

Compliance at Banks, Company Law and Financial Markets Law
Observations on Whether the Law Sheds Adequate Light on Ownership

Compliance bij banken, ondernemings- en financieel (toezicht)rechtelijke kanttekeningen
t.a.v. de vraag of het recht voldoende duidelijk maakt waar de eigendom berust

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List of abbreviations

A-g	Attorney-general
ArA	Arbeidsrechtelijke annotaties
Awb	Algemene wet bestuursrecht
BprWft	Besluit van 12 oktober 2006, houdende prudentiële regels voor financiële ondernemingen die werkzaam zijn op de financiële markten (Besluit prudentiële regels Wft), <i>Stb</i> 2006, 519
BW	Burgerlijk Wetboek
CA	the Companies Act 2006
ECHR	European Convention on Human Rights, Rome, 4 November 1950
The Enterprise Division	the Enterprise Division of the Amsterdam Court of Appeal
FCA	the Financial Conduct Authority
FSA	the Financial Services Authority
FSA 2012	Financial Services Act 2012
FSMA	the Financial Services and Markets Act 2000
GW	Grondwet voor het Koninkrijk der Nederlanden van 24 augustus 1815
ICCPR	International Covenant on Civil and Political Rights, New York, 19 December 1966
MAB	Maandblad voor Accountancy en Bedrijfsconomie
MiFID	the Markets in Financial Instruments Directive – Directive 2004/39/EC of the European Parliament and the Council of 21 April 2004, on markets in financial instruments amending Council Directives 85/611/EC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and the Council and repealing Council Directive 93/22/EEC, <i>OJ L</i> 145/1
NJ	Nederlandse Jurisprudentie
RMT	Rechtsgeleerd Magazijn THEMIS
Stb	Staatsblad van het Koninkrijk der Nederlanden
Stcrt	de Nederlandse Staatscourant
SYSC	FCA Handbook, <i>Senior Management Arrangements, Systems and Controls</i>
WCAM	Wet Collectieve Afwikkeling Massaschade
Wed	Wet van 22 juni 1950, houdende vaststelling van regelen voor de opsporing, de vervolging en de berechting van economische delicten (Wet economische delicten)
Wft	Wet van 28 september 2006, houdende regels met betrekking tot de financiële markten en het toezicht daarop (Wet op het financieel toezicht)

Wwft

Wet van 15 juli 2008, houdende samenvoeging van de Wet identificatie bij dienstverlening en de Wet melding ongebruikelijke transacties (Wet ter voorkoming van witwassen en financieren van terrorisme), *Stb* 2008, 304

1 Chapter 1 – Why ownership at law of compliance at banks matters

1.1 Introduction: Setting the parameters – why this thesis?

In 1999, I started being professionally positioned as a ‘compliance officer’ in a bank. My career in the world of the compliance function in banks began in an international private banking environment, during which phase I predominantly focused on assisting the bank’s management in preventing the private bank from being (mis)used for money laundering.¹ In my capacity as the global head of the compliance function of ABN AMRO’s worldwide private banking activities, I was among the protagonists of the Wolfsberg group of banks. This group assembled the banks which at the time combined the greatest spread in businesses with the greatest geographical footprints.² In subsequent positions within the ever expanding construct of the compliance function in ABN AMRO, I gained exposure to a much wider ambit of the compliance function in banks, participating in and witnessing first-hand the iterative process of ‘(re-)engineering’ both content and process.

Arguably, where banking is concerned, in recent years, ‘compliance’, which I will define later, has been pushed to be reactive in nature only. Sometimes, it has been necessary to correct deficiencies within the shortest possible time. Banks have been confronted with a situation in which it was impossible to weigh all consequences of the measures they had had to put into practice. Many such measures, and indeed entire programmes, were implemented and enforced on the basis of the proverbial

¹ In 2000, ABN AMRO International Private Banking launched its *International Private Banking Compliance Cycle*, introducing a comprehensive *method* for conducting client due diligence. At the time we were frontrunners in the industry, not least because we openly addressed the ambit of predicate offences to money laundering. All later ABN AMRO global client due diligence approaches have been, to a considerable degree, derived from the (original) International Private Banking Compliance Cycle.

² At inception this concerned ABN AMRO, Banco Santander, Bank of Tokyo-Mitsubishi UFJ, Barclays, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan Chase, Société Générale, and UBS. The Wolfsberg Group of Banks initially got together in 1999 as (the then pre-eminent) globally operating private banks, to share experience and develop efficient anti-money laundering tools and standards for the future. From the outset, the banks worked closely with Transparency International (the best known NGO fighting corruption) and with two experts, Mark Pieth (professor of criminal law at the University of Basel and chairman of the OECD Working Group on Bribery and Corruption) and Stanley Morris (former head of FinCEN/Interpol). The Wolfsberg Group is not formally organised (eg as an association), but it was agreed among the group that it would strive to react with one voice to manifest itself.

quick-and-dirty keel. And many banks have come to rue the zeal with which they hurtled into creating huge compliance functions.

The reactive *modus operandi* naturally led banks to orientate themselves upon regulation and to explore ways to implement such regulation.³ Banks were and remain to be on the receiving end of regulation. With the increasing volume and complexity of regulation, compliance lay claims on banks' capacity to translate rules into practicable prescriptions informing the actual business processes. There is a likely tendency to undergo compliance as burdensome. Where banks were being forced to digest and implement regulation, this led to seeing compliance as something which unavoidably had to be delegated to 'order-taking' departments⁴ operating in execution modes. Compliance became process-driven, mechanical, and rule-based.

Whereas banks have been and remain to be struggling to absorb the spate of regulation, they will likely continue to approach compliance in this passive manner. In any case, they will remain to put reliance on the given rule-book. It is this given rule book they will be looking to, to inform them on the meaning of compliance. They may, thereby, be confused by Dutch financial markets law, either mistakenly to assimilate compliance to a department (performing the compliance function),⁵ or to associate it to a (mere) risk; 'compliance risk'.⁶

In my experience, neither do banks readily associate compliance with directors' duties, such that it is understood as being self-evident that compliance forms an integral part of these duties. Nor do they readily relate compliance to corporate governance. Banks will not automatically understand compliance as being an element of corporate governance. The single most important driver for my ambition to write this thesis is that I find that law fails to give pertinent guidance on the matter. Where

³ Mussche points out that 'internal compliance programmes' bring companies to engage into programmes initiated by making inventories of regulation possibly applying to them. See Mussche 2013, on p 425. In my experience, such approaches, often mistaken for 'compliance risk methodologies', led banks to end up making extremely granular catalogues of regulation.

⁴ I could also irreverently designate such departments as 'errand-boy' departments.

⁵ Cf article 21 para 1 Regulation prudential rules Wft.

⁶ The Regulation prudential rules does not define 'compliance risk'. It defines 'integrity risk', however, as the risk of damage to the reputation or current or future damage to assets or results of a financial company as a result of inadequate compliance with norms prescribed by or derived from the statutory law.

corporate governance law and enterprise-wide risk management are concerned Simkins & Ramirez, come to a similar conclusion in their 2008 paper combining finance and law:

‘Corporate governance law does not presently include any particular guidance regarding enterprise-wide risk management.’⁷

Where law fails to provide adequate instruction on directors’ ownership⁸ of compliance by allocating it to them, this supports the risk that compliance is mistaken for an organisational matter. This, in turn, sustains the persistent tendency of delegation to compliance departments. I believe such delegation risks directors’ abdication of ownership of compliance. It is my aim to turn this tendency around. I cannot profess to do this with any degree of success, if I do not demonstrate the consequences of such ownership. Hence, I must address whether and how law provides the means for effectuating compliance as a directors’ duty. This will bring me to sanctioning.

On one hand, I am privileged to have played my part in establishing compliance as a ‘must-have’. On the other, my professional impressions instilled the wish to contribute to putting matters into perspective. Developing knowledge and theory addressing the ownership of compliance may prevent it from becoming a fad.

1.2 Primary research question

Directors’ duties and corporate governance are by no means the exclusive domain of jurisprudence.⁹ Having said this, however much as it may seem axiomatic at company

⁷ Simkins & Ramirez 2008, p 594.

⁸ Legal academe will forgive my ‘modernist’ and even faddish usage of the term ownership in the title of my thesis and in various instances throughout this book. I do not have any intention to suggest any technical relation to the law of (rights and interests in) property.

⁹ In fact, in line with Kroeze, Timmerman and Wezeman, where they address a company’s organisation, it may be argued that lawyers ought to show modesty where directors’ duties and corporate governance are concerned. The reality and dynamism of the directors’ actions as much as the scope of corporate governance are largely outside a lawyer’s purview. See Kroeze, Timmerman and Wezeman 2013, p 107. In similar vein, Assink broaches that in his experience lawyers’ grasp of the practice of entrepreneurship is not very impressive. This may foster an expectation gap; entrepreneurs may not be capable of methodically weighing up all the consequences of their day-to-day actions and

law that observing relevant law and regulation is a board responsibility,¹⁰ jurisprudence¹¹ dedicates scant attention to compliance as a director's duty. And neither, it seems to me, does jurisprudence address how compliance relates to corporate governance.

Does the law shed adequate clarity on whether the ownership of compliance lies with the managing board, such that common company law promotes the desired conduct of the relevant actors? Is it thereby sufficiently clear that compliance is within the category of corporate governance?

It will be clear from the above that my hypothesis is that this is not the case, or, at least, that law isn't particularly outspoken on the matter. The law failing to instruct directors on ownership of compliance and failing to provide that compliance is a subcategory of corporate governance, leads to banks not readily making such connection. Banks naturally look to the law for instruction. As a consequence of the present state of financial markets law they will likely persist in confusing compliance for a mere organisation matter. This leads to delegation and, in turn, exposes banks to liability.

Where law addresses directors' duties and corporate governance, this is naturally primarily rooted in company law, which is not to say that any specific branches of the law will not also address any such aspects. Thus, for instance, Dutch financial markets regulation contains provisions concerning the governance in banks.¹² Where the particular matter of regulating corporate governance in banks forms the subject of

they likely have a heavily streamlined version of reality as it is known to them. Assink 2010 at pp 2 and 3, esp. paras 11 and 17. Finally I would note that it was P Sanders who, as early as in 1971 mooted the question as to whether it should be judges, not being economists, who are prevailed upon to pass judgment on decisions made by a company's managing board. My source Meijer, Storm and Timmerman 2012, p 29.

¹⁰ See, eg Grapperhaus 2003, p 417.

¹¹ This use of the term jurisprudence is a matter of the English language. It concerns *legal theory*, see, eg Freeman 1994, p 1, and Williams 2006, p 282. Freeman indicates that the French translation of jurisprudence is *théorie générale du droit*, see Freeman 1994, p 1 footnote 1.

¹² See, eg, article 2:12 para 1 (d) and (g) Wft, read in conjunction with articles 3:15 and 3:19 Wft, providing for the minimum number of persons setting the bank's daily policy and the minimum number of members of a bank's supervisory board or comparable corporate organ.

the public debate, there will invariably be an outspoken recognition of (general) company law as the principal source.¹³

1.2.1 Why focus on compliance in banks?

Where the application to compliance within companies is concerned, I narrow this thesis down to banks. What is my justification for this narrowed approach?

Compliance is by no means exclusively a matter for banks, although I presume that Dutch financial markets law dedicates relatively more attention to compliance than any other branch of Dutch law. It may then be asked here whether any conclusions would not, with equal justification, extend beyond banks.

More than anything else, I have deliberately limited the application to compliance in banks in recognition of the topicality of banking regulation. The debt crisis that set in in 2007 has triggered continued attention to banking regulation. There is broad recognition that banks have a special place in society. Walker puts it as follows:

‘Banks are different from other corporate entities because public confidence is critical to their survival in a way and to an extent that does not arise even in the wake of serious brand damage sustained by a major consumer-oriented non-financial business. When depositor confidence is lost in a bank, its whole survival is put in jeopardy.’¹⁴

Taking Walker at his word, why ought we to be more apprehended where a bank’s survival is in jeopardy, were depositor confidence to melt away? At the risk of flogging the dead horse, this is to do with the likely fall-out of a bank’s failure. In so far as a bank’s creditors considered in isolation are concerned, its bankruptcy’s consequences may be dismissed as bog standard counterparty risk. Along similar lines, the risk incurred by the bank’s investors considered in isolation, is capable of being classified as mere investor risk. But bank failures may have systemic

¹³ See, *eg*, the Walker Report 2009, p 23, para 1.1: ‘[I]n the case of BOFIs [banks and other financial institutions] in the UK, this statutory corporate governance responsibility under the Companies Act 2006 is complemented by the “comply or explain” principles of the Combined Code which is overseen and maintained by the FRC and by financial regulation under the Financial Services and Markets Act 2000.’ Parentheses by me, AJK.

¹⁴ The Walker Report 2009, p 25.

consequences,¹⁵ possibly reaching far beyond its creditors. That even a looming failure of one individual bank may in fact trigger a systemic crisis, is widely recognised.¹⁶ And it is the potential consequences of a systemic crisis which amply justify particular attention to the regulation of banks. Whereas banks are a source of finance for a large number of borrowers and they manage the payments system, the disruption caused by the materialisation of a threat to the banking system as a whole, will prove very costly to society.¹⁷ I find, once more, Walker's formulation particularly apt:

'Given that the cost in the event of failure is likely to exceed the downside risk for shareholders, *on recent experience by a very large margin*, the type and extent of financial risk that a BOFI board is able to assume is necessarily constrained by regulation and supervision.'¹⁸

With all this, we come to the important aspect of society's willingness to accept the potential consequences of banking failures. Whereas the risk to the banking system posed by the 2007 debt crisis, clearly had a knock-on effect on the real economy, and whereas central banks as much as governments have seen no other way than injecting liquidity or even nationalising banks, the picture that had emerged in society was that banks' profits benefit the shareholders and the recipients of bonuses, whereas the invoice for the failure to manage risk properly lands on the doorstep of the tax payer, the customer and the employee.¹⁹

¹⁵ For a succinct description of systemic risk, with reference to the authoritative sources, see Llewellyn 1999, p 13: '[T]he key systemic point is that banks are potentially subject to runs, which may have contagious effects. The externality is that the failure of an insolvent bank can cause depositors of other banks to withdraw deposits. This can cause a solvent institution to become insolvent because a large proportion of bank assets are not easily marketable, and because a panic may drive down the current value of those assets which are marketable. In the event of a run, a bank is forced to dispose of assets which, because of asymmetric information problems, cannot be sold at par as potential buyers (if they exist at all) impose a high risk premium in the purchase price.'

¹⁶ Corroborated by a vast body of source references. I confine myself to mentioning Busch 2010, p 10, Van Esch 2010, p 262 – where Klaver notes that for a bank to be capable of triggering systemic risk, there is no prerequisite that it is acknowledged as a systemic bank.

¹⁷ Llewellyn 1999, p 13, the Walker Report 2009, p 24.

¹⁸ The Walker Report 2009, p 91, *emph. by me*, AJK. See also *op cit*, p 24: '[T]he partial or complete failure of such an institution is likely to give rise to public interest externalities and moral hazard of a kind and to an extent far in excess of those for any other type of business.'

¹⁹ A line of reasoning borrowed from Adviescommissie Toekomst Banken 2009, especially pp 7 and 8.

The term banks encompasses the entire gamut of banks, ranging from institutions almost exclusively engaging in so-called utility-type business, through to such banks that engage in activities recognised as higher risk.²⁰ In the latter category, one may think of investment banking activities, including proprietary trading, securitisation or off-balance sheet transactions. In the light of the central issue as to where the ultimate invoice for a meltdown of public confidence will land, it may then be asked whether banking regulation should effectuate the distinction between:

1. Banks which threat of failure will invariably lead to a need of rescue measures to be taken by state-agencies, this necessarily being at the cost of society at large; and
2. Banks which failure will be at the (exclusive) peril of its contractual counterparties and investors, both these groups considered in isolation.

Were such a regulatory distinction capable of being realised, there might be an argument that there is a far greater requirement to have sound compliance measures in place at the first category of banks; it will be for that category of banks that society will demand a regulatory regime instilling an adequate degree of confidence. As far as the second category is concerned, society would naturally be less bothered; an (isolated) bankruptcy would not lead to the need for society to put up the rescue price.²¹

In essence, this raises the issue of whether a potential threat to investment banks, were such banks as a category truly insulated from access to funds by borrowers and, more importantly, the payments system, would not negatively impact confidence. In other words, is it possible to insulate investment banks from systemic risk? This may be difficult, given the difficulty to make a clear-cut distinction between wholesale and retail business.²² I recall that the reaction to the fall of Lehman Brothers is widely attributed to the consequences of the drying up of confidence between banks *inter se*,

²⁰ Llewellyn distinguishes between 'wholesale' and 'retail' business. See Llewellyn, p 41.

²¹ Llewellyn writes that it is more appropriate for retail financial services to be regulated more explicitly than wholesale businesses. *Ibid*, p 42.

²² See, *eg, ibid*, p 41. Llewellyn also points to the difficulty at law to make a workable distinction.

resulting in banks refusing to grant credits to other institutions, which culminated in the drying-up of the interbank money market.²³

The matter as to the rationale of differentiating among banks and other financial institutions, has played its part in the consultation preceding the Walker Report (2009).²⁴ Interestingly, *prima facie*, Walker may appear to argue differently:²⁵

‘Where the business of a bank is in relatively low-risk activity, both the regulatory and the governance task will be less than in the case of a bank whose scope extends to activities involving larger risk [. . .].’

And so, where banks do engage in higher risk type of activities, Walker submits that investors are likely seeking higher returns, and where such activities are being conducted by a bank, this will then likely require greater reliance on corporate governance as much as financial markets regulation, in order to bolster the protection of market confidence.²⁶ But, Walker’s line of reasoning must not be misunderstood. The above references start from a given assumption that banks may be *combining* low and higher risk activities. This becomes clear where Walker avows:²⁷

‘The working assumption, for the purposes of this Review, is that although capital and liquidity requirements are being adjusted substantially to an extent that may make some areas of higher risk activity unattractive, BOFIs will continue to be permitted to engage in a wide range of activities some of which involve materially higher risk than “utility-type” business.’²⁸

It is outside the purposes of this thesis to opine on whether regulation ought to lead to a clear-cut differentiation of investment banking and utility-type banking. I believe that this will be extremely complex to effectuate at law. Next to this, it may

²³ See, eg Adviescommissie Toekomst Banken 2009, p 8.

²⁴ The Walker Report 2009, p 10.

²⁵ *Ibid*, p 26.

²⁶ *Ibid*, p 26.

²⁷ *Ibid*, p 26.

²⁸ Although not outspokenly, I presume that Walker favours freedom for banks to engage in such combined types of activities; he writes: ‘[T]he challenge will be to find the right balance with, on the one hand, materially enhanced supervision and regulation to ensure safety and soundness, but without, on the other hand, so cramping enterprise in major financial institutions that they fail adequately to meet the needs of the wider economy.’ *Ibid*, p 10.

ultimately prove to be impossible to insulate investment banks from the systemic issue, as much as I readily agree that where an investment bank does not have depositors, the systemic risk is incapable of being caused by the threat of a bank-run.

But, in view of the above, I submit that the matter of compliance in banks merits being addressed with greater expedience than for other corporate entities. I shall stay away from addressing any other possible areas of application, despite the fact that any matters discussed may concern companies other than banks.

1.3 Derived research – compliance at banks

There are scant, if any, writings of authority²⁹ on demarcation and delineation of the obligations falling within the remit of compliance. Efforts to create such inventory of subjects making up the compliance universe, risk undue focus on an organisation issue. My thesis seeks to emphasise that compliance is a directors' duty as a matter of company law. I aim thereby to steer the course of the discussion from undue focus on making an inventory of compliance obligations to one not riddled in terminology. I observed earlier it is only natural that banks will be looking to the law to inform them on the meaning of compliance. My thesis will therefore set out to explore how and where law broaches compliance.

The derived research question addressed in chapter 2 is the definition and meaning of compliance at banks as a matter of law. At a cursory glance, financial markets law appears to approach compliance from an operational perspective. As a consequence of this, my thesis will (have to) address the way the law deals with the *compliance function in* [as distinct from at] banks.

