to improve the underrepresentation of women on boards. The broader topic of diversity on boards has been incorporated into the debate on good corporate governance. A **temporary law** (see 2.4) has been passed but will not yet come into force due to the unexpected dismissal of the cabinet<sup>3</sup>. It would require companies to have **at least 30% women on their executive and supervisory boards per 2016**. Since the law prescribes '**comply or explain**' and will be automatically deleted in 2016, its success will (again) primarily depend on **voluntary commitments and actions by corporate leaders**.

### 1.2 Facts and figures

The Netherlands has one of the highest employment rates of women in the EU: 69.3% against the EU average of 58.2% (2010)<sup>4</sup>, but this does not translate into a strong position of women in management across the economy.

#### 1.2.1 Women in management positions

Table 1.2.1 Women in management positions (in % of employed)<sup>5</sup>

| Sectors               | 1994 | 2001 | 2003 | 2009 |
|-----------------------|------|------|------|------|
| Corporations          | 6    | 13   | 12   | 16   |
| Public administration | 14   | 23   | 24   | 28   |
| Education             | 19   | 28   | 29   | 34   |
| Health care           | 42   | 54   | 52   | 62   |
| Culture               | 21   | 38   | 32   | 28   |
| Total                 | 14   | 26   | 24   | 28   |

<sup>1</sup> Eurostat Newsrelease 2 April 2012.

<sup>2</sup> Eurostat 2010.

<sup>3</sup> Due to the unexpected dismissal of the cabinet per April 23rd, the royal decree needed to announce the date of enforcement has not been issued so the law will **not be in force per July 2012**. After the parliamentary elections in September and the formation of a new cabinet it depends on the new cabinet if the law will be implemented and when.

<sup>4</sup> Eurostat 2010.

<sup>5</sup> Emancipation Monitors (2002, 2010), Ministry of Education, Culture and Science.

As shown in table 1.2.1, the corporate sector (with one third female employees) is seriously lagging behind: only 16% of managerial positions are being held by women (2009) against the average of 28%.

### 1.2.2 Women on boards

In the last decade progress has been made, but primarily in the *share of women on supervisory boards* and primarily on *boards of large international (listed) companies*.

**Table 1.2.2 Women on boards<sup>6</sup> of the largest 5000 companies**

| In %<br>Companies | Executive Boards (EB) |      |      |      | Supervisory Boards (SB) |      |      |      |
|-------------------|-----------------------|------|------|------|-------------------------|------|------|------|
|                   | 1999                  | 2005 | 2007 | 2009 | 1999                    | 2005 | 2007 | 2009 |
| Top 25            | 0                     | 1.8  | 0    | 5.6  | 8.1                     | 8.7  | 13.9 | 14.4 |
| Top 100           | 0.2                   | 3.1  | 2.6  | 5.3  | 6.7                     | 8.5  | 10.5 | 11.9 |
| Top 500           | 0.9                   | 3.0  | 3.4  | 4.3  | 4.4                     | 5.5  | 7.6  | 9.0  |
| Top 5000          | 2.5                   | 3.1  | 3.4  | 3.2  | 3.1                     | 4.9  | 6.2  | 6.0  |

| In %<br>Companies | Total Boards (EB+SB) |      |      |      |
|-------------------|----------------------|------|------|------|
|                   | 1999                 | 2005 | 2007 | 2009 |
| Top 25            | 4.7                  | 5.6  | 8.9  | 10.6 |
| Top 100           | 3.8                  | 6.0  | 7.3  | 9.3  |
| Top 500           | 2.8                  | 4.3  | 5.6  | 6.8  |
| Top 5000          | 2.8                  | 3.8  | 4.5  | 4.2  |

**Conclusion: Women are still severely underrepresented on executive (3.2%) and supervisory boards (6.0%) in the top 5000 companies.**

The group 'Top 25 companies' is similar to the group of data used in the European Commission Database<sup>7</sup>, that reported 19% women on supervisory boards (2011); this is in sharp contrast with the overall picture and should be used with caution.