²⁹ Jurgens starts from article 21 Regulation prudential rules Wft (from which it may be inferred that compliance is the observance of laws, internal rules, regulation and procedures). He then distinguishes between a 'restrictive' and an extensive interpretation of the term 'legal provisions' within the referenced provision from the regulation. Jurgens prefers the restrictive interpretation: '[...] the compliance officer has the task to monitor adherence to legislation pertaining to the conduct of business in control and in integrity, including related internal standards, which may be derived from that legislation.' See Jurgens en Stijnen 2008, p 77.

How does the law address compliance *in* banks? Which subject areas are typically subsumed under the scope of compliance? Where and how does the law address *the compliance function*?

Where the scope of the compliance function is concerned, the law specifically aimed at regulating the core activities³⁰ of banks, forms a likely point of departure. It is these norms which represent the areas where the state, having weighed the reasons for and against such intervention, deems it necessary to intervene in the economic process. Weighing the reasons for and against, is the normal way of deciding on the balance of reasons. From the perspective of economic theory, state intervention is justified where it cannot be taken for granted that private ordering will yield welfare-maximising results.³¹

Norms addressing substantive issues typically classified as pertaining to compliance will have been moulded in a bottom-up manner. At the core of this, also in a historical sense, lies the Dutch norm of duty of care, which is as clear a manifestation of the principle of societal acceptability³² permeating Dutch law as there may be. Conduct of business norms typically associated with compliance, have originated in private law, where their purview is the relationship between a bank as the seller of a product/provider of a service and its (prospect) customer. Over time, with a view to enhancing the protection of customers, these norms have found their way to public law. In view of this, I will address the private law enforcement of banks' special duty of care where I address duty of care as a core compliance norm at financial markets law. My thesis aims to explore the legal construct such that these norms may be related to the overarching perspective.

A distinct category of norms classified as pertaining to compliance seeks to avoid banks being (mis)used for money laundering or the financing of terrorism. Here, the choice for state intervention follows from the position that, on balance, the

³⁰ See for this narrowing down to 'core activities', Compliance and the compliance function in banks 2005, para 3.

³¹ Cheffins 1997, p 127. I note, *eg* that Timmerman submits that, in certain private law areas, the lawmaker may feel the need to compensate to prevent private law contracts from containing grossly unreasonable conditions in cases where one party is in a clearly subordinate position to the other. See Timmerman 2008, pp 337 and 338.

³² Asser-Hartkamp/Sieburgh 2010, 43.

importance of implicating players in the financial sector in matters traditionally pertaining to the exclusive domain of the state, outweighs the interest of upholding the strict separation of the public and private spheres.

Comparative perspective to compliance in banks – English law

In analysing the law on the above issues, I shall make cursory comparisons between the Dutch and English positions at law. At the time I started my research, certain parties argued that London was the financial capital of the world.³³ Whereas a great number of banks will be subject to English law, this naturally gives prominence to an English law perspective. Add to this the interesting contrast between ‘the common law’, meant here to express English³⁴ law, in comparison with Dutch law, which has adopted Roman and French law as its starting-point.³⁵ These two factors contribute considerably to the actuality of my choice.

1.4 Compliance and risk

Chapter 3 addresses compliance and risk. Compliance ought not to be mistaken for a (mere) risk. Seeking a possible relation between compliance and risk leads to a foray into risk in business economics. In doing so, I cursorily digress to (operational) *risk management* and touch upon the *Enterprise Risk Management – Integrated Framework* from the Committee of Sponsoring Organizations of the Treadway Commission (COSO). The central theme of my thesis being that the law ought to clarify where ownership of compliance lies, causes me to use that particular juncture to approach the allocation as a matter of organisation of responsibilities for *the risk*

³³ See, eg <http://www.london.gov.uk/london-life/business-and-jobs/financial-centre.jsp> - which sets out that ‘London is the banking centre of the world’.

³⁴ I will not address specific matters of jurisdiction, since these are outside the scope of my thesis. Hence, I will use the term ‘English law’, without any particular consideration of the states defined under the Interpretation Act 1978 which are being designated in the statute law discussed. This thesis will often refer to CA, for the purposes of which Great Britain is a single state. Hence, the proper usage of terms should, whenever touching upon matters concerning CA *per se*, then be ‘British law’ and ‘British company law’. Davies uses ‘English law’ interchangeably with British (company law), see, eg, Davies 2008, p 4.

³⁵ See for this distinction, eg Williams 2006, p 23, and James 1989, pp 25 and 26. James, *op cit*, p 16 and 17, succinctly addresses the way the (English) common law relies on precedent, causing its rules having evolved *inductively*, in contrast to ‘the European civil law’, characteristically deriving from a code, as a consequence making the task of the courts being *deductive*.

management process. The division of responsibilities is often approached on the basis of distinguishing (varying) lines of defence, and I shall briefly refer to such ‘lines-of-defence models’. The latter may be important to inform the responsibilities of the company organs such as the managing and supervisory boards. Chapter 3 will include risk and risk management at law.

1.5 Derived research – corporate governance

Addressing the wider issue of corporate governance, rather than limiting myself to directors duties as a matter of company law, allows me to canvass an inclusive³⁶ view of corporate governance; corporate governance looks at what the directors do, and it comprises their duties.³⁷ Thus, if compliance were a directors’ duty, it is within the broader category of corporate governance.

What is the meaning of corporate governance at law? Does corporate governance encompass the directors’ duties?

From my analysis I will submit the view that, as a matter of law, corporate governance can be taken to cover (the wider issue of) the (entire) system by which companies are directed, managed, led and/or controlled.³⁸ It is because of this, that my analysis will address the meaning at law to the terms ‘directing’, ‘managing’ and ‘controlling’. I shall explore the extent to which these terms are capable of clear

³⁶ I borrow the term ‘inclusive’ from Eijbsbouts’ description of the OECD’s choice for the ‘values approach’ to corporate governance in 2004, where he moots that the OECD places corporate governance in the perspective of: ‘[. . .] maximising value subject to meeting the corporation’s financial and other legal and contractual obligations. This inclusive definition stresses the need for board of directors to balance the interests of shareholders with those of other stakeholders – employees, customers, suppliers investors, communities – in order to achieve long term sustained value.’ See Eijbsbouts 2010, p 57. In such approach corporate governance is, as Lambooy writes, no longer confined to the traditional ‘rules of the game perspective’; which perspective she describes as corporate governance focusing first and foremost on the division of power within a company, *ie* between the bodies that comprise a company. See Lambooy 2010, p 31.

³⁷ Almost literally from the UK Corporate Governance Code, pp 1 and 2.

³⁸ I take this definition from Clarke 2007, p 1. Walker’s definition is a striking illustration of the potential breadth of the meaning of corporate governance; homing in on the aspect of directing the company on the one hand and on the shareholder orientation in the UK; ‘[T]he role of corporate governance is to protect and advance the interests of shareholders through setting the strategic direction of a company and appointing and monitoring capable management to achieve this’, see The Walker Report 2009, p 23.

distinction. Starting off on an, arguably, provocative note, is to take the analysis from a literal quote from Swot Company Law:

‘[T]he director is obliged to speculate the company’s property in order to make a profit for the company.’³⁹ ⁴⁰

What is, as a matter of law, the meaning of the terms ‘directing’, ‘managing’, and ‘controlling’, as these terms make up the essence of corporate governance? To what extent does the law allow clear distinction between these three terms?

Comparative perspective to corporate governance – English law

As with my analysis of compliance in banks, I shall make cursory comparisons between Dutch and English company law. Two reasons are similar; at the time I started my research, London was portrayed as the financial capital of the world, and there is the phenomenally interesting perspective of the difference between English law and Dutch law.

But, where corporate governance is concerned, yet another compelling argument for casting a cursory glance on the English position is that the Dutch corporate governance model is generally classified as pertaining to the Continental European/ Japanese model, whereas the English corporate governance model is typical for the Anglo-American model. There appears to be broad consensus that the dominant corporate governance models are the Anglo-American model, with a shareholder orientation and financed by outsiders, and the Continental European/ Japanese models, characterised by recognising the interests of a wider group of stakeholders and insider financing.⁴¹ It may also be mentioned that, where the theme of corporate governance is concerned, the UK merits being considered the European frontrunner.⁴²

³⁹ Blake and Bond 1985, p 110.

⁴⁰ Davies writes with, it must be said, far greater authority (and persuasion): ‘companies are in business to take risks.’ Davies 2008, p 493.

⁴¹ Almost verbatim from West 2009, p 108.

⁴² See, eg Davies 2008, p 359, where it is observed that that the Cadbury Committee Report of 1992 and the associated Code of Best Practice ‘provided a focal point for the subsequent spread of corporate governance codes throughout Europe.’ Also, Mallin 2006, p 47: ‘[T]he [Cadbury] Report is widely recognised as having set the foundations for a ‘best practice’ system of corporate governance, both in the UK and subsequently in many countries across the world.’

1.6 Derived research – banks' corporate social responsibility

Where I address the meaning at law of corporate governance, I look, within that research question, at the meaning of the term directing at law. Directing encompasses setting the strategy. Setting the strategy may take the form of taking corporate resolutions and corporate resolutions may be made positive in the form of *regulations* – rules addressing the legal person and its organs. Regulations may also take the form of 'values', 'codes of ethics', 'integrity codes' or 'business principles'. 'Values', 'codes of ethics', 'integrity codes', or 'business principles' typically are an expression of a bank's ambitions and aspirations – and these are likely to be an expression of the bank's claim on its relevance to society.

Why is this relevant to a thesis seeking to relate compliance to governance?

Essentially, compliance addresses the observance of norms. As said, certain norms defined by the bank itself may well be the expression of a bank's claim on its relevance to society. The first question that comes to mind is what obligations a bank has towards society at large, and whether such obligations are a matter of law. This issue being expressed as a matter concerning *society at large*, prompts the association with Corporate Social Responsibility ('CSR').⁴³

What are a bank's obligations towards society at large as a matter of law? Are such legal norms within the domain of CSR?

I aim to substantiate my view that, where Dutch law is traditionally deeply rooted in the premise of societal acceptability,⁴⁴ Dutch law recognises that banks have a duty to promote the interests of society at large. This is not to say that all so-labeled CSR-norms are within the ambit of (the) law.

⁴³ Eijssbouts prompts a similar point where he notices that terminological grounds suffice to subject the legal norm of tort, phrased in the statute law as: 'an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct', to closer inspection from a CSR-perspective. Eijssbouts 2010, p 83.

⁴⁴ Asser – Hartkamp/Sieburgh 2010, 43.

1.7 Derived research – internal and external sanctioning

What importance does the law casting greater clarity on compliance pertaining to directors' duties have, if there were no consequences to directors' breaching such duties? Would, without any such consequences, the behaviour of the relevant actors change in a positive sense? The line of reasoning underlying this question may, arguably with greater justification, be turned around. Will awareness of and sensitivity to the consequences of breaching their duties, increase if the law more outspokenly allocated ownership of compliance to directors. And, will increased awareness and sensitivity lead to better behaviour? If this were the case, there is a *prima facie* practical sense to my thesis.

Looking at the consequences of breaching duties, brings me to sanctioning. This is understood as punishing in reaction to non-observance of rules. The relevance of sanctioning to my thesis lies in exploring the extent to which sanctioning mechanisms promote the desired conduct by the relevant actors. Where the rules to be observed are concerned, we may distinguish between legal norms and internal norms. The latter category of norms consists of such norms to which banks commit of their own volition.⁴⁵ Where sanctioning is concerned, I distinguish:

1. The internal perspective; measures imposed by bank organs; and
2. The external perspective; sanctions imposed outside (the powers of) the bank, by external parties.

Prior to addressing the internal sanctioning perspective, I shall address the form in which the bank shapes its internal legal order. Banks may, of their own volition, purposefully commit to self-imposed norms. I will deal with the way banks 'regulate' for themselves. This matter will include such documents as a bank's *policy* under article 3:10 Wft, and a bank's 'code of conduct'.⁴⁶ For the perspective of internal

⁴⁵ In anticipation, I note that, although there is a likely presumption that sanctioning breaches of internal rules takes the form of internal measures (*eg* disciplinary measures decided by organs of the bank), I shall have to assess whether there may also be external consequences to breaches of internal rules.

⁴⁶ *Eg* the code of conduct referred to in best practice provision II.1.3 (b) Dutch corporate governance code.

sanctioning, it may be asked what the consequences are of breaching (external) legal norms with like justification as analysing the consequences of breaching internal norms. In order to direct this thesis towards the significance of compliance, the formulation of the research objective homes in on *internal* rules on compliance. This should bring me to the practical significance of my thesis; are the internal consequences of compliance breaches likely to have consequences as a matter of breaching directors' duties?

What are the possible consequences of breaches of the bank's *internal* rules on compliance? Is there a possibility that such breaches expose the bank or any of its organs to responsibility and liability as a matter of company law?

The reply to this research question must yield clarity that the possible ramifications of compliance shortcomings are a matter of company law. It will be this realisation that should inform banks on steering clear from relegating compliance to a mere operational management issue.

I then get to the external perspective, looking at situations where sanctions are brought to bear by outside parties. These outside parties may consist of clients, regulators and judicial authorities. In exploring this perspective, I include addressing whether third parties may claim against the bank on the grounds that the bank has acted in breach of its own (internal) compliance rules.

What sanctions may be imposed by parties outside the bank for breaches of compliance norms?

1.8 The proof of the pudding

Will awareness of and sensitivity to the consequences of breaching their (compliance) duties, likely increase if the law more outspokenly allocated ownership of compliance to directors? Whereas the practical significance of my thesis pivots on this question, I have sought to assess (such) practical validity through an analysis of recent case law

from the Enterprise Division, and had this followed by a meeting with experts from the field. This is accounted for in a distinct chapter entitled the proof of the pudding.

1.9 Conclusions from my thesis and confrontation with reality

In chapter 9, I draw my conclusions, for which the reply to my primary research question forms the natural prelude. I shall follow up with a look at the reality of organising compliance (departments) in banks in order that I may confront my findings with daily practice. Such approach should help my readership to understand what might be the consequences of my views and what might be the likely changes were my recommendations to prove fertile ground. I shall then express recommendations to make limited additions to the Dutch corporate governance code, such as to express with more emphasis that compliance pertains to the directors' duties.

1.10 Method

By far the greater part – the only exception being the expert meeting forming the second panel to chapter 8, 'The proof of the pudding' – of this thesis, is based on literature study. Within this, with only a minor foray into business economics literature at the inception on chapter 3, 'Compliance and risk', the body consists of legal sources. On the method of legal research, I afford a digression to a (translated) citation from Van Gestel *et al.*⁴⁷

'[M]ost importantly, good scientific research is not the same as mechanically executing a step-by-step schedule. In the ultimate analysis, it isn't form, but substance that makes the difference, meaning that rather than the method, mostly intuition, experience, creativity and thinking 'outside the box' generate sound academic knowledge. Expressed differently: methodologically perfect research doesn't yield, on and by itself, interesting, relevant research breaking into uncharted territory. Whether any research does, exclusively depends on content.' (my translation, AJK)

Where Dutch legal sources are concerned, I follow a traditional pattern, with due appreciation of custom as well as principles of law. As to the sources of English law, two principal and two subsidiary sources must be mentioned. The principal sources are legislation and judicial precedent; the subsidiary sources are custom and books of authority.⁴⁸ English law gives great weight to the decisions of the judges. Hence, a considerable part of the law is not the result of legislation. The phrase ‘the common law’, is usually used to signify this part of the law.⁴⁹ Over time, there is a development under which the role allocated to arguments and ideas that were to be found in explanatory literature, increases. The decision in *Pepper v Hart*⁵⁰ permitted to courts the use of background materials as part of the search for legislative intent,⁵¹ and courts do now openly refer to books of authority.

Van Manen,⁵² asserts that part of legal research consists of describing the normative points of views from others, and presenting those in an organised way. All this, as he continues⁵³, with the primary objective of developing consistent knowledge.

Importantly, where jurisprudence appears to differ from (most) other academic disciplines, is that classifying (‘subsuming’) a certain phenomenon (applied to this thesis: compliance) under a pre-existing category (directors duties or corporate governance), is exclusively the consequence of decisions made by lawyers. This means that classifying a fact as pertaining to a (given) category (Van Manen refers to this classification as: the diagnosis), is primarily to do with the authoritative normative judgment of lawyers, rather than something existing in ‘reality’ irrespective of jurisprudence.⁵⁴

1.11 Roadmap

Reflecting the lines set out above, the following is the roadmap to the remainder. Chapter 2 addresses compliance. Compliance being this thesis’ point of departure,

⁴⁷ Van Gestel *et al* 2007, p 1449.

⁴⁸ Almost *verbatim* from James 1989, p 7.

⁴⁹ Williams 2006, p 22.

⁵⁰ [1993] A.C. 593.

⁵¹ See also Williams 2006, p 220.

⁵² Van Manen 2008, p 1929.

⁵³ *Ibid*, p 1929.

chapter 2 seeks to inform the reader on the legal significance of the term. Chapter 3 addresses compliance and risk, and it includes the way the law approaches risk and risk management. Chapter 4 deals with corporate governance – it expounds an inclusive approach to corporate governance; in addition to concerning the relationships between companies’ organs, it is essentially about directing the company. Hence, it includes their duties. Where corporate governance includes directors’ duties, it thereby encompasses compliance. And so, compliance is safely within the category of corporate governance. Chapter 5 turns to CSR. Given the present-day prominence given to banks’ responsibility owed to society at large, chapter 5 explores whether such responsibility can be founded on the law. If this were the case, the chapter then seeks to address whether banks’ responsibility to society at large is tantamount to banks’ CSR. Chapters 6 and 7 in turn broach internal and external sanctioning. The overture to chapter 6 is the relevance of internal norm setting – how do banks shape their legal order? This is done with a view to providing the fundament to this thesis’ tenet that breaching internal compliance norms may yield liability based on mismanagement. In Chapter 8 the searchlight is set to practice. Chapter 8 questions whether it is likely that the law more outspokenly allocating ownership of compliance to the managing board, serves to promote the desired behaviour by the relevant actors. This shall be done through a dyptich. The first panel is a look at recent case law from the Enterprise Division. The second consists of an expert meeting.

The thread of the quest will end in chapter 9. Whilst chapter 9 will supply the reply to the primary research theme, it seeks to confront such answer to the reality of the way banks currently address compliance. Thus, where the analysis purports that compliance ought not to be confused with an organisation issue – it being an integral duty of the managing board – chapter 9 addresses whether such conclusion negates compliance functions’ right to existence. Finally, chapter 9 submits recommendations to:

1. Have the Dutch corporate governance code express that compliance pertains to directors’ duties; and

⁵⁴ *Ibid*, p 1929.

2. Have Dutch financial markets law express market confidence and the reduction of financial crime as regulatory objectives, both pertaining to integrity.

1.12 Concluding notes

The following is a quote from Nelson:⁵⁵

“As a matter of style, where possible the Book quotes the original source, rather than the author’s summary or restatement, ‘as a basis for comment, criticism or review’.”

I don’t believe I could have written this any better and will leave it at that.

For this thesis I have not been able to include materials dating after October 2013, although I shall comment in passing that the Supreme Court ruled *VEB/Fortis* on 6 December 2013.

⁵⁵ Nelson 2008, p 7.

2 Chapter 2 – Compliance at banks, financial markets law perspectives alongside private law, including banks' special duty of care

2.1 Introduction

Naturally, my quest for the ways compliance at banks may be classified at law, first obliges me to explore the current situation; what definition and meaning of compliance exist at law? This consists of identifying literal references to the term compliance. Next, whereas compliance is essentially about the observance of norms, compliance is also explained through exploring substantive issues capable of being classified as pertaining to compliance.⁵⁶ Altogether, norms falling in the domain of compliance cover a wide array of obligations. They may originate from:

1. Financial markets law;
2. Private law; and
3. Voluntary norms.

On voluntary norms, my thesis explores their nature at law and the extent to which they may cause internal or even external liability. Thus, my thesis will explore whether third parties may claim against banks for breaches of self-imposed compliance rules. Chapter 6 addresses internal liability and chapter 7 turns to liability to third parties.

This chapter hence addresses the research objective expressed in chapter 1 as:

How does the law address compliance *in* banks? Which subject areas are typically subsumed under the scope of compliance? Where and how does the law address *the compliance function*?

Addressing financial markets law's approach to compliance leads to the one provision in statute law addressing the compliance function; article 21 Regulation

⁵⁶ See for this approach, Compliance and the compliance function in banks 2005, para 3.

prudential rules Wft (section 2.2).⁵⁷ The Regulation prudential rules Wft being a subordinate implementation instrument to Wft, causes me summarily to address the nature of Dutch financial supervision law (section 2.2.1). My first port of call will be the requirement from the Regulation prudential rules Wft that the compliance function performs its function in an *independent* manner (section 2.2.1.1). Next I trace the historical development of article 21 Regulation prudential rules Wft, which leads me to compliance and integrity (section 2.2.1.2).⁵⁸ Section 2.2.1.3 looks at the way the lawmaker systematically⁵⁹ organises compliance and, or distinct from, risk within financial markets law. This will be done in anticipation of chapter 3 addressing compliance and risk. I purposefully apply a systematic approach with a view to assessing whether the lawmaker subsumed compliance to (the category of) risk (management) or whether compliance is within a category of its own. As this systematical interpretation starts off within (the construct of) financial supervision law, within this same section I subsequently draw a succinct analogy to the Dutch corporate governance code – does such analogy point to any different insights on the relation between risk management and compliance?

Section 2.3 continues the quest by assessing in the scope of compliance through exploring substantive issues likely pertaining to compliance in banks. By way of introduction, section 2.3.1 is an excursion to the area of anti-corruption compliance. With equal justification, I could have made such excursion to competition law (compliance). From section 2.3.2, I address items capable of being categorised as pertaining to compliance from the Regulation prudential rules Wft. Composing such catalogue of issues (possibly) pertaining to the compliance function's areas of responsibility is not complete without mentioning the public law norm of duty of care transposed into Dutch law from the MiFID.⁶⁰ Section 2.3.2.2 addresses the scope of

⁵⁷ With a pendant in article 31c Regulation supervision of conduct of business Wft.

⁵⁸ I note that the Regulation prudential rules Wft defines 'integrity risk' as the risk of damage to the reputation or current or future damage to assets or results of a financial company as a result of inadequate compliance with norms prescribed by or derived from the statutory law.

⁵⁹ See, on systematic interpretation Asser *Algemeen Deel* (1974), p 34: '[I]n looking for meaning or manner of speech, we look at the provision itself, but each legal provision forms part of a more or less extended act, such act forming part of legislation in general, and legislation in turn of the aggregate of law.' See, also, Franken 1999, para 8.1.2.

⁶⁰ At the time of writing this, the Commission had published its proposal for MiFID II on 20 October 2011. See *Proposal for a Directive of the European Parliament and of the Council*, 20 October 2011, COM (2011) 656 final], available on the web at: http://ec.europa.eu/internal_market/securities/docs/isd/mifid/COM_2011_656_en.pdf.

compliance in this thesis, I include this duty of care from Wft originating from the MiFID, which is classified as a behavioural or a conduct of business aspect, notwithstanding that its application is primarily, but by no means exclusively, relevant to banks which may offer 'investment services' or conduct 'investment activities'.

The duty of care is a key component of the conduct of business aspects of financial markets law. As said, I address this duty of care as one originating from the MiFID. Dutch law also enforces a 'special duty of care of banks' under a parallel system of private law obligations, which I deal with at that point. I readily acknowledge that such apparent duplicity is likely to create confusion. The principal distinction is between compliance norms originating from financial markets law on one hand, and private law on the other. Within private law, we distinguish between rules applying to banks owned by companies, subjecting them to company law, and private law rules governing (business) relationships banks have with third parties. Where enforcement of the duty of care through private law is concerned, we are in the category of private law norms originating from the law of obligations. Hence, in addressing the duty of care within this chapter, I shall leave company law without discussion. As will be seen, there is tremendous interplay between the duty of care as a norm from financial markets law and the special duty of care enforced through the law of obligations.

I continue addressing the scope of compliance in banks with the prevention of financial crime, which, under Dutch law is a matter of specific statute laws pertaining to the integrity of the financial sector, alongside, rather than subordinate, to Wft. This will involve Wwft and the Sanctions Act 1977. I shall submit that these two statute laws are safely within the domain of financial markets law.

My cursory exploration of the position at English law seeks to address banks' compliance with financial markets regulation. This will go to illustrate the distinction between a firm's duty to ensure compliance with its regulatory obligations and the duty to counter the risk of financial crime.

I conclude this chapter by anticipating on a way to improve Wft such that it outspokenly connects the requirement of conducting the business with integrity to

statutory objectives. My proposal is inspired by an analogy to FSMA⁶¹ and serves towards the build-up of the components for my overall recommendations.

2.2 Statutory designation of the compliance function

Article 21 Regulation prudential rules Wft provides:⁶²

1. A payment institution, clearing institution, entity for risk acceptance, credit institution, funded pension institution, insurer or branch [. . .] has a department performing a compliance function in an independent and effective manner. The department has the task of checking the adherence to legal and internal rules having been drafted by the financial company or branch itself.
2. The department meant in the first paragraph, of a bank as meant in article 3:17, first paragraph, or 3:23, second paragraph, of the act, which may offer investment services or conduct investment activities in the Netherlands, additionally has the following tasks:
 - a) advising the persons who are responsible for rendering investment services or investment activities in the adherence to legal and internal rules;
 - b) conducting oversight over the adequacy and effectiveness of the internal rules and procedures;
 - c) assessing the effectiveness of the procedures which have been drafted and the measures which have been taken to remediate the deficiencies identified in the adherence to legal and internal rules; and
 - d) reporting at least annually to the persons setting the day-to-day policy of the bank and to the organ, if any, tasked with the supervision over the policy and the day-to-day course of events of the bank concerning matters in regard to the adherence to legal and internal rules. Within the annual reporting it will be

⁶¹ As it was in force through at least 1 April 2013. I derive my proposal from section 2, para 2 FSMA, which expresses the general duties of 'the [single] Authority' and postulates 'market confidence' as the first regulatory objective. At the time of writing this, the UK Government expected the Financial Services Act 2012 to commence on 1 April 2013. Under the Financial Services Act 2012, the restatement of the three (new) regulators' duties is different, and 'market confidence' is no longer made explicit.

⁶² The Regulation supervision of conduct of business Wft contains a counterpart in article 31c, addressing investment companies, with a slimmed down para 1.

specifically noted whether measures have been taken where deficiencies have been identified.

3. The department of a bank meant in the second paragraph will have the necessary authority, resources, and expertise at its disposal, and it will have access to all information essential for it to discharge its responsibilities properly and independently.

On the face of this provision, it would be tempting to define compliance simply by a repetition of the lawmaker's words: 'the adherence to legal and internal rules'.

2.2.1 Financial supervision law/financial regulation

Under Dutch law, the public (or administrative) legal and state organised involvement in manifesting the (presumed) public interest in the financial sector, is consistently labeled as: financial supervision.

This may be confusing to an English readership, as the term most widely used there is financial regulation. I note that, in a British context, financial supervision may be defined as 'the more general observation of the behaviour of financial firms.'⁶³ Llewellyn also distinguishes monitoring from regulation, by defining monitoring as observing whether the specific rules of behaviour for the financial sector are being observed.⁶⁴ However, there is common ground in Dutch books of authority that where we say financial supervision law, we mean financial markets regulation, or, in short, regulation. I shall leave terminological nuances between English and Dutch on this matter for what they are.

Where the term supervision is concerned, I would note that Book 2 BW, containing most of the Dutch (general) statute law on companies,⁶⁵ uses the Dutch word for supervision (or oversight) in a general sense where it concerns the duty of the supervisory board⁶⁶ to supervise (or to keep the oversight of) the managing board.⁶⁷

⁶³ See, eg Llewellyn 1999, p 6.

⁶⁴ *Loc cit.*

⁶⁵ Book 2 BW is labeled 'legal persons', and hence addresses all general aspects of legal associations capable of assuming and asserting rights and obligations, as would a natural person.

⁶⁶ Article 2:140 para 2 BW.

In similar vein, there is also a reference to ‘the supervisory organ’ in article 2:153 para 3 (a) BW. In these instances, ‘supervision’ is a matter for the internal organisation of the company, and it thereby has its own company law specific meaning.

In contrast, other references to supervision in the statute book either concern involvement of a party outside the company (such as DNB, Stichting Autoriteit Financiële Markten,⁶⁸ ‘the supervisory instance’,⁶⁹ or the Dutch department of justice⁷⁰), or they consist of references to other statute laws. By far the most frequently referenced act is Wft, but there are also references to the Act on the supervision of financial reporting, to the Act supervision securities transactions, and the Act supervision audit firms.⁷¹ It is with this category of involvement outside the company, that we enter the domain of supervision of financial institutions as a matter of public (or administrative) law.

Financial supervision law may be classified as forming part of banking and securities law. There is a ready presumption that Dutch financial supervision law is made up by Wft, which is not altogether correct. I shall address this matter where I touch upon anti-money laundering, financing of terrorism and the Sanctions Act 1977.⁷²

The necessary precursor to illustrating compliance from the perspective of Dutch law on financial supervision, is the distinction within Wft between ‘prudential supervision’ on one hand, and ‘behavioural’ on the other. The definitions from the Act itself are:

⁶⁷ I have also seen this translated as: the supervisory board monitors the managing board, but this gives the erroneous impression that the supervisory board were to keep an eye on the management board’s each and every move.

⁶⁸ Stichting Autoriteit Financiële Markten to be addressed later.

⁶⁹ See, eg article 2:359b para 5 BW.

⁷⁰ The department of Justice being required to grant non-objection to the intentions or past-record of prospective managers of certain legal entities; see for companies article 2:68 BW, para 3 of which labels the exercise of this function by the department of Justice as supervision.

⁷¹ My English translation of: Wet toezicht financiële verslaggeving, *Stb* 2006, 571 (a statute on oversight by the AFM of financial reporting by companies issuing securities); Wet toezicht effectenverkeer 1995, *Stb* 1995, 646 (almost completely withdrawn; a statute on securities transactions); and Wet toezicht accountantsorganisaties. *Stb* 2006, 404 (a statute on the regulation of audit firms).

⁷² See *infra*, para 2.3.2.4, p 72 *et seq.*

1. Prudential supervision is directed to the solidness of financial companies and to contributing to the stability of the financial sector;⁷³ and
2. Behavioural supervision is directed to orderly and transparent financial market processes, fair relations between market parties and treating clients carefully.⁷⁴

Often, albeit not without exception, banks also (intend to) offer investment services, or (intend to) conduct investment activities. Article 21 of the Regulation prudential rules Wft provides that where a bank may also offer investment services or conduct investment activities, the compliance function has certain ‘additional’ tasks. These additional tasks, connected as they are to investment services and activities, typically have greater commonality with the behavioural supervision perspective than the prudential one, notwithstanding that this distinction had not been intended to be sector specific. The result is that:

- Where there is an (apparent) overlap between legislative provisions, the classification of the services provider from a sectoral perspective will nonetheless be leading in determining the applicable legal regime (concretely this means that for banks, the accent will lie on prudential supervision); but
- Otherwise (where there is no overlap) the prudential and behavioural perspectives work side by side.

In the eyes of the lawmaker, the law on financial supervision has taken three perspectives for guiding its orientation towards attainment of the public goals as they are expressed in the statutory definitions of prudential and behavioural supervision. These perspectives are effectiveness, market focus and administrative and financial efficiency.⁷⁵ The perspective of effectiveness is then broken down into three individual, equivalent objectives: i) the stability of the financial system as a whole; ii) the financial solidness; and iii) the promotion of orderly and transparent market processes, fair relations between market parties and, within that context, consumer protection.

⁷³ Article 1:24 para 1 Wft.

⁷⁴ Article 1:25 para 1 Wft.

2.2.1.1 Independence of the compliance department

Article 21 Regulation prudential rules Wft provides that the compliance department performs the compliance function in an independent manner. Of course it is relevant to establish the meaning of the term independent. I find this aspect particularly interesting, as it is often suggested that the compliance function should have a reporting line to the supervisory board or a subcommittee thereof, additional or next to its reporting line to the managing board.⁷⁶ It may therefore be asked whether the requirement that the compliance function is performed independently suggests a (certain) degree of independence from the managing board.

The explanatory memorandum to the Regulation⁷⁷ does not provide an interpretation to this particular element at the explanation for article 21 as such. On article 21 Regulation prudential rules Wft, it merely indicates that the provision forms the integration into the Regulation of article 69 of the Dutch Regulation on Organisation and Control.⁷⁸ But perhaps I might make an inference to the identical explanatory memorandum, where it comments on article 17 Regulation prudential rules Wft. On the element of 'independence' concerning the internal audit function, it provides that this signifies: 'independent from line management and distinct from the controls which are integrated into the various business processes.'⁷⁹ The earlier Regulation on Organisation and Control, dating from 2001, also contained the explicit element of independence for the compliance function in its article 69. The context there also points to independence referring to independence from line management, as the requirement immediately preceding article 69 Regulation on Organisation and Control provided that promotion and enforcement of conducting the business with integrity is the primary responsibility of line management. To the point of my reason

⁷⁵ See Nota Hervorming van het toezicht op de financiële marktsector, *Kamerstukken II* 2001-2002, 28 122, nr 2, para 1.1, p 3.

⁷⁶ Analogous to the suggestion in Principle 5.3 of the Banking code that the head of internal audit has a reporting line to the chairman of the audit committee. Van der Slikke asserts that compliance officers ought to be genuinely independent and makes the surrealistic suggestion that the compliance function should be performed by the regulator. Van der Slikke 2012, p 166.

⁷⁷ *Stb* 2006, 519, p 113.

⁷⁸ *Regeling Organisatie en Beheersing, Stcrt* 2 april 2001, nr. 65, p 23 *et seq.*

⁷⁹ *Stb* 2006, 519, p 111.

of addressing independence at this (admittedly, otherwise somewhat premature) particular junction, I note that the Regulation on Organisation and Control recommended that ‘the compliance officer’ ought to have direct access to the supervisory board, where so required. The rationale provided there in support of this recommendation is that where managing board members’ possibly breaching internal directives is concerned, the compliance officer ought to have this alternative (to ‘bypass’ the managing board).

Hence, where Dutch financial markets law requires an element of independence for the compliance function, it may be presumed that this points to independence from line management. It may presently be asked what such independence precisely means. On one hand, it may be imagined that independence merely signifies an organisational aspect. The compliance function is, for instance, physically accommodated outside the business activities. Compliance function employees may not sit within the same office environment as employees conducting the business. A concrete example could be a bank’s dealing-room; the compliance function’s employees may be physically located outside the dealing-room. In the same vein, the compliance function may be independent in planning, organising and performing its activities toward the fulfilment of its tasks. The most senior compliance officer responsible for, say, the compliance function for a bank’s dealing-room, may not be a member of the specific organisational unit’s management team. But, as will be clear from what follows, the matter of independence is not one deriving relevance from such organisational aspects.

On the other hand, independence may be explained in terms relating to the compliance function’s hierarchical reporting line(s). I assimilate the matter of ‘reporting line’ to an employer’s power to give instructions – in line with the assumption of a hierarchical relationship underlying employment contracts in Dutch law.⁸⁰ If we interpret independence in this manner, we may think about whether it is legally acceptable that the compliance function takes instructions from ‘line management’. Of course, the first aspect we may wish to consider is the meaning of ‘line management’. Thus, taking it from the earlier example in this section, we could

consider whether ‘line management’ ultimately refers to the power of the most senior employee responsible for the bank’s dealing-room, and we could then formulate a premise that independence requires that the compliance function for the dealing-room may not take instructions from this most senior employee.

The really relevant question here is where ‘line management’ ultimately ends. We may ask whether a bank’s managing board is line management. If the managing board were line management, a consequence could be that the compliance function ought to be independent from the managing board. In my view, the question whether the managing board is capable of being classified as ‘line management’, is not one of law. Terms such as line management do not have a(ny specific) legal meaning. But, for the purposes of my thesis, the issue as to whether the compliance function takes instructions from the managing board is relevant. My thesis departs from the position that adherence to law and relevant regulation is the responsibility of the managing board. It is however suggested that - in order for it to be (truly) independent - the compliance function should have a reporting line to the supervisory board.⁸¹ As said, I translate ‘reporting to’ as implying a power to instruct. Thus, in my view, having the compliance function reporting to the supervisory board, presumes that the supervisory board has power to give instructions to the compliance function.

A possible ultimate consequence of independence of the compliance function; that the compliance function acts on the instruction from another organ than the managing board, prompts a ready analogy to the way the Banking code portrays the position of the internal audit function for banks. Principle 5.3 of the Banking code provides:

Within the bank there functions an internal audit function occupying an independent position. The head of internal audit reports to the chairman of the managing board and he has a reporting line to the chairman of the audit committee.

This provision from the Banking code may, in turn, match the Dutch corporate governance code. Not dissimilar to Principle 5.3 of the Banking code, best practice

⁸⁰ Cf article 7:610 BW containing the element of being within the service of the employer and article 7:660 BW, requiring an employee to comply with the employer’s regulations.

V.3.2 of the Dutch corporate governance code provides that the internal auditor has access to the external accountant *and to the chairman of the audit committee*. However, unlike the Banking code, the Dutch corporate governance code contains an explicit and overriding position; Principle V.3 provides:

The internal auditor functions under the managing board's responsibility.

The Dutch corporate governance code does not make any references to a compliance function. But, surely, had the Dutch corporate governance code contained equivalent provisions on the compliance function, this would likely not have been any different; it would have provided that the compliance function operates under the managing board's responsibility. To me, it is difficult to imagine that the managing board were capable of assuming this responsibility, if the compliance function should take instructions from any other company organ. I could also express this as follows: how can the managing board assume responsibility for compliance if the compliance function were independent (from it)? In addition, were the supervisory board to make (any) use of its power to instruct the compliance function, doing so would constitute 'acts of management' by the supervisory board.⁸² And, where the supervisory board performs acts of management, it thereby assumes managerial responsibility for such acts – a responsibility possibly culminating in liability. Clearly, regardless of whether responsibility is a tempting prospect for the supervisory board, this undermines the principle that the managing board is responsible for compliance. Under Dutch company law, the managing board exerts its powers with a certain degree of autonomy.⁸³ And, importantly in my view, a constellation in which the compliance function were capable of being instructed by the supervisory board, would undermine the position that the supervisory board's primary task is to exert supervision over the managing board. Having performed acts of management, the supervisory board should either supervise itself,⁸⁴ or, in any case, it is thereby estopped from exerting supervision over the managing board in regard to anything conducted by the compliance function in furtherance of the instructions from the supervisory board.

⁸¹ Or a committee thereof, *eg* the audit committee.

⁸² *Cf* article 2:151 BW.

⁸³ Maeijer expresses this such that he feels urged to 'underline' that the managing board is autonomous in exercising the powers conferred to it by statute law and the articles of association, see his note to *ABN AMRO*, at 2.

In line with the previous argument that the supervisory board's primary task is to supervise the managing board, there is the argument that it is, hence, not its task to supervise any other organisational unit within the company. Evidently, for the supervisory board to be in a position to exert its supervision of the managing board, it must be well informed. Being well informed may certainly imply that the supervisory board actively approaches other persons than managing board members in order to obtain the required or desired information. The premise is that it is the managing board which informs the supervisory board.⁸⁵ Thus, the responsibility for the supervisory board's access to information within the company⁸⁶ lies with the managing board. Assink suggests that whereas the supervisory board may presume the information put at its disposal by the managing board to be correct and complete, the supervisory board should timely ensure obtaining necessary additional information, as and when it transpires that the information provided to it by the managing board is defective.⁸⁷ Surely, this is what is being expressed in best practice III.1.9 of the Dutch corporate governance code; it is the supervisory board's proper responsibility to demand such information which it requires in order to fulfil its task, and this may cause the supervisory board to access others within the company.