**Table 1.2.3 Women on boards of listed companies<sup>8</sup>**

| % women          | 2007 | 2008 | 2009 | 2010 | 2011 |
|------------------|------|------|------|------|------|
| Executive        | 2.0  | 2.0  | 3.1  | 3.6  | 4.4  |
| Non-executive    | 6.8  | 7.7  | 10.4 | 11.1 | 11.8 |
| Weighted Average | 5.1  | 5.7  | 7.8  | 8.4  | 9.2  |

Looking at women on boards of listed companies (around 100), 9.2% of board seats are occupied by women (2011), up from 5.1% in 2007. Again, only 4.4% of executive board members are female and almost three times more serve in supervisory board roles (11.8%). Women are on average 4 (EB) to 8 years (SB) younger than men; in addition, one third of the women on boards are non-Dutch whereas one fourth of their male counterparts<sup>9</sup> are. Progress has been very slow. At the current growth rate,

<sup>6</sup> Emancipation Monitor 2010.

<sup>7</sup> EC Database ([http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/index_en.htm))

<sup>8</sup> The Dutch Female Board Index (2007-2011), Erasmus University Rotterdam.

<sup>9</sup> Dutch Female Board Index 2011: listed companies.

without any interventions, the target of at least 30% women on executive boards will be reached in 2050 and for supervisory boards in 2039.

Government had set a target that by 2010 20% of the senior management posts at the 100 largest companies should be held by women; this target was clearly not met.

## 2. Policy debate

### 2.1 Policy principle

The Emancipation policy 2015<sup>10</sup> is built on the principle that the *appointment of women on boards is the primary responsibility of corporations, employers and employees, and not of government*; it is companies' right and responsibility to appoint women to the top of their organisations. Government plays a **supporting role** in promoting more women to senior and top functions in corporations, organisations and the public sector. Prevailing argument is that **more gender diversity will lead to better performance**. Three activities have been defined: subsidising the 'Charter Talent to the Top' (see 2.5.2); monitoring and reporting on progress on an annual basis; and engaging in dialogue with sectors that are lagging behind in this regard.

In the preceding Emancipation policy (the previous) government set itself a target of reaching at least 25% female senior and top civil servants by 2011, which was reached in 2010 (26%). Women's representation in public administration varies greatly. Women are still significantly underrepresented at executive level in the Social and Economic Council (SER), public-law bodies and boards of water authorities. In the judiciary gender balance has been reached, but not at the level of presidents of the courts. One third of members of government advisory bodies are women.

### 2.2 Legal framework

Most companies have a **two tier board**, consisting of an executive board responsible for management and day to day execution of the business and a supervisory board, with main tasks of control and advice management. Executive board members are (full-time) employees of the company whereas supervisory board members typically spend a few days per month on their supervisory tasks and have more than one position.

Large public and private limited liability companies<sup>11</sup> may fall under a specific legal regime ('structuurregime'). In such cases the works council has the right to nominate a maximum of 1/3 of the supervisory board members. This '**special nomination right**' is stronger than the general right of shareholders and works council in large companies to propose candidates. The supervisory board of companies under this regime can only refuse to put forward the proposed candidate for appointment by the shareholders on a specific and limited number of grounds: (1) that the candidate is not fit for the position; (2) that the composition of the board as a whole will not meet criteria of good governance in case of appointing this candidate. When appointed, they are deemed to serve all stakeholders interests to the same extent as their colleagues on the board

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<sup>10</sup> Hoofdlijnen Emancipatiebeleid 2015, Ministry of Education, Culture and Science: <http://www.rijksoverheid.nl/onderwerpen/vrouwenemancipatie/documenten-en-publicaties/kamerstukken/2011/04/08/hoofdlijnen-emancipatiebeleid---vrouwen--en-homo-emancipatie-2011-2015.html>

<sup>11</sup> Criteria: capital > € 16 mln, works council in place and > 100 employees in the Netherlands.

who were not appointed through this mechanism. They are not seen as 'employee representatives' like in some other countries.

Although statistics are not available, anecdotal evidence shows that works councils, often influenced by or (partially) composed of union members, put forward women candidates more often.