In my view, it is conceivable that the supervisory board has direct contact with the compliance function, with a view to obtaining information. But this is different from the supervisory board being in a position to instruct the compliance function. From what I wrote, it follows that information obtained from parties within the company other than the managing board should, at all times fall under the responsibility of the managing board. Thus, if the supervisory board were, on the basis of information directly obtained from the compliance function, to come to a conclusion that the company is not compliant, or, more interestingly, that the compliance function is deficient, these are matters for (the responsibility of) the managing board. It should not be the supervisory board which, at such conclusion, should instruct the compliance function directly to take remedial measures. Again, if the supervisory

⁸⁴ Which is, of course, an impossibility.

⁸⁵ Cf article 2:141 para 1 BW.

⁸⁶ And, in any case, information concerning the company which the supervisory board obtains beyond the involvement of the managing board.

⁸⁷ Assink 2009, p 94.

board were to instruct the compliance function directly, the managing board will, thereby, forfeit its responsibility, particularly for any of the consequences of the measures taken on such instructions.

It will be clear that I am not in favour of the compliance function reporting to the supervisory board or any committee thereof. Where the compliance function reports to any party which is not subordinate to the managing board, this undermines the managing board's responsibility for compliance. Also, were the compliance function to report to the supervisory board, this blurs the difference between exerting supervision and performing acts of management. The compliance function reporting to the supervisory board compromises the latter's detachment and discretion. It may be tempting to suggest that 'a (mere) reporting line' does not necessarily presume the compliance function to be subordinated. In practice, however, any party receiving reports, will wish to be in a position to influence the way such reports are presented, and, more to the point, will feel a need to act upon the information obtained – the latter if only to avoid potential responsibility for failure to do so. All this is not to suggest that the supervisory board may not, as and when required, receive information from the compliance function directly. But, for this to work properly, such information should reside under the responsibility of the managing board.

The aspect of independence bears a relation to the question whether the compliance function ought to be given a power to 'veto' certain transactions. The desirability of giving a power of veto to a company officer is inspired by a recommendation concerning the position of the chief risk officer ('CRO') from the Walker Report 2009. On such aspect of the envisaged role of the CRO Walker recommends:

'In exercise of the enterprise-wide role, the CRO would be expected to be in a position to assess, independently of the executive in individual business units, and with due regard to materiality, whether a proposed product launch or the pricing of risk in a particular transaction is consistent with the risk tolerance determined by the risk committee and board, and should be able to exercise a power of veto, where necessary.'⁸⁸

The above quote from Walker renders support to my view that independence must not be pushed to any type of independence from the managing board; rather, it underpins the view that ‘line management’ stops at the level of the executives of ‘individual business units’, whereby those executives do not hold the position of directors. For the sake of clarity; I am not in favour of giving the compliance function a power of veto. Were the compliance function to have such power, this would obfuscate the principle that the business is responsible for compliance. If the compliance function is given a power of veto, this could well bring a (derived/residual) responsibility for the compliance function for not having exercised this power when things turn out wrongly. Prone to risk-aversion, compliance functions will be unstinting in vetoing transactions.

2.2.1.2 Compliance and integrity, a historical perspective

The requirement to have an independent *compliance function* originated from article 69 of the Dutch Regulation on Organisation and Control, which, prior to the enactment of Wft, formed part of the DNB rulebook for the financial sector.⁸⁹ The Regulation on Organisation and Control mentioned that the independent compliance department was to assess whether the managing board had drafted explicit policy on minimising the risk of the company or its employees acting without integrity.⁹⁰ This is as clear an illustration one can get that in the Netherlands compliance was taken as falling within the remit of ‘integrity’. A historical perspective should, however, not lead to the myopic view that the remit of compliance were limited to matters categorised under integrity in the statute law. A clear example is article 4:14 para 2 (c) Wft, addressing orderly and transparent financial market processes, fair relations between market participants and the duty of care owed to clients. I bring this up at this early stage, because it is safe to say that this is an area where the compliance

⁸⁸ The Walker Report 2009, p 98.

⁸⁹ This was the *Regeling Organisatie en Beheersing*, issued by DNB on the basis of its authority to issue recommendations and general directives, as defined in article 22 of the Act on the supervision of the credit sector. *Regeling Organisatie en Beheersing* was published in *Stcrt* 2 april 2001, nr. 65, p 23 *et seq.*

⁹⁰ This may, perhaps, also be worded as: ‘the risk of the company or its employees not being *in integrity*’. I infer such wording from the ideas of Erhard, Jensen and Zaffron with their new paradigm on integrity. See, Erhard Jensen and Zaffron 2009.

function has a role.⁹¹ The statute law, however, defines these matters ‘outside’ integrity.

So, historically the legal requirement of having an independent compliance function is rooted in the domain of integrity. The lawmaker now distinguishes the controlled conduct of the business from conducting the business with integrity. Thus, article 3:17 Wft para 1 presently provides:

‘A payment institution, clearing institution, entity for risk acceptance, credit institution, funded pension institution, or insurer domiciled in the Netherlands, designs its conduct of business in a manner warranting the controlled conduct of its business, and this conduct to be with integrity’⁹²

The provision presently contained in article 3:17 Wft formed part of the legislative effort of introducing one overall financial markets act (on ‘financial supervision’), which was to be the apotheosis of the decision to overhaul the supervision of financial markets taken in 2002.⁹³ When introduced with the (first) Memorandum of amendment to Wft of March 2005, this article, homing in on *the design of the conduct of business*, formed a pendant to an article earlier on in the act requiring that the financial company conduct *an adequate policy* aimed at integrity (this is now article 3:10 Wft). According to the Explanatory Memorandum, the design of the conduct of business has the function of supporting the policy towards integrity.⁹⁴ The requirement to design the conduct of business so that it is conducted with integrity, is, thereby intended to be *instrumental* in nature (as opposed to a purpose within itself).

In the lawmaker’s eyes, the conduct of business is made up of four (distinct) elements):⁹⁵

1. General aspects;
2. Integrity aspects;

⁹¹ For banking investment firms see article 21 para 2 Regulation prudential rules Wft, for (non-banking) investment firms, see article 31c para 2 Regulation supervision of conduct of business Wft.

⁹² Once more borrowing from Erhard, Jensen, and Zaffron I could choose to translate this as: that it warrants this to be controlled and *in integrity*, see *supra* footnote 138.

⁹³ *Kamerstukken II* 2002–2003, 28 122, nrs 1-3.

⁹⁴ *Kamerstukken II*, 2004-2005, 29 708, nr 10, under article 2:38 on page 240. ‘The design’ is my translation of ‘de inrichting van de bedrijfsvoering’.

3. Prudential aspects (aimed at promoting the solidness of the financial company); and
4. Behavioural aspects.

The Regulation prudential rules Wft, in turn, comprises the integrity aspects under Chapter 3, entitled *conduct of business with integrity*.⁹⁶ I will address the substantive requirements from this Regulation in more detail below where I address the scope of the compliance function.

In late 2002, integrity became an object of financial supervision with the Act on modernisation and harmonisation of financial supervision.⁹⁷ It is interesting to note the distinction where integrity is either classified as a goal, or as an object of financial supervision. In the official (full) title of the Act on modernisation and harmonisation, integrity is made an object of supervision, but the (first) Memorandum of amendment to Wft repeatedly states that with the Act on modernisation and harmonisation, integrity became a goal of financial supervision.⁹⁸ If it were the idea that integrity is an essential condition for the proper functioning of financial markets, in logical terms, the consequence is that integrity is not a purpose in itself, but an instrument.⁹⁹¹⁰⁰

⁹⁵ *Kamerstukken II*, 2004-2005, 29 708, nr 10, under article 2:45.

⁹⁶ Dutch: [I]ntegere uitoefening van het bedrijf. It is difficult to translate from Dutch to English, as the Dutch language has an adjective for integrity. The English 'integer' (only used in mathematics) is etymologically closer to the Dutch word. Meanwhile, in England the use of the term integrity in the same context as its use in the Netherlands, is gaining substantial ground. The substitutions having come into FSMA as a consequence of the Financial Services Act 2012 include a new section 1D in FSMA, introducing 'the integrity objective' as an operational objective for the newly created Financial Conduct Authority ('FCA'). See, also, the ICAEW Audit Firm Governance Code January 2010, where the Professionalism principle provides that audit firms should uphold the value of integrity. In comparison, the term does not appear in the UK Corporate Governance Code, September 2012. The latter makes one reference to 'probity' only.

⁹⁷ From 14 November 2002, the act found its way into the sectorally divided Financial supervision law statutes in existence in the pre-Wft era. It takes its verbose official name from this fact; *Wijziging van de Wet toezicht beleggingsinstellingen, de Wet toezicht kredietwezen 1992, de Wet toezicht natuura-uitvaartverzekeringsbedrijf en de de Wet toezicht verzekeringsbedrijf 1993 met het oog op het opheffen van enige verschillen tussen deze wetten en het in de wetten expliciteren van integriteit als onderwerp van toezicht, alsmede in verband met enige noodzakelijke technische aanpassingen*, *Kamerstukken II*, 28 373.

⁹⁸ *Kamerstukken II*, 2004-2005, 29 708, nr 10, p 240.

⁹⁹ Altogether, I think we ought to take care that integrity will not inflate into a fad. It may end up resulting in 'integritism', a term I loosely borrow from R Jeurissen.

The Explanatory Memorandum to the Act on modernisation and harmonisation of financial supervision¹⁰¹ contains a wide ranging description of integrity, distinguishing:

1. the personal integrity of directors and members of staff;
2. the organisational integrity of the financial institution;
3. the integrity in relationships; and
4. the integrity concerning the market conduct of the financial institution.

By themselves, such denominators make it difficult to distinguish. The accompanying text from the Explanatory Memorandum points out that conflicts of interest are to be subsumed under personal integrity. Integrity in relationships ('relational integrity') is described as concerning market conduct of the financial institution in its relation to third parties as well as the conduct of third parties damaging the integrity of the financial institution, as, for instance, insurance fraud. This element has found its concrete translation into article 17 para 2 (b) Wft currently providing that integrity is understood as preventing business relationships with customers which relationships may damage the confidence in the financial company or in the financial markets.

From the Explanatory Memorandum's text, it is clear that both the element of personal integrity, involving certain people *within* the organisation, and the element of relationships with third parties ('relational integrity') are matters of integrity. In practice, however, aspects concerning personal integrity, for instance pre-employment screening with the aim of assessing the personal integrity of candidates for vacancies for so-called integrity sensitive positions, are organised as a matter for human resource functions instead of the compliance function.¹⁰² Conflicts of interest is a challenging subcategory of personal integrity. One thing is developing policy statements addressing dealing under a conflict of interest. Reacting to and taking

¹⁰⁰ The analogy may be a discussion on whether 'good corporate governance' is a purpose in itself, or rather an instrument. Cf Van Ginneken 2012, p 726, where he observes that 'good corporate governance' is an instrument promoting better functioning of enterprises, but not a purpose in itself.

¹⁰¹ *Kamerstukken II*, 2001-2002, 28 373, nr 3, p 11.

¹⁰² Rather, all such matters concerning personnel, regardless of their hierarchical ranking, is perceived as being within the remit of the human resources function – sometimes it is even seen as a matter for a bank's (company) security function, which I find difficult to explain other than an unfortunate result of company politics and turf battles.

measures against conflicted directors is another. The Explanatory Memorandum to the Act on management and supervision,¹⁰³ which introduced the new regime on conflicting interests,¹⁰⁴ acknowledges this challenge; there is a presumption that the company becomes aware of the conflicting interest. Although it lies with the conflicted director to broach his conflict, the collectivity of the board must heed potential conflicts.¹⁰⁵

In practice I find another aspect of greater interest; where relational integrity is concerned, the lawmaker ‘limits’ this to third parties with which the institution has ‘contractual’ relationships, notably clients. Why shouldn’t this category, shoulder-to-shoulder with personal integrity, encompass all the institutions’ stakeholders? With this, I could imagine that the institution is sensitive to and critical on the reputation of its financiers, as much so as it is on its choices on certain allegiances.¹⁰⁶ In much the same vein, an institution may seek to steer on its integrity in function of the geographical markets in which it chooses to operate. This may include considerations as to where and how it is regulated – as it is recognised, in fact, that an institution’s regulators are among its stakeholders.¹⁰⁷

This ‘front-load’ character of compliance is well illustrated in the (first) Memorandum of amendment of March 2005, where it says that the policy of the financial company will have to admonish the creation of awareness, the promotion and the enforcement of acting with integrity.¹⁰⁸ I think it cannot be expressed any better. Whereas it might be argued that the single reactive or passive element lies in the enforcement of acting with integrity, otherwise the elements of supplying awareness and promoting acting with integrity, clearly point to acts of directing the company.

¹⁰³ Wet van 6 juni 2011 tot wijziging van boek (sic) 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen, *Stb* 2011, nr 275.

¹⁰⁴ The new para 6 to article 2:9 BW, providing that the conflicted director does not partake in the deliberations and decision taking.

¹⁰⁵ *Kamerstukken II*, 2008-2009, 31 763, nr. 3, p 13.

¹⁰⁶ As an example one may think of industry associations or NGOs.

¹⁰⁷ See, eg *Enhancing corporate governance for banking organizations* 1999, p 3, footnote 3, including ‘supervisors and governments.’

¹⁰⁸ *Kamerstukken II* 2004-2005, 29 708, nr 10, on page 240: ‘Het beleid van de financiële onderneming zal moeten voorzien in de bewustwording, de bevordering en de handhaving van integer handelen [. . .].’

Ultimately, article 21 Regulation prudential rules Wft took its present shape in late 2007,¹⁰⁹ when it adapted to Commission Directive 2006/73/EC.¹¹⁰ In addressing ‘compliance’, or, rather, ‘the compliance function’, under Dutch law, I should therefore make the explicit observation that there is nowadays a prominent EU-element. Within the broader context of Dutch law on financial supervision, by far the greater part of the law on the regulation of *markets in financial instruments* originates from EU sources.

2.2.1.3 Compliance and, or distinct from risk in financial markets law

I anticipated in my introduction to this chapter that this brief look at the lawmaker’s approach to compliance and risk management will be done by applying the method of systematic interpretation of the statute law; an attempt to garner meaning by ascribing relevance to the context of legal provisions. Article 21 Regulation prudential rules Wft, containing the requirement of having a compliance function, sits in paragraph¹¹¹ 4.1 of the Regulation. This paragraph 4.1 is entitled ‘General aspects of the conduct of the business’. Whereas the next paragraph (*ie* paragraph 4.2 Regulation prudential rules Wft), is entitled ‘Risk management’, the compliance function is systematically, at least at this juncture, categorised outside risk management. We may infer that the compliance function is, thus, not classified as a ‘risk management function’. On ‘risk management’ as such, the Regulation states that the provisions from paragraph 4.2 serve to implement article 3:17, para 2, (c) Wft, which subparagraph addresses the *solidness*¹¹² of the financial company. From the listing of the risks which the risk management paragraph seeks to concern in article 23 para 2 of the Regulation,¹¹³ it

¹⁰⁹ By the Regulation of 30 October 2007, *Stb* 2007, 407.

¹¹⁰ The MiFID implementing Directive, esp article 6 on ‘compliance’.

¹¹¹ There is some scope for terminological confusion here. The Dutch act designates subsections of so-called chapters literally as ‘paragraphs’. Whereas it would be possible to term such ‘paragraphs’ as ‘sections’, this causes the misleading overlap with the English term section, which refers to the divisions of the statutes we term ‘articles’. To confuse matters even further, English law designates such subdivisions of sections which follow opening parts as ‘paragraphs’.

¹¹² Had I been cheeky, I would have translated the Dutch ‘soliditeit’ as ‘financial soundness’.

¹¹³ *Sc* concentration risk, credit and counterpart risk, liquidity risk, market risk, operational risk, interest risk resulting from non-trading activities, residual risk, securitisation risk, and insurance risk. The article adds that a bank, investment company, or clearing institution also takes into account such risks as result from the macro-economic environment the company is active in, and which risks are connected to the actual position of the economical cycle.

appears they all pertain to *financial* aspects, arguably with the exception of operational risk. Moreover, in this article 23, the Regulation prudential rules Wft does not list integrity risk, whereas it does contain a definition of ‘integrity risk’ in its definition article. Hence, integrity risk is not among the risks making up the category of ‘risk management’. The categorisation and the distinction implied thereby in the Dutch statute law, conform to the MiFID implementing Directive. The MiFID distinguishes between compliance and risk management. Article 6 of the MiFID implementing Directive addresses compliance for investment firms.¹¹⁴ Article 7 then follows to deal with risk management.

Whereas I find that the above illustrates that the lawmaker (correctly) distinguishes compliance from risk management, I have not found any description or rationale for making this systematic distinction within explanatory memoranda or *travaux préparatoires*.

Perhaps the categorisation and classification at law of compliance and risk should pertain, rather, to the common company law, or even to the Dutch corporate governance code. I shall elaborate on this in chapter 4 where I address the relevance at law on the meaning of directing the company (*infra* section 4.2.7), and on risk management within Dutch company law. For the present purposes, I confine myself to referring to Principle II.1 second para from the Dutch corporate governance code:

‘The managing board¹¹⁵ is responsible for complying with all relevant primary and secondary legislation, for managing the risks associated with the company activities and for financing the company. The managing board shall report related developments to and

¹¹⁴ The MiFID implementing Directive in Article 6 coins this in terms of: ‘failure by the firm to comply with the obligations under Directive 2004/39/EC’ (*ie* the ‘original’ MiFID). It adds the interesting dimension that the measures and procedures put in place to minimise such risk of non-compliance, should also ‘enable the competent authorities to exercise their powers effectively under that Directive.’

¹¹⁵ I note that I take exception to the translation in the English version of the Corporate governance code available at the website of the *Monitoring Commissie Corporate Governance Code*; where it translates *het bestuur* as ‘the management board’. The more natural translation appears to be ‘managing board’. See, *eg* Davies 2008, on p 398, who consistently refers to managing board. His only references to ‘management board’ are clearly identifiable as quotations by his placing them in quotation marks (as on p 399). It is also striking that the Commissie Peters’ translation of 25 June 1997 of Recommendations on Corporate Governance in The Netherlands, referred to the board of directors, rather than to the managing or management board.

shall discuss the internal risk management and control systems with the supervisory board and the audit committee.’

The ensuing best practice provisions do not make it clear whether the apparent distinction between compliance with relevant legislation on the one hand and managing the risks on the other, has a particular significance and was made deliberately. The best practice provisions lack any further references to ‘compliance’. It may be argued that, from the ‘instruments’ listed in best practice provision II.1.3, the code of conduct comes closest to the instruments with which the compliance function has the greatest affinity.

The position in the UK Corporate Governance Code seems to point to compliance controls being subsumed under the wider category of risk. The UK Code provides that the board should set the company’s values and standards.¹¹⁶ The UK Code presumes that: ‘[T]he board is responsible for determining the nature and extent of the significant risks it is willing to take in achieving the strategic objectives.’^{117 118} It also appears to classify compliance as adjacent to risk management, where it provides that the ‘material controls’ include: ‘financial, operational and compliance controls.’¹¹⁹

2.3 Scope – the ambit of compliance at banks

2.3.1 Introduction – why this matters

In order to establish whether (the term) compliance (itself – *ie* as distinct from ‘the compliance function’) has any relevant meaning at law, we may seek to assess whether the context to article 21 Regulation prudential rules Wft, yields clarity on the substantive scope of the (company) department’s responsibilities made obligatory under it. The remit of the areas of responsibility of the compliance function in banks, however, forms an area of uncertainty. From an international perspective, this is

¹¹⁶ Supporting Principle A.1.

¹¹⁷ Main Principle C.2.

¹¹⁸ By way of anticipation, I note that this points to ‘business decisions’ – see, *eg infra* p 111.

¹¹⁹ Code Provision C.2.1.

strikingly illustrated by the fact that the Basel Committee on Banking Supervision itself, saw the need to conduct a survey of its 2005 paper on compliance and the compliance function in banks;¹²⁰ ‘Implementation of the compliance principles, A survey’.¹²¹ In fact, the Committee makes it very clear that among the two major issues that the responding authorities¹²² faced, was: ‘the scope of compliance risks.

This section is all about sizing up the matter. A way of defining compliance is doing so from an operational perspective: ‘compliance is what(ever) the compliance function does.’ Whereas I find this unsatisfactory at best, and opportunistic at worst, the idea to define compliance from an operational perspective is, however, not as outlandish as it may seem at first glance. Often, new areas of attention tended conveniently to get allocated to compliance functions in reaction to some outside event. I would, in this respect, particularly mention the Siemens case, although being outside the stricter confines of regulation of the financial sector.