## 2.3 Self-regulation: Corporate Governance Code

The Dutch Corporate Governance Code<sup>12</sup> (2004) is applicable to listed companies and contains principles and best practice provisions that regulate relations between the management board, supervisory board and shareholders. Although it is an instrument of self-regulation, much has been incorporated in various laws already. Compliance is monitored and promoted by the Monitoring Committee, which has been established in July 2009 for a term of four years and consists of 4 men and 3 women.

Relevant principle of the code (III.3) regards the **composition of the board**: *'The supervisory board shall aim for a diverse composition in terms of such factors as gender and age.'* The board shall prepare a profile of its composition, in which the – for the business - relevant aspects of diversity need to be addressed. Moreover, the board shall put forward a concrete goal regarding diversity. In case of deviations and non-compliance, the board needs to explain in its annual supervisory board report the reasons and put forward an action plan how and when the goal will be reached.

Almost all listed companies have indeed included a profile of board composition, but only 58% have explicitly addressed diversity. Just 17% included a concrete goal on diversity<sup>13</sup>. However, **none included specific reference or goals regarding gender diversity**. Typically board reports state that 'diversity in composition is important and that diversity in experience and expertise take priority over diversity in gender, nationality and age'<sup>14</sup>. The public debate about the importance of *gender* diversity has not reached all board rooms yet.

Pressure from the public and parliament to include specific targets on gender in the Code has so far not led to adaptations to the Code. In its December 2011 report<sup>15</sup> the Monitoring Committee concluded that 'there is no progress in the number of women on supervisory boards'. Only 2 listed companies (out of 104) had at least 30% female supervisory board members.

## 2.4 Kalma's Law: Temporary Targets

On 19 June 2009 the Social-Economic Council issued a formal Advice on 'how diversity can contribute to better results in organisations'<sup>16</sup>. The Council was divided on the topic of women on boards; some members advised government to prepare for legislation but the majority was against such action. It concluded that if self-regulation

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<sup>12</sup> [http://www.commissiecorporategovernance.nl/page/downloads/DEC\\_2008\\_UK\\_Code\\_DEF\\_uk\\_.pdf](http://www.commissiecorporategovernance.nl/page/downloads/DEC_2008_UK_Code_DEF_uk_.pdf)

<sup>13</sup> De Samenstelling en het functioneren van de raad van commissarissen in het boekjaar 2010..., October 2011, Instituut voor Ondernemingsrecht;

[http://www.commissiecorporategovernance.nl/page/downloads/2011\\_Deelrapportage\\_diversiteit.pdf](http://www.commissiecorporategovernance.nl/page/downloads/2011_Deelrapportage_diversiteit.pdf)

<sup>14</sup> Het verslag van de Raad van Commissarissen, Instituut voor Ondernemingsrecht, Oct 2011:

[http://www.commissiecorporategovernance.nl/page/downloads/2011\\_Deelrapportage\\_RvC-verslag.pdf](http://www.commissiecorporategovernance.nl/page/downloads/2011_Deelrapportage_RvC-verslag.pdf)

<sup>15</sup> [http://www.commissiecorporategovernance.nl/page/downloads/2011\\_MCCG\\_ENG.pdf](http://www.commissiecorporategovernance.nl/page/downloads/2011_MCCG_ENG.pdf)

<sup>16</sup> SER-advies Diversiteit in het personeelsbestand, 2009:

[http://www.ser.nl/~media/DB\\_Adviezen/2000\\_2009/2009/b27861.ashx](http://www.ser.nl/~media/DB_Adviezen/2000_2009/2009/b27861.ashx)

would not lead to significant progress, the government should reconsider the instruments it had been using so far. In his reaction<sup>17</sup> on 16 December 2009 the Minister of Social Affairs and Employment followed the majority opinion of the Council and reinforced the prevailing approach of self-regulation and monitoring.

On December 9<sup>th</sup> 2009 a law proposal, '**Kalma's law**', was adopted by the Second Chamber of the parliament, with the support of all parties except the Orthodox Christian (2 seats out of 150): '*Companies should strive for a gender balanced board, meaning that at least 30% of each gender on both the executive and the supervisory boards should be represented*'. However, government did not immediately put forward legislation to this end, nor was the proposal incorporated in the review of the Corporate Governance Code. In the end, the provision was included into a package of proposals under the **Revision Law on Corporate Governance** in 2011. Topic of this Revision Law was to improve the quality of governance by several measures, including introducing a limitation on the number of board seats an individual director may hold.

The law has been signed by the Minister and was planned to come into force per **July 2012**, but might be postponed or cancelled<sup>18</sup>. The 30% target for both executive and supervisory board positions will be applicable to all private companies with limited liability and public companies unless they meet two of three criteria:

- The value of its assets on the balance sheet does not exceed € 17,500,000;
- Net sales for the financial year does not exceed € 35,000,000;
- The average number of employees for the financial year is less than 250.

It would apply to around **4,500 companies**.

The provision does not include penalties in case of breach, other than '**comply or explain**'. This means that the company needs to explain the reasons for a breach and the actions it is undertaking to correct the imbalance in its annual report. It remains to be seen if shareholders at annual general meetings will put this topic on the agenda. However, the transparency will enable better monitoring of the developments and will create pressure from the outside world (press, lobby groups).

The provision will be **automatically deleted** from the law per January 2016, which is also the date for first year compliance.

Research by the Erasmus University<sup>19</sup> showed that for the group of listed companies that would have to comply (85) *241 women* should be newly appointed on supervisory boards from 2011 to 2016. Theoretically **compliance with the law is possible for most listed companies** as regard to supervisory board positions if at every end of term (in general 4 years) male board members would be replaced by women. Since appointments to executive boards are generally not limited to specific timeframes and the underrepresentation of women there is much greater, it is expected that most listed companies will not be compliant by 2016 regarding executive board positions.

The Equality department (Ministry of Education, Culture and Science) will monitor and report on progress of 'Kalma's law'. Due to the very large group of companies (4,500)

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<sup>17</sup> [http://www.ser.nl/~media/Files/Internet/Kabinets%20reactie/2010/b27861\\_kabinetsreactie.ashx](http://www.ser.nl/~media/Files/Internet/Kabinets%20reactie/2010/b27861_kabinetsreactie.ashx)

<sup>18</sup> See footnote 3 above.

<sup>19</sup> <http://www.eur.nl/nieuws/detail/article/26520-vrouwen-quotum-voor-meeste-beursondernemingen-haalbaar/>

and high numbers of positions involved, this will not be a full check but random sampling from 2016 onwards.

Main **weaknesses** of the temporary target law are:

- Absence of **penalties**.
- **Temporary** nature, automatically deleted per 2016.
- **Unrealistic scope** due to number of companies involved (approx. 4,500), the huge gap between the starting point (now 3.2% executive board and 6.0% supervisory board) and the target of 30% in a short timeframe (2016).
- **No specific actions or budget** to support new or extra initiatives to help successful implementation of the law.
- **Limited monitoring** and reporting on results ('sampling'), starting from 2016 when the law is deleted (unless an extension is negotiated in parliament by that time).

**Positive elements** are:

- The topic is embedded into legislation, which has **significant (symbolic) value**.
- The reporting mechanism in annual reports will lead to more **transparency** and more **pressure** from the outside world on companies to change.
- The combination with other legal requirements, such as the limitation on the number of board positions one person may hold, will lead to discussions about the **quality of governance** instead of gender diversity as such.
- By **including targets for both levels**, the risk of overrepresentation of women outside the corporate sector on company boards, in order to fulfill targets, is mitigated.
- By including targets for executive board level, more emphasis is placed on building a **pipeline** for supervisory positions.
- By **extending the targets** to medium size companies from large listed ones, the process of creating awareness will spread further.

## 2.5 Voluntary initiatives

### 2.5.1 Ambassadors Network

From 2001 – 2008 the Ministers of Economic Affairs and Education, Culture and Science supported an initiative by the private sector to set up yearly 'networks of ambassadors'<sup>20</sup>. These networks consisted of CEOs and senior leaders in organisations committed to taking concrete action in their companies to improve the low representation of women in senior management. The initiative was successful in raising awareness in the corporate world and creating momentum. Also, the

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<sup>20</sup> [www.ambassadeursnetwerk.nl](http://www.ambassadeursnetwerk.nl)

participating CEOs served as role models for their colleagues in the corporate sector. The initiative did not include an official public reporting or monitoring mechanism.