On 15 December 2008 the United States District Court for the District of Columbia (‘the Court’), entered the final judgment in the civil action of the US Securities and Exchange Commission (‘the SEC’) as plaintiff against Siemens as defendant.¹²³ Siemens had consented to the entry of the final judgment without admitting or denying the allegations of the complaint alleged by the SEC. The SEC’s claim was that Siemens had, over a period from 2001 through 2007 engaged in widespread and systematic public sector bribery. The bribes allegedly paid amount to approximately USD 1.4 billion.¹²⁴ Among the transactions were bribes regarding the metros in Venezuela and China, electricity projects in Israel, China and Iraq (the latter in connection with the UN Oil for Food Programme), telecoms in Bangladesh, Nigeria and Vietnam, identity documents in Argentina, medical equipment in Vietnam, China and Russia, traffic control systems in Russia, and refineries in Mexico.

¹²⁰ Compliance and the compliance function in banks 2005.

¹²¹ Implementation of the compliance principles 2008.

¹²² The authorities being the banking supervisory authorities from 21 countries, including those from the 13 Basel Committee member countries.

¹²³ *US Securities and Exchange Commission vs Siemens Aktiengesellschaft*.

¹²⁴ It is, in perspective to this amount, intriguing that according to the SEC complaint, Siemens made a profit of over USD 1.1 billion from the projects or sales capable of being brought in connection to the bribes. Cf the SEC’s Complaint, page 2.

The reason I find this case striking is that it appears to be commonly understood by all parties concerned that the occurrence of the alleged transactions amounting to bribes were to do with Siemens staff circumventing ‘internal controls’. Internal procedures towards checks-and-balances (eg the four-eyes principle) typically function to prevent manifestation of *operational risk*.¹²⁵ Notwithstanding this, the Court orders that a monitor is to assume the mandate of corroborating what is literary termed ‘a compliance programme’. The compliance programme should address the improvement of Siemens’ programme for ensuring compliance with the anti-corruption laws. There is a ready presumption that where internal control mechanisms serve to prevent the breach of laws, regardless of whether such laws may be seen as addressing areas particularly relevant to the company’s core activities (or business objectives), designing and enforcing such controls is a matter for the compliance function.

As indicated, the Siemens case is outside the stricter confines of my thesis, as it does not concern the financial sector. More so, where, in view of the highly-regulated environment of the financial sector, it is perfectly appropriate to use the term ‘regulatory compliance’, this is different in many other entrepreneurial corporate sectors. However, it is safe to say that it is generally accepted that corporate anti-corruption, also within banks, is within the scope of compliance. I regard the Siemens case as the harbinger of this development.

In this context, I add that it is generally recognised that corporate anti-corruption is within the class of CSR-norms. The joint draftsmen of Preadviezen Maatschappelijk Verantwoord Ondernemen 2010 moot this is as flowing from the ‘Profit-component’ of CSR. Whereas making profit may not come at the expense of harming the lawful interests of third parties, among which ‘People’ and ‘Planet’, this also encompasses the societal environment which has created the legal and economic frameworks within which the entrepreneur is permitted to attain his objectives. And this implies that the entrepreneur adheres to regulation addressing the conduct of business,

¹²⁵ Where Lambooy addresses corruption as a CSR-theme, she appears to depart from the position that preventing corruption is a matter for a company’s internal control environment, see eg Lambooy pp 175 and 176. But she also writes ‘[. . .] when doing business in weak governance zones, it becomes increasingly clear that a company should give high priority to implementing in-house compliance

specifically regulation aimed at preventing dishonest trade practices, such as corruption.¹²⁶ Lambooy concludes that the reason the fight against corruption is being explicitly identified as being part of CSR, is that corruption is considered to be one of the greatest challenges to achieving sustainable development, creating a disproportionate impact on poor communities and damaging the essence of society.¹²⁷ Whereas this is different from the subsumption under the Profit-component, this is in line with Lambooy's equating CSR to sustainability.

Other areas where it may be interesting to watch developments, are (observance to) a bank's own corporate governance rules, competition law, and corporate social responsibility. I address corporate social responsibility in chapter 5.

2.3.2 Focal areas of attention for the compliance function in banks

Following the statute law (including relevant secondary legislation) in its tracks, the next paragraphs will address the aspects subsumed under 'integrity' (paragraph 3.3.2.1), and duty of care from the MiFID as transposed into Dutch regulation (paragraph 3.3.2.2), which latter paragraph will also cover (special) duty of care as a private law norm.

2.3.2.1 Integrity

The Regulation prudential rules Wft subsumes a panoply of subjects under integrity.¹²⁸ This yields a disparate population of the compliance remit, which is difficult to comprise in a synthetic formula. In what follows, I shall limit myself to highlighting 1. systematic analysis of integrity risks; 2. procedures and measures warranting integrity; 3. preventing certain conflicts of interests; 4. incident management; and 5. client due diligence, including client acceptance measures.¹²⁹

programmes with a view to reducing the risk of corruption (hereafter: anti-corruption programmes).', Lambooy 2010, p 175.

¹²⁶ Eijsbouts *et al.*, p 23.

¹²⁷ Lambooy 2010, p 206.

¹²⁸ Articles 10 – 16 Regulation prudential rules Wft.

¹²⁹ I leave i) reliability of those exercising integrity sensitive functions; ii) back-to-back loans; and iii) checking against sanction lists without discussion.

As to 1 Systematic analysis of integrity risks

The Regulation prudential rules requires the addressees to take care systematically to analyse integrity risks.¹³⁰ *Integrity risk* is defined as:

‘[the] risk of harm to reputation or existing or future threat to capital or results of the financial company, resulting from inadequate compliance with requirements from or by virtue of any statutory provision.’¹³¹

Whereas the requirement of causation between the compliance breach and the reputation or financial loss may be taken to limit the scope, this definition is wide ranging. It opens up the scope of ‘integrity’ to any statutory laws or secondary legislation. Of course it may be argued that integrity on one hand and compliance on the other are distinct areas, but I would note, in anticipation, that in my view the remit of compliance must be capable of being defined. To me, the starting point is an orientation towards the institutions’ core activities.

For this contention, there is scant supporting material. However, first I would point to the (first) Memorandum of amendment to Wft of March 2005, which highlights the criterion of causality contained in the criterion that, where criminal acts or breaches of law committed by either the financial company or its employees are concerned, there must be a risk that the confidence in the financial company or the financial markets is tarnished.¹³² This is being illustrated by the observation that a financial company’s employee going through a red light will not harm such confidence.¹³³

The next reference source may well be the Dutch corporate governance code. Although already quoted above, I repeat part from the quote from Principle II.1 second paragraph:

¹³⁰ Article 10 para 1 Regulation prudential rules Wft.

¹³¹ Article 1 Regulation prudential rules.

¹³² ‘t Hart also points out that not all potential harm to a financial company’s reputation will come within the remit of the statute law’s definition of an integrity risk. See Jurgens en Stijnen 2008, p 67.

¹³³ *Kamerstukken II* 2004-2005, 29 708, nr 10, p 240.

‘The managing board is responsible for complying with all relevant primary and secondary legislation, for managing the risks associated with the company activities and for financing the company.’

I do not benefit from any explanatory notes or preparatory materials to this particular provision, and I am not aware that any exist, but I would draw the attention to the choice of terms: ‘all relevant legislation’, and: ‘the risks associated with the company activities’.

Some inspiration to this effect may also be taken from the Basel Committee’s paper on the compliance function for banks, where it stipulated that the category of norms taken as reference points (‘the compliance rules and standards’) ought to apply to the institutions’ banking activities.¹³⁴

The requirement for the institution systematically to analyse its integrity risks, resonates the Basel Committee’s 2005 paper on the compliance function. This paper provided that the compliance function supports senior management in identifying, measuring and assessing compliance risks. The Basel Committee puts this in a context of a planning cycle; at least on an annual basis senior management, with the assistance of the compliance function formulates plans to manage the main compliance risk issues facing the bank.

As to 2 Procedures and measures warranting integrity

The Regulation prudential rules Wft requires the addressees to take care that their policy on integrity¹³⁵ is reflected in procedures and measures.¹³⁶ The addressees must take care to implement such policies, procedures and measures, which must be systematically checked.¹³⁷ The addressees must take care to organise independent supervision on the implementation of such policies, procedures and measures, and

¹³⁴ See Compliance and the compliance function in banks 2005, para 3.

¹³⁵ The policy being the one required under article 3:10 para 1 Wft; ‘an adequate policy warranting the conduct of business with integrity.’

¹³⁶ Article 10 para 2 Regulation prudential rules Wft.

¹³⁷ Article 10 para 4 Regulation prudential rules Wft.

they must have procedures providing for reporting identified shortcomings or deficiencies to the compliance function.¹³⁸

It is interesting to see that the Regulation does not define which organisational function is responsible for setting these measures. In my view the responsibility for defining the policy (which, in the system of the statute law, precedes the procedures and measures meant here, *ie* in article 10 para 2 of the Regulation), firmly lies with the managing board. By having clarity on this point, the responsibility for setting the compliance tone and the strategic compliance agenda, which are an integral part of the managing board's duty to manage the company, are best manifested. This is not to say that the company may, and perhaps even should, engage the compliance function in defining the policy, given that the professional knowledge on all matters pertaining to the compliance domain, should be available within that function. There may yet be a certain doubt as to whether it is sound - conceptually and organisationally - to allocate all of defining the overarching policy, the subordinate procedures and measures, next to duties towards implementing, monitoring, maintaining oversight, and taking remedial action, to one and the same function – notwithstanding that it is understood that a bank's conduct of business should be audited by internal audit, and that a bank's compliance function should also be the object of regular audits.¹³⁹

As to 3 Preventing certain conflicts of interests

The Regulation prudential rules Wft requires the addressees to have at their disposal procedures and measures on preventing conflicts of certain persons' private interests with those of the institution or with the interests of the institution's clients.¹⁴⁰ To me, the gamut of preventing conflicts of interests touches the heart of the matter. At this juncture of my thesis, it is not the place to address the rationale for the manifestation of state powers by interfering in free societal relations through regulation. However, it is recalled that in company law as much as in financial market regulation, a core theme is mitigating the effects of opportunistic behaviour by, especially, those who

¹³⁸ Article 10 para 5 Regulation prudential rules Wft.

¹³⁹ Compliance and the compliance function in banks 2005, *eg* Introduction para 9, p 7.

¹⁴⁰ Article 11 Regulation prudential rules Wft.

are entrusted with the power to direct financial companies.¹⁴¹ It is evident that where private interests of persons connected to the bank, (may) conflict with the interests of the bank, or of the bank's clients, this is about the starkest manifestation of opportunistic behaviour getting in the way of the bank acting in its clients best interests. It is here that agency problems lurk. More than anything, this area is also one where sound corporate governance, in the sense of ensuring appropriate checks and balances on the actions and behaviour of the parties involved, is under the spotlight. Finally, I would note that for banks in general, it will be extremely difficult to dispel the public perception that these conflicts do not get the better of taking due care of clients' interests.

As to 4 Incident management

Addressees must have a risk management and record system.¹⁴² In itself, this requirement appears to be straightforward enough. I would note that the term 'incidents', brings us almost back full circle to the definition of integrity risks, addressed above. The Regulation prudential rules Wft defines incident as:¹⁴³

'an action or event posing a severe threat to the conduct of business with integrity of the financial company concerned.'

Where the conduct of business is not in integrity, this may cause integrity risks. As with the duty systematically to analyse integrity risks, the Regulation narrows the scope of 'incidents', this time by a requirement of materiality; the threat must be severe.

As to 5 Client due diligence, including client acceptance measures

The Regulation prudential rules Wft requires the addressees to have at their disposal:

1. Procedures and measures on client acceptance;

¹⁴¹ See *supra*, chapter 1, p 18, where I mooted that financial markets regulation purports to impose norms where the state, having weighed the reasons for and against such intervention, deems it necessary to intervene in the economic process.

¹⁴² Article 12 Regulation prudential rules Wft.

¹⁴³ Article 1 Regulation prudential rules Wft.

2. Client identification procedures and measures;
3. Organisational and administrative procedures and measures on classifying the risks of clients, products or services; and
4. Procedures and measures on analysing client data, also in relation to the services applied for by their clients and towards identifying diverging transaction patterns – these procedures and measures enable the institution to establish the integrity risks posed by certain clients, products or services.¹⁴⁴

Interestingly, arguably with the exception of the duty to address client acceptance, all four of these requirements smack of the Act on the prevention of money laundering and terrorist financing. In my view, the lawmaker sought to emphasise, as best as possible, that all of the duties and actions flowing from the anti-money laundering legislation, ultimately are within the domain of integrity (*ie* the integrity of the financial sector). This point is also clear from the Explanatory Memorandum to the criminal code, upon the introduction of the common law criminal sanction against money laundering.¹⁴⁵ Here, the lawmaker made it explicit that repressing money laundering as a matter for the common criminal law, concerns the integrity of the financial sector. The same point is made by the Basel Committee on Banking Supervision, in its paper Customer due diligence for banks. It was this paper that introduced the duty to take client acceptance measures from a policy perspective as the point of departure.¹⁴⁶ The same is now clear from legislative developments in the UK. With the substitutions into FSMA resulting from the Financial Services Act 2013, the FSMA defines ‘the integrity objective’, which comprises the element that the UK financial system is not used for a purpose connected with financial crime.¹⁴⁷

2.3.2.2 Duty of care from the MiFID

¹⁴⁴ Article 14 Regulation prudential rules Wft.

¹⁴⁵ *Kamerstukken II*, 27 159, nr 3, p 5.

¹⁴⁶ Customer due diligence for banks 2001, see Introduction, para 4, p 2, and subsequently, as a Principle to have a customer acceptance policy, in Principle 1 on p 6.

¹⁴⁷ The new section 1D coming into the amended FSMA.

The MiFID got implemented in the Dutch statute book in 2006, as an integral inclusion in the first iteration of the enactment of Wft.¹⁴⁸ The scope of the MiFID encompasses ‘investment firms’ and ‘regulated markets’, as well as – for specified parts – credit institutions authorised under Directive 2006/48/EC,¹⁴⁹ where those credit institutions provide investment services or perform investment activities.¹⁵⁰ For the purposes of my thesis, I leave regulated markets without discussion. The MiFID’s implementation into Dutch financial supervision law causes banks with their seat in the Netherlands which intend to combine banking with investment services and activities within the Netherlands, to be under an obligation to apply for a licence by virtue of article 2:13 Wft. Article 2:13 Wft provides that the regulator will grant the licence where the applicant shows he will comply with such legal requirements from Wft addressing:

- 1 orderly and fair market processes;¹⁵¹
1. protection of clients’ entitlements to financial instruments held by the bank on their clients’ behalf;¹⁵² and
2. certain rules pertaining to trading and settlement within a multilateral trading facility, where the applicant intends to carry on such a facility.¹⁵³

Banks with their seat in another member state¹⁵⁴ must have been authorised under the notification procedure for their Dutch banking activities to combine those activities with investment services or investment activities.¹⁵⁵ Banks combining banking and

¹⁴⁸ Thus, article 4:14 para 2 (c) Wft, was newly contained in the statute law in (the enactment of) Wft, as published in *Stb* 2006, 664. At the time of writing this, the Commission published its proposal for MiFID II on 20 October 2011. See *Proposal for a Directive of the European Parliament and of the Council*, 20 October 2011, COM (2011) 656 final], available on the web at: http://ec.europa.eu/internal_market/securities/docs/isd/mifid/COM_2011_656_en.pdf.

¹⁴⁹ The recast Banking Directive, p 1 *et seq.*

¹⁵⁰ The MiFID Article 1. The MiFID (still) refers to the Banking Directive, which has been repealed by the recast Banking Directive.

¹⁵¹ Article 4:14 para 2 (c) Wft.

¹⁵² Protection of clients’ entitlements is addressed by article 4:87 Wft.

¹⁵³ These rules for multilateral trading facilities flow from article 4:91a Wft.

¹⁵⁴ European Union Member states as well as other states which are parties to the Agreement on the European Economic Area, see article 1:1 Wft.

¹⁵⁵ Article 2:98 para 1 (a) Wft. The presumption being, of course, equivalence of regulation on the MiFID within the home member state. Under article 2:14 para 2 Wft DNB may notify the home country regulatory authority of the conditions which will apply by virtue of the general interest. Note that article 2:15 para 2 Wft indicates that the credit institution may conduct the activities listed in Annex I of the recast Banking Directive, unless the notification from DNB provides otherwise or does not contain a reference to those activities. The assumption must be that DNB will always carefully

investment services or investment activities, regardless of where their seat is, are commonly referred to as banking investment companies. The elements from article 2:13 Wft get us to the substantial requirement of duty of care.

2.3.2.2.1 Duty to act honestly, fairly and professionally

The first limb of article 2:13 Wft steers us to article 4:14 Wft. Article 4:14 para 2 (c) Wft, in turn, addresses orderly and transparent financial market processes ('fair and orderly functioning of markets'). Article 4:14 para 2 (c) Wft seeks to cover the duties for investment firms to act honestly, fairly and professionally in accordance with the best interests of their clients.¹⁵⁶ In substance, this requirement is a manifestation of the public law duty of care owed to clients, as are articles 4:25 para 1 and 4:90 para 1 Wft. Article 4:14 para 2 (c) Wft, pertaining to part 4 Wft, addressing behavioural supervision (as distinct from prudential supervision), adds this requirement to act honestly, fairly and professionally in the context of designing the conduct of business. There is no equivalent provision in article 3:17 Wft. The latter provision, sitting in part 3 Wft, which part addresses prudential supervision, is of general application to credit institutions.

Where banks do not fall under article 4:14 para 2 (c) Wft, by virtue of the fact they are not banking investment companies, this does not preclude them from being subject to (other) duties of care as a matter of public law.¹⁵⁷ This means that whereas investment companies have a statutory obligation to design the conduct of their business so that, broadly speaking, it is conducted honestly, fairly and professionally, banks, as such, do not. I hasten to add:

assess the notification made by the home country regulatory authority to establish whether the foreign bank wishes to combine its banking activities with investment services or activities. I would note, however, that Annex I of the Recast Banking Directive includes trading for own account or for account of customers in transferable securities, and portfolio management and advice.

¹⁵⁶ Cf article 4:90 para 1 Wft, providing that an investment company must apply itself to the provision of investment services in an honest, fair and professional manner for its clients' best interests.

¹⁵⁷ All from Wft: articles 4:19 para 1 on providing pre-contractual information, 4:19 para 3 on the commercial motive for the information, 4:20 para 1 on the timing of providing information, 4:20 para 3 on providing information during the ongoing contractual relationship, 4:23 on suitability, 4:24 on appropriateness (hence, articles 4:23 and 4:24 falling under the 'know-your-customers' denominator), and 4:25 generically on duty of care. See Busch 2010, p 245 *et seq*, and p 1014, esp footnote 6; and Jurgens en Stijnen 2008, p 65, where 't Hart confines himself at this cited juncture to observing that there remain public law duties of care for banks other than banking investment companies.

1. Many banks will be so-called banking investment companies to which article 4:14 para 2 (c) Wft applies;¹⁵⁸
2. Where a bank is not also an investment firm, it also owes a variety of public law duties of care.¹⁵⁹

For an odd and, in any case, indirect way of expressing that the public law duty of care is of generic application, see article 4:25 par 1 Wft. This provision causes generic application of the (public law) duty of care, but sees fit to relegate particularity to subordinate regulation. For the purposes of my thesis, the Regulation behavioural supervision¹⁶⁰ as well as the Regulation restrained remuneration policies¹⁶¹ are of particular interest. As to the latter, although outside the remit of my thesis, it is interesting to note that this regulation sees to set aside a principle of Dutch private law, which overrides *iustum pretium*.¹⁶²

2.3.2.2 Special duty of care as a private law norm

The financial markets law norm of duty of care is rooted in private law.¹⁶³ And, Dutch law enforces ‘special duty of care of banks’ under a parallel system of private law obligations.¹⁶⁴ This apparent duplicity creates confusion. My choice to address

¹⁵⁸ For banks with their seat in the Netherlands this flows from article 2:13 para 1 Wft. For other member state banks, the assumption is that their home state regulatory authorities have applied equivalent tests consequent to their implementation of MiFID and which will be assessed under the notification procedure under article 2:14 Wft – this follows from article 2:98 para 1 (a) Wft.