## 2.5.2 Charter 'Talent to the Top'

In 2008 the **Charter 'Talent to the Top'**<sup>21</sup> was developed in close cooperation between government, the corporate sector, the employers' federation and the unions. The Charter is headed up by former Minister of Housing Sybilla Dekker (liberal party) and is funded by government. Its aim is to *realise and preserve a continuous smooth flow of women into top positions*. Nowadays it has over 180 signatories from the private and public sector, among which are only a few listed international companies.

### Commitment from line management

Signatories commit to carrying out an assessment of the situation (with a focus on women in operational as opposed to supporting and staff roles), setting clear and measurable targets, implementing actions and reporting annually on progress in general (not on individual signatories). The strategy and goals are recorded in management agreements, so the responsibility for the implementation lies with line management. The Charter's method can be described as '**naming and praising**', since its actions are reporting on progress in general and highlighting good practices. There are no penalties involved for non-compliance with the goals and targets companies themselves have set.

### Results

The Charter's Monitoring Committee reported an average growth of 7.5% (over 2008 and 2009) of women in senior management at the participating organisations, in line with the set target of 21.4% in 2013. In 2010 17.2% of top positions (executive board and management reporting to executive board) were held by women and 26% of sub top positions (layers 3 and 4). Although the overall reported **results are encouraging**, there are significant differences between sectors. The best results are reported in non-profit and (semi-)government signatories and the lowest numbers of women in top management in the corporate sector, such as the industry/energy/construction (8%) and consultancy in ICT/construction/infrastructure (11%). Most signatories (72%) reported a growth of women in management positions since their signing of the Charter.

Both initiatives, the Ambassadors Network and the Charter 'Talent to the Top', do not specifically address the topic of women on supervisory boards but have significant influence on this development by raising awareness but also by creating visibility for the women identified in the top layers.

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<sup>21</sup> [www.talentnaardetop.nl](http://www.talentnaardetop.nl)



## 3. Transferability issues

### 3.1 The Norwegian approach: quota legislation with penalties

It is *unlikely* that the Norwegian system of legislated quotas with penalties ranging from fines to ultimately delisting of a company will be transferred to the Netherlands.

#### Lack of popular support

Dutch society does not have a tradition, like the Norwegian, to use mandatory quotas to correct imbalances. The recent Special Eurobarometer on Women in Decision-making positions<sup>22</sup> confirms that only 18% of the Dutch population (26% in EU) would be in favour of binding legal measures to achieve a more balanced representation of men and women on company boards. Self-regulation by companies (35%) and voluntary measures such as corporate governance codes and charters (20%) are widely preferred and accepted. However, there is growing frustration with the lack of progress and a number of opinion leaders that were against a Norwegian-style solution in the past have spoken up in favour of it now.

#### Lack of political will

The political will to introduce mandatory quotas is lacking, and has even diminished under the new cabinet. The temporary nature of the 'Kalma-law' and the lack of penalties clearly demonstrate the absence of political will to follow the Norwegian example.

#### Other factors

There are no wholly state-owned companies in the Netherlands, so government's influence by setting an example by appointing women to these posts is absent.

The Norwegian law applies to non-executive directors, and not to the executive teams; the Dutch target law applies to both. Since the pool of talent for supervisory board members is typically made up of former executive board members, it is important to have targets for both. This will also prevent women predominantly being recruited from other sectors than the corporate, such as academia, politics, professional services, public administration and NGO's.

### 3.2 The UK approach: The Davies Report and Beyond

The UK and Dutch approach are similar in many ways, such as the preference for a voluntary rather than mandatory legal approach and the important role of self-regulation through Corporate Governance Codes<sup>23</sup>.