¹⁵⁹ I listed such duties from Wft in footnote 157 above.

¹⁶⁰ *Stb* 2006, 520, together with *Stb* 2008, 546.

¹⁶¹ *Stb* 2010, 806.

¹⁶² Article 1486 of the previous Dutch Civil Code formed an explicit prevention of an action on the grounds of disadvantage. HR 28 October 2011, *LJN* BQ5986, lays down that an unbalance between the performance on obligations does not, as such, constitute a breach of *bona fides*. My source: Hallebeek 2013, p 64.

¹⁶³ With Eisma, see below, it can be said that duty of care is ‘essentially’ a private law norm. Schonewille appears to assume private law origination of duty of care, and, in any case, whilst observing there are parallel private and public law foundations for duty of care, addresses the private law foundations first. See Schonewille 2011, pp 9 *et seq.* Also, Scheltema en Scheltema suggest that duty of care has been ‘imported’ from the law of obligations into financial markets law, *cf* Scheltema en Scheltema 2009, p 62.

¹⁶⁴ As developed in case law starting (somewhat hesitantly) in 1990 with *Van Lanschot/Bink*, followed in 1995 by *ABN AMRO/Hendriks, D/ING, Rabo/Everaars, MeesPierson/Ten Bos, Van de Klundert/Rabo, Van Zuylen/Rabo, Safe Haven, ABN AMRO/Van Velzen, De Treek/Dexia, Levob/Bolle, Stichting Gedupeerden Spaarconstructie/Aegon Bank, VEB/World Online, Fortis/Bourgonje, Van de Steeg/Rabobank*, and *A cs/NBG*.

the private law aspects of duty of care here may be criticised for being somewhat arbitrary. I choose to do it here in view of the substantive equitability of these obligations. We must distinguish between private law rules applying to banks owned by companies, subjecting them to company law, and private law rules governing (business) relationships banks have with third parties. Where enforcement of the duty of care through private law is concerned, we are in the category of private law norms originating from the law of obligations. Hence, in addressing the duty of care within this chapter, I shall leave company law without discussion.

I draw particular attention to the manner in which Eisma¹⁶⁵ in 2007 described the relation between private law duty of care and its ‘translation’ into financial markets law. He observed that a somewhat disguised purpose of (Dutch) financial supervision law is to accommodate sanctioning of a system of private law obligations through public, or in any case administrative, law.¹⁶⁶ He stressed that duty of care is the single most striking example of norms from an essentially private law character, having been ‘plagiarised’ into the public law. Eisma admonished that such plagiarising has the undeniable drawback that nuances and subtleties are lost. He then writes:

‘[U]nder concrete circumstances, many private law rules are corrected by reasonability and fairness, *cf* for instance article 2:8 par 2 and 6:248 par 2 BW.’¹⁶⁷

I believe that exactly this same point is made by Snijders in 2012,¹⁶⁸ five years beyond Eisma’s publication:

‘In all these cases however, it must be considered that the application of public law conduct of business rules in the context of a specific contractual or other private law legal relationship, urges refinement and adaptation to the private law context and the parties’ interests determined by private law. Such conduct of business rules, for instance, provide for the impact of reasonability and fairness, but the margin of appreciation necessary to refine and to procure such adaptation, ought to be derived from this

¹⁶⁵ S E Eisma, *Het doel van de Wft: een juridische benadering*, in Busch 2007, p 29.

¹⁶⁶ Note that this may also, as it were, work the other way around. Knigge and Bakker write that case law accepts that through the concept of societal care, the provisions on conduct of business from public law, take effect in private law. See Knigge and Bakker 2011, p 55. *Cf* Van Baalen, in Busch 2010, pp1014 through 1018.

¹⁶⁷ Busch 2007, p 29.

identical reasonability and fairness. For instance, this is no different as regards societal propriety or proper social conduct, requisite where a tort has been committed.’

Intriguingly, Eisma’s view failed to survive the modernisation of the book in which it first appeared. *Onderneming en financieel toezicht* saw its second edition in 2010 and Eisma co-authored a chapter on the objectives of Wft, the remit of which is no longer narrowed down to legal analysis, as it had been in his contribution to the first edition. In the more recent, modernised(?) chapter, with explicit and repeated reference to economic theory, the requirement of regulation, including conduct of business regulation (and hence, such parts of regulation which address duty of care), is endorsed as a matter of necessity.¹⁶⁹ Of course, I should say that the specific matter of the foundations and origins of the norms on conduct of business, is not addressed in any detail, but I do sense that Eisma’s fairly critical approach to Dutch conduct of business regulation under Wft, is overridden, or in any case, purged.

Where Scheltema and Scheltema analyse the relation between public and private law in Dutch financial markets regulation in view of the financial economic crisis of 2008, they are outspoken indeed in their outright rejection of the ‘translation’ of the private law duty of care into public law.¹⁷⁰ They argue that it is impossible to translate private law norms into public law, if only because doing so will always remove the private law norm from its context.¹⁷¹ Hence, in their view, it is undesirable to sanction private law norms through administrative law.¹⁷² According to these authors, the formulation of public law conduct of business rules, needs to form a considerate reflection of the objectives of the public law. Hence, the point of departure is that where there is no public interest involved in regulating the

¹⁶⁸ Snijders 2012, p 953.

¹⁶⁹ M P Boots, S E Eisma, D Schoemaker, De doelstellingen van de Wft, in Busch 2010, pp 15 and 16: ‘[D]e noodzaak van het gedragstoezicht, evenals dat van het prudentieel toezicht, vloeit voor een belangrijk deel voort uit de informatieasymmetrie tussen de afnemer en aanbieder van financiële producten of diensten.’

¹⁷⁰ Scheltema en Scheltema 2009, p 62.

¹⁷¹ They (only) give two examples; article 8 para 8 of the Act enforcement of consumer protection, *Stb* 2006, 591, which consists of a simple reference to an integral paragraph from the Civil Code (*sc* paragraph 3A from Title 3, book 6 BW) and provides that all such provisions must be complied with. The second example is duty of care.

¹⁷² *Ibid*, p 64.

relationship between market parties, private law suffices. Only if there is an objective justification for state supervision, should the rules be laid down in public law.¹⁷³

Tjong Tjin Tai observes that the way financial service providers will arrange for their compliance with duties of care originating from public law is a translation into a ticking-the-box exercise. Tjong Tjin Tai then goes on to write that where private law duties of care concern the assessment in reality of and reacting to the individual position of the counterparty, these duties of care go beyond their public law equivalents.¹⁷⁴ I feel inclined to read a greater affinity with private law duty of care than with public law duty of care into his comments.

I note that care needs to be exercised in appreciating that the above references to Scheltema and Scheltema and to Tjong Tjin Tai, may well concern sanctioning under the public law system. Scheltema and Scheltema particularly deal with the question of the enforcement under administrative law of an originally private law norm. This is what Cherednychenko terms: 'private financial supervision law';¹⁷⁵ public law conduct of business rules on duty of care in providing financial services to (prospective) clients, imposed upon financial companies as licensing conditions for the conduct of business as a matter of financial supervision law.¹⁷⁶ Thus, the context is to be distinguished from the application of norms now having been codified into public law, by civil courts in private law suits.

So, back to enforcement of the duty of care in private law suits. Dutch literature discusses whether Dutch courts, in doing so, are at liberty to impose further reaching obligations than those originating from the MiFID. Busch is outspoken in his view that (the Dutch civil) courts do not have such liberty.¹⁷⁷ He points out that the MiFID, for the greater part, provides for maximum harmonisation,¹⁷⁸ prohibiting member states from imposing stricter norms where their authority to do so does not flow from the MiFID *expressis verbis*.¹⁷⁹ In countering the arguments Busch identifies from the

¹⁷³ *Ibid*, p 83.

¹⁷⁴ See his note to *Fortis/Bourgonje* at 1.

¹⁷⁵ D: financieel toezichtprivaatrecht.

¹⁷⁶ Cherednychenko 2012, p 223.

¹⁷⁷ Busch 2012, p 70.

¹⁷⁸ MiFID implementing directive, article 4.

¹⁷⁹ *Ibid*, p 67.

adversaries' camp, Busch adduces, first, that financial supervision regulation with an *ex ante* perspective, will not lead to solutions which are unacceptable *ex post*. The reason that this is, in his view, a mere theoretical position, lies in the high and well-developed degree of protection of investors, which will only increase under MiFID II. Second, Busch invokes the principle of the certainty of the law. Investment companies should not be confronted with special private law duties of care reaching farther than those from the MiFID duties, severe as these are.¹⁸⁰

Others, however, uphold the courts' discretion on the matter, which they construe, above anything else, on the autonomous characters of the public and private law systems. Hence, Cherednychenko, who addresses whether private law still has its role to play, or is relegated instead to sanctioning breaches of administrative law norms, concludes that the private law norm continues to exist, notwithstanding that it (*ie* the private law norm) has seen translation into a public law counterpart. Cherednychenko admonishes to this his contention that public law norms do not constitute a *specialis* to the private law norm, but that there exists a 'truly double system'. In his view, the way public law norms take shape in private law relations brings that the sets of norms in either systems will not grow apart altogether – and this will prevent too much uncertainty of the law. Where public law norms give greater protection than the private law counterparts, the public law norm will in fact prevail – but not the other way around.¹⁸¹

Cortenraad is an outspoken believer in the individual right of existence of the special duty of care as a private law norm adjacent to the public law behavioural norms.¹⁸² And, in this respect, he also unambiguously formulates that the content of the private law norm may vary from being narrower to further reaching than the public norm duty. And, I applaud that Cortenraad stresses that the right of existence of the private law norm is corroborated (reinforced) by the illegibility of Wft!¹⁸³

¹⁸⁰ *Ibid*, p 71.

¹⁸¹ Cherednychenko, p 231.

¹⁸² Cortenraad 2012, p 704.

¹⁸³ *Ibid*, p 705.

2.3.2.3 Special duty of care

In the broader context of my thesis, I find the private law origins of the duty of care of particular interest. As a matter of private law, special duty of care is inextricably related to reasonability and fairness.¹⁸⁴ At Dutch law, relations between persons ('social relations') are governed by the norm that one owes *a duty of care*.¹⁸⁵

This duty of care has its origins in *Lindenbaum/Cohen*. The Supreme Court ruled that an unlawful act may also concern acts breaching the care¹⁸⁶ owed, in societal relations, to another's person or goods. The norm from *Lindenbaum/Cohen*, is now codified in article 6:162 par 2 BW, where it is phrased as breaching what may, according to unwritten law, be appropriate in societal relations.¹⁸⁷ Importantly for the present purposes, Dutch private law thus already imposes a 'societal norm' to have regard to the justifiable interests of others – a duty of care of sorts – in cases where there is no contract, and absent any circumstances classifying as a 'legal relationship' outside contract, which legal relationship is governed by reasonability and fairness.¹⁸⁸ Whereas the terms 'care' (propriety) on one hand, and 'reasonability and fairness' on the other, may have much in common, under Dutch law reasonability and fairness impose a higher, more stringent standard.¹⁸⁹

Where banks have a contractual relationship with their clients, duty of care arises as a straightforward term of the contract itself. Article 2 of the General Banking Conditions 2009 provides that the bank shall exercise due care when providing services *and* that in its provision of services it shall take the customer's interests into

¹⁸⁴ The link between reasonability and fairness and banks' 'special duty of care' is made *expressis verbis* in *Van de Klundert/Rabo*, dictum at 3.6. Note that *Van de Klundert/Rabo* concerned a contractual relationship.

¹⁸⁵ Nieuwenhuis 1974, p 54.

¹⁸⁶ The literal term used by the Supreme Court being 'zorgvuldigheid' in stead of 'zorg'. This may seem semantics, but is not entirely without relevance in the present context.

¹⁸⁷ The Dutch text is difficult to translate; 'hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt'. Warendorff, Thomas and Curry Sumner's translation of article 6:162 para 2 BW is: 'Deemed tortious are an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct. See Warendorff, Thomas and Curry-Sumner 2009.

¹⁸⁸ Asser – Hartkamp/Sieburgh 2010, 398 lists such relationships recognised in case law as being governed by reasonability and fairness. For our purposes, especially the pre-contractual phase and the cases where the relationship between one of the contracting parties and certain third parties concerned in the agreement, have relevance.

¹⁸⁹ Nieuwenhuis 2003, p 54.

account to the best of its ability.¹⁹⁰ In the contractual relationship between bank and client, article 6:248 par 1 BW applies,¹⁹¹ which takes with it that the nature of the contract, statute law, custom and reasonability and fairness add to its consequences. Reasonability and fairness nowadays have, as a pairing of terms, always the same consistent meaning.¹⁹² Key to appreciating the consistent relevance of reasonability and fairness is their nexus to article 3:12 BW,¹⁹³ providing that in establishing the requirements imposed by reasonability and fairness, due consideration must be given to general principles of law, the convictions of law as they exist in the Netherlands, and the societal and personal interests of those interested in the matter to hand. On the meaning of article 248 par 1 BW, suffice it to say here that in legal relationships governed by reasonability and fairness, the parties to that relationship must have regard to each other's justifiable interests.¹⁹⁴

In addition, where the contractual relationship between bank and customer may properly be classified a 'contract of services'; one under which the bank undertakes to perform certain activities outside employment, such activities not consisting of making a material object, safekeeping, publishing or transporting, article 7:401 BW provides that the bank must observe the care owed by a good service provider. It is argued that this norm is no more than a modern day translation of a general contractual norm (discussed above), the reasonability and fairness governing the relationship between debtor and creditor.¹⁹⁵ Cortenraad adds the proviso that the obligation from article 7:401 BW only concerns the way the institution performs its obligations arising from the contract. Cortenraad writes that this causes the obligations flowing from article 7:401 to be more limited than those from banks'

¹⁹⁰ Dutch Bankers' Association, *General Banking Conditions 2009*, 27 July 2009. This wording does not make it clear whether exercising due care and taking the customer's interests into account to the best of the bank's ability, are equivalent obligations, or, in stead, distinct, and hence, multiple ones. The General Banking Conditions are binding by virtue of article 2:232 BW.

¹⁹¹ In fact, article 248 BW is binding in nature and cannot be contracted out, see Asser – Hartkamp/Sieburgh 2010, 380.

¹⁹² Asser – Hartkamp/Sieburgh 2010, 385.

¹⁹³ As much as to article 6:2 BW.

¹⁹⁴ Case law ranging from *Baris/Riezenkamp* through the more recent *Vodafone/ETC*. Where *Baris/Riezenkamp* is concerned, I should note that the Supreme Court explicitly paved the way for a 'legal relationship' preceding the actual existence of the contractual one; 'parties, by entering into negotiation toward the conclusion of an agreement, relate to each other in a special legal relationship, governed by good faith.'

¹⁹⁵ See Asser – Tjong Tjin Tai 2009, 93.

special duty of care developed under case law.¹⁹⁶ For our purposes, it is relevant to add that this open norm, duly typified as a blanket-norm, aims to accommodate all relevant circumstances of a given situation. Hence, the nature of the service contract, the interests involved in the given situation and, last but not least, the profession or the branch in which the service provider operates.¹⁹⁷ Thus, clearly, where banks are concerned, the general private law widely opens the doors to the case law specifically addressing the remit of their (special) duty of care.

Van Lanschot/Bink

In case law, the first – somewhat hesitant – step on the way leading to a spate of judgments postulating the special duty of care owed by banks, is *Van Lanschot/Bink*.¹⁹⁸ In it, the Supreme Court ruled that:

‘[. . .] a professional credit provider like the bank — which as a rule is better able to assess the risk the surety runs, than is the private party who is prepared to provide the guarantee on account of his personal relationship to the debtor — may only contend that the error remains to be for the account of the private surety, if he claims, and in so far as necessary, proves, that he has informed the surety on those risks.’¹⁹⁹

The aspect making *Van Lanschot/Bink* worthy of note is that caring for the client’s interests could well amount to consequences contrary to the bank’s own interest.²⁰⁰

ABN AMRO/Hendriks

The Supreme Court’s ruling in *ABN AMRO/Hendriks*²⁰¹ is in line with *Van Lanschot/Bink*, but, and this makes it worthwhile mentioning it, the ‘societal’

¹⁹⁶ Cortenraad 2012, pp 701 and 702.

¹⁹⁷ Asser – Tjong Tjin Tai 2009, 94, 97-99.

¹⁹⁸ Tjong Tjin Tai refers to *Van Lanschot/Bink* in his comment to *Fortis/Bourgonje*.

¹⁹⁹ Dictum at 3.4. In his note to this case, Brunner mentions that under English law, where the prospective surety is a client of the bank himself, the bank should advise the surety to obtain expert advice. This duty originates from *the special relationship of trust* between the bank and its client, note C J H Brunner, at 3.

²⁰⁰ Tjong Tjin Tai observes this in his note to *Fortis Bourgonje*, at 1.

²⁰¹ The Supreme Court rules that the bank’s duty of care (which origination was also explicitly sourced to the then prevailing General Banking Conditions) remains to apply where the bank has a conflict with its client. See dictum at 3.4. The Court of Appeal, see dictum at 3.1.3, had ruled that *the societal role of banks* prevents accepting that they provide incorrect information to clients on their legal position, a ruling not meeting with disapproval from the Supreme Court. Attorney General Vranken admonishes that the case concerned the legal relationship between a bank and its client, in which the professional bank is confronted with a generally unprofessional client, that their relationship is one of

component becomes part of the customary jargon. I should note that, *ABN AMRO/Hendriks* addresses *contractual relationships*.²⁰²

Rabo/Everaars

From there, we get to *Rabo/Everaars* in which the term of art ‘*special duty of care*’ is coined for the first time. The Supreme Court seeks to reiterate, with approval, the Appeals Court’s consideration that:

‘[I]n view of the possibly very big risks the client-investor may run in options trading, the Bank is – as particularly professional and expert in this field – held to a special duty of care on the matter vis-à-vis private, non-professional clients. Apparently the Court has inferred this duty of care from that which the tenets of reasonability and fairness, in light of the contractual relationship with clients like these, carry along.’

The Supreme Court also rules that the duty of care at issue is one the nature of which purports to protect the client against the danger of his own carelessness or lack of judgment.²⁰³

MeesPierson/Ten Bos

Early in 1998, the Supreme Court cast its judgment in *MeesPierson/Ten Bos*. The ‘societal’ component that had already been seen in *ABN AMRO/Hendriks*, is re-emphasised. By testament a mother had been granted the usufruct over the estate from the father of two daughters. The mother had appointed an agent to manage the assets. This asset manager transferred part of the estate to a bank account with Rabo. Another part of the estate was invested in American stocks, for which investment the purchase price was borrowed from the bank. The American stocks depreciated which led to a capital loss. The daughters claimed against the bank.²⁰⁴ The Supreme Court rules:

‘The Court of Appeal has correctly judged that the societal function of banks carries with it a special duty of care, as much as towards their clients on account of the

trust and that the bank owes a contractual duty to have due consideration for the client’s interests. Vranken then explicitly refers to *Van Lanschot/Bink*, see conclusion Vranken, at 21.

²⁰² As does the later judgment *Van de Klundert/Rabo*.

²⁰³ *Rabo/Everaars*, dictum at 3.3 *in fine*.

prevailing contractual relationship with them, as towards third parties whose interests it must have regard to on the grounds of what may, according to unwritten law, be appropriate in societal relations.’²⁰⁵

This judgment reinforces the explicit reference to banks’ ‘societal function’. Attorney General De Vries Lentsch-Kostense – clearly applauding this phrasing – explains such particular choice of words as the Appeals Court’s pointing to the special duty of care which is incumbent on banks.²⁰⁶ Importantly, and in no uncertain terms, the judgment forebodes banks’ special duty of care towards third parties whose interests it must take into account.²⁰⁷ De Vries Lentsch indicates that in establishing what the duty of care in societal relations, actually requires, the standards applying in the contractual relationship, will have a certain reflex effect.²⁰⁸

Safe Haven

Especially apposite where it concerns banks’ special duty of care towards *third parties* is the Supreme Court’s judgment in Fortis/Sichting Volendam, known as *Safe Haven*. Claimants against Fortis Bank were investors in a limited company in incorporation, Safe Haven. This company had been registered with the trade register with the intended purpose of providing investment advice. The company’s founder had, in his capacity as director of Safe Haven, entered into investment advisory contracts with numerate investors. At the founder’s request, the bank had opened a bank account in the name of Safe Haven. Forty-two investors remitted large amounts to Safe Haven’s account. As such, they had no contractual, pre-contractual or any ‘other’ relationship capable of being classified as a ‘legal relationship’ outside

²⁰⁴ This ultra-brief description of the facts is derived from Kleijn’s note, see at 2.

²⁰⁵ Dictum at 3.6.2.

²⁰⁶ In her conclusion, at 15.

²⁰⁷ Under the circumstances of the case, these third parties were the daughters Ten Bos, which had become the ‘bare-owners’ of funds held in the bank account. The mother/ guardian had been granted the usufruct, and acted as the legal representative of her daughters. The bank had no contract with the daughters. The account was initially administered under the name ‘Heirs J H ten Bos’, and had later been named ‘minors Karen M M and Yvette B M ten Bos’, and ‘Capital bare-ownership’.

²⁰⁸ In her conclusion, at 15.

contract, which legal relationship is governed by reasonability and fairness²⁰⁹ with Fortis²¹⁰ whatsoever. Well over f16 million (over €7.2 million) got lost.

Through a foundation, incorporated with the objective of representing the interests of those having invested in Safe Haven,²¹¹ the claim against Fortis was that the bank had accountably failed in its duty to ascertain whether, at the opening of the account, the accountholder acted in conformity with the law. The foundation asserted that, in any case, from a certain moment, the bank ought to have known that Safe Haven's founder acted unlawfully, and it should then have acted to close out the account.

The Supreme Court, explicitly²¹² quoting the formula²¹³ from *MeesPierson/Ten Bos* on the foundation of banks' special duty of care on their societal function, acknowledges Fortis's duty to have regard to claimants' interests. The Supreme Court then rules that the remit of duty of care depends on the circumstances of the case and that certain duties flowing from the public law²¹⁴ also purport to protect the interests of investors such as claimants, is among the circumstances. Mok seeks to phrase it thus:

“banks' duty of care is not purely contractual, and therefore owed to clients, but also *societal*, and therefore *erga* third parties.”[emph from me]²¹⁵

Although somewhat beside the particular point (the special duty of care being founded upon banks' function in society) addressed at this juncture, I note that where public law duties demonstrably – in *Safe Haven* this being sourced from the *travaux préparatoires* to the then Act in the Supervision on the custody of securities – also

²⁰⁹ Asser – Hartkamp/Sieburgh 2010, 398; case law recognises that there are all matter of relationships which are governed by the higher standard of reasonability and fairness. Especially the pre-contractual phase and the cases where the relationship between one of the contracting parties and certain third parties concerned in the agreement, have relevance in this context.

²¹⁰ More to the matter, with Generale Bank, a predecessor to Fortis.

²¹¹ Cf article 3:305a BW – the foundation representing equivalent interests of others.

²¹² *Ie* including the source reference to *MeesPierson/Ten Bos* from NJ.

²¹³ Dictum at 3.6.2.

²¹⁴ The facts of the case occurring between 1996 and 1998, the public law at issue being the then Act on the Supervision on the custody of securities (*Wet Toezicht effectenbeheer*).

²¹⁵ See note Mok at 2. From Mok's note, I should also mention that he refers to banks' exerting a degree of oversight on their clients' activities, for instance on the matter of money laundering and financing of terrorism. He classifies this as assisting the judicial authorities which may be classified as civil duty.

seek to protect investors' interests, such public law duties are thereby capable of being invoked in a civil law suit.²¹⁶ Doctrinally, outside contractual relations, this is the so-called requirement of relativity from article 6:163 BW.²¹⁷ Van Baalen submits that where financial markets' regulation is concerned, the 'hurdle' of relativity is possibly lower than it would appear *prima facie*; since, from the moment a public law rule also purports to protect the customers' interests, relativity is a given.²¹⁸ Next to this – so as to properly distinguish contractual relationships – I would add that Mok²¹⁹ explains that public law duties will be reflected within contractual relationships through article 6:248 par 1 BW.

Fortis/Bourgonje

In 2010, the Supreme Court ruled in *Fortis/Bourgonje*.²²⁰ The Supreme Court and its attorney-general are not saying the same. Whereas A-g Wissink states in his conclusion that: "banks' special duty of care arises from their societal position",²²¹ the Supreme Court rules that: 'the nature of the management agreement between parties, causes Fortis, as particularly professional and expert in the field of asset management, to be under a special duty of care, based on the tenets of reasonability and fairness.'²²² I submit that the Supreme Court carefully as much as deliberately sought to distinguish from the attorney-general's formulation. From here, it is interesting to look at Tjong Tjin Tai's note, who admonishes that this judgment is illustrative of recent case law, highlighting the aspect of the special duty of care finding its underpinning from banks' societal position and their special expertise.²²³ I go along with the dichotomy Mok phrases in his note to *Safe Haven*;²²⁴ being that in contractual relationships (the) duty of care originates from the tenets of reasonability and fairness, and beyond that, the duty of care is societal and concerns the interests of

²¹⁶ Breaching the provisions of Wft does not *eo ipso* impair the validity of private law juridical acts. This flows from article 1:23 Wft. Thus, where a private party seeks to invoke protection by a provision from Wft, this needs to be postulated in a civil law suit. Closely related to the provision of article 1:23 Wft is article 1:75 para 3 Wft, which provides that where the regulator issues an instruction, this does not impair contracts between the addressee of the instruction and third parties.

²¹⁷ Article 6:163 BW provides: [T]here is no obligation to pay damages where the violated norm does not purport to protect against the damages which have been suffered by the injured party.

²¹⁸ Busch 2010, p 1015. I would note that Van Baalen erroneously submits that relativity is equally relevant in contract law as it is in tort law. See Kersten en Diekman 2014, p 261.

²¹⁹ In his note to *Safe Haven*, at 2.

²²⁰ *Fortis/Bourgonje*.

²²¹ At 3.10.

²²² Almost exactly similar to its ruling in *Rabo/Everaars*.

²²³ See his note to *Fortis/Bourgonje* at 1.

others. It is with this in mind that I believe that Tjong Tjin Tai reads too much into the Supreme Court's ruling.

2.3.2.4 Prevention of financial crime

Article 3:17 Wft requires banks to design the conduct of their business in a manner warranting the conduct of the business with integrity. Article 3:17 para 2 (b), 2° Wft provides that integrity comprises preventing the financial company or its employees from committing criminal offences or other breaches of statutory laws, which may harm the confidence in the financial company or in the financial markets. I already mentioned that the lawmaker finds that integrity comprises 'relational integrity', and that this comprises, next to the market conduct of the financial institution in its relation to third parties, *the conduct of third parties damaging the integrity of the financial institution*.²²⁵ Article 14 para 1 Regulation prudential rules Wft requires procedures and measures on client acceptance. Immediately thereupon, para 2 requiring formality on identification, explicitly points out that this is *without prejudice* to the Act on the prevention of money laundering and financing of terrorism.

In so doing, surely, the lawmaker seeks to express that all of the duties and actions following from anti-money laundering and sanctions²²⁶ legislation pertain, in the ultimate analysis, to the domain of integrity. When the lawmaker introduced the offence of money laundering into the common criminal law, he stated that repressing money laundering is about the integrity of the financial sector.²²⁷ In the Explanatory Memorandum to our current anti-money laundering Act,²²⁸ the lawmaker first puts it that the Act pertains to rule making concerning the integrity of financial-economic processes. For my purposes, it is particularly relevant to note that the lawmaker provides this explanation, where he describes the money laundering Act in relation to other statute laws, such as Wft and the Sanctions Act 1977.²²⁹ In my view it is odd

²²⁴ At 2.

²²⁵ *Kamerstukken II*, 28 373, nr 3, p 11

²²⁶ Where sanctions are concerned, also see article 16 Regulation prudential rules Wft.

²²⁷ *Kamerstukken II*, 27 159, nr 3 p 5.

²²⁸ Wwft.

²²⁹ *Kamerstukken II*, 2007-2008, 31 238, nr 3, p 5.

that the Explanatory Memorandum to the anti-money laundering Act states that where Wft contains provisions covering client due diligence, their purview does not include preventing money laundering or financing of terrorism. In stead, where the Memorandum then continues to read that the purposes of Wft are *broader* than those of the anti-money laundering Act, it is entirely correct.²³⁰ In any case, where, as a matter of conducting the business with integrity, a bank must prevent itself or its employees from committing criminal offences, this will include committing the common law criminal offence of money laundering,²³¹ as well as such offences from the anti-money laundering Act and the Sanctions Act 1977, as are listed under the Act on economic offences.²³² The Explanatory memorandum to the anti-money laundering Act reads that where Wft addresses such aspects of integrity as preventing conflicts of interest, prevention of implication in criminal acts or implication in actions breaching what may, according to unwritten law, be appropriate in societal relations, this may be classified as ‘internal integrity’.^{233 234} I would note that this is unnecessarily confusing in view of the dimensions to integrity the lawmaker chose to distinguish in 2002 upon introducing integrity as an object of supervision. At the time, the aspects seemingly covered by internal integrity, were capable of being classified under either personal integrity, or organisational integrity.²³⁵

Be this as it may, I believe that it is appropriate to say that:

1. It is a purpose of Dutch *financial markets law* that banks take measures to prevent money laundering, financing of terrorism and breaching sanctions law; and
2. Where these two areas are grafted on (protecting the) integrity (of the financial markets), they are within the domain of compliance.

²³⁰ *Ibid*, pp 5 and 6.

²³¹ Where the bank has reported under the anti-money laundering Act, the facts reported may not serve as the basis of or serve prosecution on a suspicion of money laundering against that bank. Hence, reporting under the anti-money laundering Act yields defence against prosecution under common criminal law. This follows from article 19 para 1 Wwft, where it is labeled as ‘indemnification’.

²³² Wed. See, on Wwft, article 1 (2) Wed, and on the Sanctions Act 1977, article 1 (1) Wed.

²³³ As distinct from taking up business relationships with persons which may harm the confidence in the financial company or the financial markets.

²³⁴ *Kamerstukken II*, 2007-2008, 31 238, nr 3, p 5.

²³⁵ See *Kamerstukken II*, 2001-2002, 28 373, nr 3, p 11.

Breaching these generic duties flowing from Wft may cause administrative sanctions, irrespective of whether such breaches concur with breaches of any of the specific statute laws.

It is a safe assumption that the areas of anti-money laundering addressed by the anti-money laundering act, as well as certain financial aspects to the Sanctions Act 1977, are within the domain of financial markets law. One way of substantiating this is to take an entirely operational approach; where regulation provides for supervision on banks' by the regulator in these specific areas, we are thereby in the domain of 'financial supervision'. The anti-money laundering Act provides that the ministers of Finance and Justice shall by regulation jointly indicate persons tasked with the supervision of compliance.²³⁶ By Regulation of 18 July 2008, the ministers of Finance and of Justice have made such indication, involving employees of either DNB or the AFM.²³⁷ The Sanctions Act 1977 provides that the minister of Foreign Affairs together with the minister (most) concerned, may either indicate persons,²³⁸ or indicate legal persons²³⁹ tasked with supervision. On this basis, there are a number of subordinate instruments. I would draw specific attention to the Arrangement on the Supervision (of the) Sanctions Act 1977, issued jointly by DNB and the AFM.²⁴⁰

The fact that money laundering prevention is a matter of financial markets law, is – albeit somewhat indirectly – clear from the minister of Finance's 1996 memorandum forming the precursor to the reform of Dutch financial markets legislation.²⁴¹ In a side comment he notes that 'the so-called anti-money laundering legislation' will be left without discussion, as 'the objectives and design are not comparable to the general supervision acts.'²⁴² For what it's worth, where the Explanatory Memorandum to Wft to-be, addressed the financing of financial supervision as a whole, it included the cost

²³⁶ Article 24 para 1 Wwft.

²³⁷ Besluit aanwijzing toezichthouders Wet ter voorkoming van witwassen en financieren van terrorisme, 18 juli 2008, *Stb* 2008, 304.

²³⁸ Article 10 para 1 Sanctions Act 1977.

²³⁹ Article 10 para 2 Sanctions Act 1977.

²⁴⁰ Regeling van de Autoriteit Financiële Markten en De Nederlandsche Bank NV van 28 september 2005, houdende regels ten behoeve van de naleving van de bij of krachtens de Sanctiewet 1977 gestelde regels met betrekking tot het financieel verkeer (Regeling toezicht Sanctiewet 1977).

²⁴¹ Notitie inzake samenhang en verschillen tussen de financiële toezichtwetten, 30 augustus 1996, *Kamerstukken II*, 1995-1996, 24 843, nr 1.

²⁴² *Kamerstukken II*, 1995-1996, 24 843, nr 1, p 2.

of regulation²⁴³ for DNB and the AFM, resulting from the anti-money laundering legislation and the Sanctions Act 1977. It indicated that this cost was to be carried by the government.^{244 245}

Otherwise, especially from a doctrinal perspective, I could not find much in support of these two areas belonging to the category of financial markets law.²⁴⁶ In the introductory chapter to Busch 2010, we glean that the book does not cover all subjects which are rated among financial supervision law, and among the examples explicitly mentioned is the anti-money laundering Act. The reason given there is that the subject of anti-money laundering is *too far removed from the system of norms from Wft*.²⁴⁷ I note, first, that this goes to show that these subjects are part of financial markets law. I would add that the system of norms from Wft outspokenly seeks to cover integrity, and, as I wrote earlier, that covers prevention of implication in criminal acts where such implication is likely to harm the confidence in the financial company or in the financial markets at large.²⁴⁸ I therefore recommend that these subjects will find their way into a subsequent edition of Busch's book.

From a comparative perspective, I would note that the fourth regulatory objective of the Financial Services and Markets Act 2000, is the reduction of financial crime.²⁴⁹ There is an analogy to market confidence not being made explicit as a regulatory objective in the object clauses²⁵⁰ of Wft; this is also in contrast to the English position, where market confidence is in fact the first regulatory perspective.²⁵¹

²⁴³ I use regulation here as a translation for *preventieve handhaving*.

²⁴⁴ *Kamerstukken II*, 29 708, nr 3, p 37.

²⁴⁵ In deviation from so-called 'individual acts of supervision', which were to be charged out to the institutions under supervision. This is the current article 1:40 Wft.

²⁴⁶ As far as I can see Van Luyn, although acknowledging that financial markets law is not exclusively contained in Wft, does not make any reference to Wwft or the Sanctions Act 1977 at all. See Van Esch 2010, p 5.

²⁴⁷ At p 3.

²⁴⁸ See *supra*, p 53.

²⁴⁹ FSMA section 2 para 2 (d). See *infra*, p 81.

²⁵⁰ The (outspoken) purposes of Wft are gleaned from article 1:24 para 1 and article 1:25 para 1 Wft as the financial solidness, contributing to the stability of the financial sector, orderly and transparent financial market processes, fair relations between market parties and treating clients carefully. Not outspoken in either of the articles is 'integrity'; I mentioned earlier that there are instances in the (first) Memorandum of amendment to Wft in which integrity is labeled a goal of financial supervision. This was with reference to *Kamerstukken II*, 2004-2005, 29 708, nr 10, p 240. See *supra*, p 43.

²⁵¹ FSMA section 2 para 2 (a).

2.4 Compliance under English law

I shall confine myself to the focal area of my thesis, financial markets regulation. This brings us straight onto the domain of FSMA. FSMA designates the FSA as the (single) regulator for financial services in the UK.²⁵²²⁵³ The FSA approach to regulation is a hybrid from banking and securities regulation.²⁵⁴ Under FSMA, the FSA has rule-making authority.²⁵⁵ Under FSMA, '[I]n discharging its general functions, the Authority [*ie* FSA] must have regard to the responsibilities of those who manage the affairs of authorized persons.'²⁵⁶ FSA itself derives from this that: '[W]e will look to the senior management of firms to ensure that businesses are run in a sound and prudent manner, and in compliance with statutory and regulatory requirements.'²⁵⁷ Nelson adds to this that the provision of section 2 para 3 (b) FSMA, enables FSA to make 'intrusive rules'.²⁵⁸ The rules are laid down in the FSA Handbook, which starts off by defining the Principles for Businesses, 11 principles which are a general statement of the fundamental obligations of regulated firms.²⁵⁹

Key among such 'fundamental obligations', is Principle 3: '[A] firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.'²⁶⁰

From an overall perspective, it is first interesting to look at the FSA Dear CEO Letter Managing Compliance Risk in Major Investment Banks.²⁶¹ In it, FSA expresses it

²⁵² FSMA section 1. FSMA does not expressly provide that FSA is the regulator by exclusion, but simply starts off by providing that the FSA has the functions conferred on it by or under FSMA.

²⁵³ At the time of writing this, the UK Government expected the Financial Services Act to commence on 1 April 2013. The Financial Services Act became law by receiving Royal Assent on 19 December 2012. The effect of the Financial Services Act will be far-reaching and the regulatory system will undergo significant reform. As a consequence, the FSA described in this section will cease to exist as such – it will be split into two bodies. The outcome will look rather like our Dutch system as there will be a micro-prudential regulator (the Prudential Regulation Authority) and a conduct of business regulator (the Financial Conduct Regulator). All this will be overarched by the macro-prudential regulator, which will be styled as the Financial Policy Committee, which is to be accommodated within the Bank of England.

²⁵⁴ Nelson 2008, p 113.

²⁵⁵ FSMA section 2 para 4, where this is expressed as the function of making rules.

²⁵⁶ FSMA section 2 para 3 (b).

²⁵⁷ *Meeting our Responsibilities*, FSA, August 1998, para 124.

²⁵⁸ Nelson 2008, p 117.

²⁵⁹ See for this the FSA Handbook, PRIN 1.1.2.

²⁶⁰ FSA Handbook, PRIN 2.1.1, Principle 3.

attaches the highest importance to managing compliance risk. The letter does not define compliance risk.

In view of my perspective that compliance should rather be approached as an aspect of a bank's governance, it is relevant to point out at this place that FSA expresses it considers 'that exercising good compliance judgment can benefit by perceiving compliance as a risk management function.' The letter sets out the way FSA views good practices it has observed in the London operations of 15 major global investment banks managing compliance risk during 2006 and the first half of 2007. This view apparently yields that 'there are certain limitations in the extent to which a firm's approach to compliance risk can mirror its approach to managing other risks, particularly where the risks in other areas may be easier to quantify.' The good practices as observed by the FSA point towards cultural and behavioural aspects as key building blocks in the successful management of compliance risk. The cultural and behavioural aspects are highlighted under a category labeled Compliance culture, and there, it is mentioned that the desired compliance culture and desired behaviours are promoted by 'values' or 'tone from the top' statements.

The FSA pronounces it will not take action against a firm for practices relating to the management of compliance risk which it considers to be in line with the good practices described in the letter. The letter does not portend to set out firms' regulatory and legal requirements.

Whereas it thereby appears – albeit not as a representation of legal or regulatory requirements – that the FSA endorses the usage of values and tone from the top statements, I would point to the comment made on this particular point by Nelson that "one must agree, but in practice the direction to 'be good' tends to be opaque at best."²⁶²

²⁶¹ Managing Compliance Risk in Major Investment Banks – Good Practices, FSA Dear CEO Letter 19 July 2007, my source: http://www.fsa.gov.uk/pubs/ceo/compliance_risk.pdf

²⁶² Nelson 2008, p 121. Nelson is critical indeed on the FSA's proclaimed principles-based approach, whereby regulation focuses on outcomes rather than prescription. This is where he first draws the analogy with the parent who warns the child to be good. Nelson finds it hard to see the advantage of uncertainty over well thought out and well drafted detailed rules. *Ibid*, pp 46 through 48.

The regulatory rules addressing compliance and the function are to be found in the FCA Handbook under *Senior Management Arrangements, Systems and Controls* ('SYSC') 6.1. SYSC 6.1.1. provides that a firm must have 'adequate policies and procedures sufficient to ensure compliance [. . .] with its obligations under the regulatory system and for countering the risk that the firm might be used to further financial crime.'