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<sup>22</sup> [http://ec.europa.eu/justice/newsroom/gender-equality/news/120305\\_en.htm](http://ec.europa.eu/justice/newsroom/gender-equality/news/120305_en.htm)

<sup>23</sup> In this paper non-executive directors in the one tier system in the UK are being compared to supervisory board members in the two tier Dutch system; this is not entirely correct since there are important legal differences.

### Dutch version

A similar version of the review process led by Lord Davies could be successful in the Netherlands. There are a number of (former) CEOs and Chairmen of listed companies who would be willing to serve as role model and engage all stakeholders successfully. However, it remains to be seen if the strong involvement of government (open consultation) and even the PM Cameron would be followed in the Netherlands, given the Dutch principle of non-interference by government, the current economic climate and the lack of broad public support for the topic as such.

### Review corporate governance code

Changing the corporate governance code to include and report on measurable objectives for board gender diversity has not been taken up by the Monitoring Committee despite the calls from parliament at the time. Since the **temporary target law** would have been effective as from July 2012<sup>24</sup> there is no need to amend the code anymore.

The Dutch Code prescribes that the report of the supervisory board will include the composition, number of meetings and main discussion topics of each of the committees, including the **nomination committee**. It seems that the UK Code requires more details on the work of the Nomination Committee.

### Investor involvement

Most shares (72%)<sup>25</sup> of listed companies are being held outside the Netherlands by non-Dutch investors. It would be interesting to learn how the UK approach has effectively led to more investor involvement.

### Advertising NED vacancies

Women benefit from transparency and clear procedures since they are not (always) part of the informal networks in which vacancies are shared and in which eligible candidates become visible. It is expected that the same reluctance as in the UK would exist among business leaders to implement an obligation to publish all NED vacancies. However, there have been recent examples of this new behaviour for high profile public administration appointments, such as vice-president of the prestigious Council of State. This call for transparency is more driven by a general feeling of the public that too many positions are being filled by a small circle of people that know each other than driven by concerns for gender diversity or women's representation on boards.

### Code of Conduct ESF's

So far the Dutch ESF's that are dealing with board appointments of listed companies are few, and are all led by men, with few or no female partners in their management. In the past few years a number of specialized ESF's, led by women and focused on

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<sup>24</sup> See footnote 3.

<sup>25</sup> Aandeelhoudersbetrokkenheid in Nederland, Nov. 2011, Nyenrode University:  
[http://www.commissiecorporategovernance.nl/page/downloads/2011\\_Aandeelhoudersbetrokkenheid\\_in\\_Nederland\\_2011.pdf](http://www.commissiecorporategovernance.nl/page/downloads/2011_Aandeelhoudersbetrokkenheid_in_Nederland_2011.pdf)

women candidates for board positions, have been established in an attempt to break through the barriers in this all-male world. Although they do not report results, anecdotal evidence suggests that they are successful in having (more) women appointed to boards. In addition, their success and PR campaigns have importantly contributed to raising awareness of the topic and contradicting the persistent belief that 'there are no suitable women candidates for board positions'.

### 3.3 The Danish approach: Operation Chain Reaction (OCR)

#### Transferability issues

The Danish approach is quite similar to the Dutch and the numbers are comparable: 10.4% female supervisory board members against 11.8% in the Netherlands (listed companies). However, half of these members in Denmark are elected by employees. The Dutch system (for listed companies) does not include such a right for employees to appoint board members but merely a 'special nomination right' for companies under the 'structuurregime' (see 2.2).

Currently there is no specific initiative aimed at supervisory boards only in the Netherlands like the OCR. Arguments in favour of transferability of the OCR recommendations are the comparability of the Dutch and Danish corporate structures (two tier boards) and governments' basic policy of non-intervention in these matters.

However, it is unlikely that Dutch government would support and subsidise a separate new initiative to this end. Nevertheless, it could be envisaged that the focus on women on supervisory boards would become **part of the mandate of the Charter 'Talent to the Top'** since the infrastructure and method of working regarding women in management positions are well established and proven successful. If so, it can be expected that some companies will put forward the objection that supervisory board positions require different processes and may involve other stakeholders (such as shareholders, works councils) that may not be influenced in the way internal company appointments for top management positions might be.