Remarkably, the requirement under SYSC 6.1.1 is for the firm 'to ensure compliance' with its obligations under the regulatory system. Under the FSA Handbook in force up to 31 October 2007, the requirement had been that the firm *must take reasonable care*. To the particular concern that the post-MiFID requirement might be a more onerous obligation than the previous one, the FSA simply answered that "[T]he requirement on firms 'to ensure compliance' is a direct copy-out of article 13 para 2 of the MiFID."²⁶³

The definition of 'regulatory system' refers to all arrangements under FSMA, and it explicitly includes any relevant directly applicable provisions of an EU Directive or Regulation.

Fundamentally, the comparison to the Dutch situation yields yet another, more intriguing perspective. The Dutch starting point is formed by articles 3:10 and 3:17 Wft, which require that the company warrants the conduct of business with integrity. Whereas the English approach might, at first glance, appear to be more limited – the equivalent provision in SYSC 6.1.1 providing there is an obligation to ensure compliance, this is deceptive. PRIN 2.1.1, Principle 1 being: '[A] firm must conduct its business with integrity.' The FSA stated in its *Meeting our Responsibilities* paper of August 1998: '[T]he FSA will need to supervise and monitor all regulated firms to satisfy itself that they are complying with both the letter and the spirit of its regulatory standards.'²⁶⁴ The end result may well be that the UK approach, is potentially²⁶⁵ further reaching than the Dutch. Whereas both the Dutch and UK

²⁶³ *FSA Policy Statement* 06/13, Organisational systems and controls, November 2006, para 4.5.

²⁶⁴ *Meeting our Responsibilities*, FSA, August 1998, para 123.

²⁶⁵ The FSA Handbook does not moot a definition for 'integrity'. The substitutions into the amended FSMA as a consequence of the Financial Services Act 2012 introduce 'the integrity objective'. Section

approaches require the conduct of business with integrity – this requirement being the very first principle under the UK system – UK regulation contains an explicit standard requiring firms to ensure compliance.

Although categorised differently, the substantive requirements from the Dutch Regulation prudential rules Wft are all reflected under SYSC 6.1 ‘Compliance’. Hence, the firm must maintain a permanent and effective compliance function, operating independently, with the necessary authority, resources, expertise and access to all relevant information.²⁶⁶

Also, the compliance function has responsibilities capable of being compared to those provided for under the Dutch Regulation prudential rules Wft, where these address the additional provisions for banking investment companies, *ie*:

- monitoring and assessing the adequacy and effectiveness of the measures and procedures put in place toward minimising the risk of failure by the firm to comply with its obligations under the regulatory system, and the actions taken to address any deficiencies in the firm’s compliance with its obligations; and²⁶⁷
- to advise and assist the relevant persons responsible for carrying out regulatory activities to comply with the firm’s obligations under the regulatory system.²⁶⁸

The FSA Handbook²⁶⁹ contains three rules which are lacking from the Dutch Regulation prudential rules Wft, namely that:

1. a compliance officer must be appointed who must be responsible for the compliance function;
 2. the relevant persons involved in the compliance functions must not be involved in the performance of services or activities they monitor;²⁷⁰
- and

1D of the amended FSMA provides that the integrity objective is: protecting and enhancing the integrity of the UK financial system.

²⁶⁶ SYSC 6.1.3 and 6.1.4 read in conjunction.

²⁶⁷ SYSC 6.1.3 and 6.1.2 read in conjunction.

²⁶⁸ SYSC 6.1.3 para 2.

²⁶⁹ See SYSC 6.1.4 paras 2 through 4.

3. the method of remuneration of the relevant persons involved in the compliance functions must not compromise their objectivity and must not be likely to do so.

2.4.1 Compliance and financial crime – the UK perspective

In the Dutch system, the role of compliance where financial crime is concerned, is capable of being connected to integrity as the starting point. Hence, as described above, the Regulation prudential rules Wft formulates certain requirements on identifying clients, risk classification and monitoring, under the express qualifier that all such requirements apply without derogating from the Dutch anti-money laundering act.²⁷¹ The Dutch lawmaker's approach purports to indicate that all matters concerning the banks' client due diligence and/ or the integrity of their clients (as distinct from the integrity of the banks themselves), are within the (broader) domain of integrity. The starting point is formed by Wft providing that, as a matter of integrity, the bank must prevent business relationships with customers which may damage the confidence in the financial company or in the financial markets. At the introduction of money laundering as an offence under common criminal law in the Dutch criminal code, the accompanying Explanatory Memorandum expressed that repressing money laundering is about the integrity of the financial sector.²⁷² Where the specific statute laws on either the prevention of money laundering or economic or financial sanctions²⁷³ are concerned, whereas the Dutch lawmaker indicated they are all within the domain of integrity, they confine themselves to the specific goals of either preventing money laundering or compliance with international sanctions measures.²⁷⁴ The lawmaker also expressed that the overarching Wft and the subordinated regulations²⁷⁵ do not have the prevention of money laundering, but the wider remit of addressing the conduct of business with integrity as their objective.²⁷⁶

²⁷⁰ It may be argued that this is the elaboration of the requirement that the compliance function be independent, which is included in the Regulation prudential rules Wft.

²⁷¹ Article 14 paras 2 through 5 Regulation prudential rules Wft.

²⁷² *Kamerstukken II*, 27 159, nr 3, p 5.

²⁷³ *See* Wwft and the umbrella Sanctions Act 1977.

²⁷⁴ Where sanctions measures are concerned, these result from resolutions from international institutional organisations or international sanctions regimes. *See Kamerstukken II*, 31 238, nr 3, pp 5 and 6.

²⁷⁵ *See* subordinated to Wft, the Regulation prudential rules Wft, and the Regulation supervision of conduct of business financial companies Wft.

²⁷⁶ *Kamerstukken II*, 2007-2008, 31 238, nr 3, p 5.

As mooted above, although it is best construed as naturally flowing from the way Wft and the specific anti-money laundering legislation are connected through the overall principle of integrity, in the Dutch context, the specific laws are almost conspicuous in their omission to make a specific reference to the compliance function. This is different in the UK, and my assumption is that this is much 'helped' by the (integration of) the reduction of financial crime as the fourth Objective of FSMA.²⁷⁷ In comparison to the UK situation, the Dutch insistence on the difference between financial markets regulation on one hand, and addressing the specific areas of money laundering prevention and sanctions measures on the other, even though it is granted that all areas concern the integrity of the financial markets, appears to be artificial.²⁷⁸

FSMA section 2, para 2 defines the reduction of financial crime as the fourth regulatory objective. FSMA section 6 expands this by providing that this objective is about reducing the extent to which is possible for a firm to be used for a purpose connected with financial crime. Financial crime is defined as including any offences involving a) fraud or dishonesty; b) misconduct in, or misuse of information relating to, a financial market; or c) handling the proceeds of crime. FSMA section 6, para 2, provides that in setting its financial crime objective, FSA must have regard to the desirability of senior management being aware of the risk of their businesses being used in connection with the commission of financial crime, and taking appropriate measures to prevent it. It falls to senior management to take appropriate measures to prevent financial crime, facilitate its detection and monitor its incidence.

The FSA Handbook addresses financial crime under SYSC 6.3. It is intriguing to see that SYSC 6.3 is limited to making references to money laundering risk, whereas, as I noted above, the definition of financial crime in FSMA section 6 para 3 is wider. SYSC 6.3.5 makes an explicit reference to the (UK) Joint Money Laundering Steering Group ('JMLSG') guidance, by providing that the FSA, in considering whether a breach of its rules on money laundering has occurred, will have regard to whether a firm has followed the guidance. The JMLSG Guidance 2011, in turn,

²⁷⁷ Under the new Financial Services Act 2012, the prevention of financial crime is subsumed under a newly introduced 'integrity objective'; the new section 1D (from substitutions into FSMA resulting from the Financial Services Act 2012).

²⁷⁸ The Explanatory Memorandum to the Dutch anti-money laundering act (*Kamerstukken II*, 31 238, nr 3), might be accused of a certain degree of wordsmithing.

addresses the relationship between money laundering, terrorist financing and other financial crime.²⁷⁹

2.5 Concluding remarks – ‘compliance’ in Dutch financial markets law

All in all, where Dutch financial markets law addresses compliance, matters capable of being related to integrity, take centre-stage. The historical perspective illustrates that compliance originated from an organisational requirement that a compliance department was to assess whether the managing board had drafted explicit policy on minimising the risk of the bank or its employees acting without integrity. Currently, the definition of integrity risk from the Regulation prudential rules Wft, such risk under the definition likely to arise from ‘inadequate compliance with requirements from or by any statutory provision’, is yet again a bridge to integrity.

I quoted with enthusiasm from the parliamentary documents where these express that the policy of the financial company will have to admonish the creation of awareness, the promotion and the enforcement of acting with integrity²⁸⁰ – such expression illustrating the ‘front-load’ character of compliance.

The use of the term integrity within the statute law, also in view of the varied and disparate explanations in the *travaux préparatoires*, may well create uncertainty. It is a missed opportunity that the key provisions in Wft on integrity are phrased negatively only; making it seem as if integrity is warranted by preventing certain matters from occurring. As I remarked, the statute law appears to define the duty of care owed to clients outside integrity – and in any case separately from it.

The statute law does not provide a clear indication as to meaning and scope of compliance. Of course, it is but a snapshot freezing a given point in time and it will therefore always be capable of refinement. It is difficult to reconcile Dutch financial markets legislation with new and ever expanding European requirements. A

²⁷⁹ JMLSG Guidance 2011, paras 1.38 and 1.39.

²⁸⁰ *Kamerstukken II* 2004-2005, 29 708, nr 10 on page 240.

consequence of this will sometimes be that requirements have (had) to be written into the statute law, regardless of whether they readily fit into the overall context and system. Because of the important European element, it will be difficult and sometimes even impossible to strike provisions from Wft and underlying regulations. However, it looks as if coherence suffers from the disparateness of parties and interests involved in piecing together the body of Dutch financial markets law.

The degree to which resort is had to secondary legislation is worrying, especially where such secondary legislation demonstrates an apparent ambition to address (unnecessary) detail.²⁸¹ I find it a missed opportunity that the requirement to have a *compliance function* from article 21 Regulation prudential rules Wft is not comprised in Chapter 3 of that Regulation, addressing conducting the business with integrity, but, instead, in Chapter 4 thereof, which deals with the controlled conduct of the business. I find it confusing that the provisions from Part 3 Wft and from Part 4 Wft need to be looked at in conjunction, and it is difficult to establish whether, and if so, the extent to which a bank is under a duty to design the conduct of its business so that it is conducted honestly, fairly and professionally.²⁸² Altogether, I find the overlap which is the consequence of the forced distinction between prudential and behavioural supervision, unnecessarily confusing. Also, the reason to distinguish between conducting a policy warranting the conduct of business with integrity²⁸³ on the one hand, and designing the conduct of the business so as to warrant its conduct to be with integrity on the other,²⁸⁴ escapes me. The explanation we glean from the *travaux préparatoires*, doesn't convince.²⁸⁵

2.5.1 Looking forward

²⁸¹ With the related risk that compliance monitoring will focus on compliance with the detailed technical rules, which diverts from promoting the underlying principles. This type of risk resulting from complexity is acknowledged by the UK Treasury and the (UK) House of Commons Treasury Committee alike, *cf* HM Treasury, Sanctions for the directors of failed banks, July 2012, at 3.12, and House of Commons Treasury Committee, The FSA's report into the failure of RBS, 19 October 2012, at 75. Both these materials focus on the regulatory culture rather than on banks' internal environments.

²⁸² The provision from article 4:14 para 2 (c) Wft which is not in article 3:17 Wft.

²⁸³ Article 3:10 Wft.

²⁸⁴ Article 3:17 Wft.

²⁸⁵ I referred to *Kamerstukken II*, 2004-2005, 29 708, nr 10, p 240. There, we are told that designing the conduct of business is 'instrumental' to the policy. See *supra*, p 43. This is a nonsense, as 'policy' comprises all actions taken by the managing board.

I agree wholeheartedly with Eisma that any attempt to ‘plagiarise’ private law duties into the public law, has the distinct drawback of reducing flexibility and appropriate consideration of the particular circumstances of a case to hand. In my view there is already too much regulation.²⁸⁶ I am not confident that adding yet further detail will improve matters. In addition, I question whether there is a need for the lawmaker to impose requirements on the organisation of banks, covering such departments or functions as the compliance function. For this, I believe that greater reliance upon company law may prove beneficial. It is a matter for the managing board to comply with the law. The managing board must take due care in assuring that adequate capacity is organised towards conducting the business in full accordance with the law. This obviously means that where the bank’s core activities are subject to detailed and complex legal requirements, those requirements are to be approached from the perspective that they form an integral part of the bank’s business.

Whilst currently both articles 3:10 and 3:17 Wft, address the aspect of integrity, the latter article juxtaposes this to the controlled conduct of the business. I am in favour of separating these two aspects altogether, thus that all references to integrity are struck from article 3:17 Wft. This could lead to a sanitation; article 3:17 Wft could thereby be confined to addressing the *controlled* conduct of the business, such term encompassing solidness (only). This way, it would be clear that conducting the business with integrity is distinct from conducting the business in a controlled manner. Hence, it lifts the domain of integrity from the (other) areas which the law terms as falling within the category of managing (financial) risks.²⁸⁷

This then brings me to article 3:10 Wft, portraying integrity as hinging on *preventing* four classes of occurrences. The way this is done represents an entirely negative

²⁸⁶ Which ‘state of affairs’ is commented upon as worrying by De Kluiver 2012, p 1050, in the following terms: ‘The drawback is that the level-headedness as regards all these legislative initiatives is no longer self-evident and the attention to principles of law appears to be on the wane.’ In equal terms, see Labeur & Wibier 2012, p 1031: ‘The law making machine has started running full revs and many policy initiatives have now been transposed into concrete regulation. This has led to an avalanche of regulation which sometimes risks exceeding the absorption capacity of those having to apply financial markets law.’ Winter laments what he calls ‘the state of our company law’ and notes that: ‘we don’t know any more what we must regulate, for what companies it is to be regulated and how that should be done.’ See Winter 2011, p 488.

²⁸⁷ As indicated before, in article 3:17 para 2 (c) Wft, where it concerns the solidness this is listed as managing financial risks, managing any other risks possibly undermining the solidness of the financial company, and taking care to maintain the required financial ratios.

approach which also risks narrowing the remit of integrity, however openly the four classes are defined. Moreover, given that the Regulation prudential rules Wft contains an even greater array of items to be addressed under the banner of integrity, and whereas statutory instruments outside Wft also address matters concerning the integrity of financial economic processes,²⁸⁸ in the current constellation, I find there is no need to define any number of classes within Wft itself.

Drawing upon the comparison to the English regulatory position, in its expression of the legislative objectives, Wft is not outspoken on market confidence alongside the reduction of financial crime as the primary point of departure. With a certain degree of benevolence these objectives are capable of being read into the law, but this may only be done indirectly and by inference. Confidence features in two limbs under both articles 3:10 and 3:17 Wft, and the prevention of financial crime may be understood to be promoted where financial institutions prevent their staff from committing criminal offences. In view of this, where I get to my recommendations at the end of this thesis, I propose rewording article 3:10 Wft so as to express the prominence of market confidence and prevention of financial crime as (key) legislative objectives, but, at the same time, so that these two objectives are subsumed under 'integrity'.

²⁸⁸ I borrow this language from the Explanatory Memorandum to Wwft, see *Kamerstukken II*, 2007-2008, 31 238, nr 3, p 5.

3 Chapter 3 – Compliance and risk

3.1 Introduction

As I hope will be clear from the outset, to me, compliance ought not to be mistaken for a (mere) risk. From my excursion in chapter 2, it appears that:

1. (strictly) within the system of Dutch financial markets law, compliance is outside *risk management* (*cf* section 2.2.1.3); and
2. the Regulation on prudential rules Wft addresses ‘integrity risk’ (*cf* section 2.3.2.1).

The theme of risk has an important place in the debate on compliance. There is considerable uncertainty on whether compliance is (a mere manifestation of) risk. This chapter looks at compliance and risk. A foray into business economics literature picks this up by exploring whether business economics literature appears to identify compliance as a category in its own right (Section 3.2). Whereas I have been unable to find business economics literature singling out compliance, section 3.3 seeks to widen the perimeter to managing the company as a category in business economics. Section 3.4 addresses risk and, in turn, section 3.5 expands on risk management and risk taking. In section 3.6, I get to the Dutch corporate governance code, which – by way of an explanation – alludes to the COSO framework for internal control. Section 3.7 moots the matter of whether a choice for any one given, particular, framework for the internal risk management and control system, should be made. Section 3.8 points to some known such frameworks for the internal risk management and control systems. Section 3.9 addresses the COSO Enterprise Risk Management – Integrated Framework. In section 3.10, I address lines of defence parlance; possible approaches to effectuating internal risk management and control systems. At that point, I broach a provisional conclusion on compliance and risk; they are to be distinguished but making the analogy helps to understand that compliance and corporate governance are getting increasingly intertwined. Whereas it is difficult to find direct references to compliance in business economics literature, the closest one gets is by assimilating compliance to risk (section 3.11).

Having come to such provisional conclusion, I get to legal analysis on the matters of risk and risk management. This is done in order to assess whether compliance is to be categorised as pertaining to risk management. Hence, I start by addressing risk management at law (section 3.12). This subject will lead to distinguishing between ‘the management and control system’ and ‘risk taking’ (section 3.12.2). The distinction appears to concern timing (section 3.12.3). ‘Risk taking’ involves setting the bank’s risk appetite. And this is where compliance and risk are incapable of being compared; not only is compliance not a core competence (as is setting the appetite for risk), but, moreover, it would be perverse to assume that banks afford varying chances that binding regulation will be complied with.²⁸⁹ ‘Timing’ leads me to distinguishing between the *ex ante* (section 3.12.2.1) and the *ex post* perspectives (section 3.12.2.2). In conclusion, whereas an *ex ante* perspective distinguishes compliance from risk, analogies between compliance and risk management present themselves in an *ex post* perspective. The key point from this chapter being that where compliance concerns rules of law, there is no management discretion to accept a risk of non-compliance. Outside the rule of law, there is liberty to decide on (internal) norms. Any such self-imposed norms will gain relevance at law (section 3.13).

3.2 ‘Compliance’ as a distinct category in business economics

I set out cursorily to explore whether compliance is identified as a category in its own right in business economics literature.²⁹⁰ None of the (granted: very limited) sources I consulted yielded any references to compliance – not even encyclopedic- or handbook- type tomes. Outside business economics, I am aware of some outspoken views that compliance is, or should be (made), an integral part of corporate governance.

In his inaugural address, Oosterhout pleads for linking up management of compliance risks as an inextricable component of corporate governance.²⁹¹ Oosterhout indicates

²⁸⁹ As will be seen *infra*, this is language heavily borrowed from Assink, 2009, p 84.

²⁹⁰ Cooper and Argyris 1998; Douma and Schreuder 2008; Beckman 2001; Crainer and Dearlove 2004; Heijnsdijk 2005; and Keuning and Eppink 2000 do not contain any reference to compliance.

²⁹¹ Oosterhout 2008, p 37.

that this is not a received paradigm in academe. Oosterhout defines compliance as preventing companies from acting unlawfully. In his view, the reason for integrating the prevention of companies from acting unlawfully within corporate governance, is that so doing addresses the agency problem dividing board members and shareholders from parties outside the company, involuntary creditors in particular. This latter agency problem, Oosterhout submits, hardly receives the scientific exposure it merits.²⁹² Oosterhout's inaugural address yields the interesting perspective that compliance pertains to cases in which the company breaches obligations, which breaches in turn are likely to cause liability towards parties outside the company. Therefore, although Oosterhout casts the meaning of compliance in terms of 'managing the risk of companies acting unlawfully', this distinguishes compliance from 'risk management' in the proper sense of the word. Hence, from Oosterhout, I infer two important points:

1. It is by no means a received wisdom that compliance is an integral part of corporate governance in academic disciplines such as business administration; and
2. Compliance – taken to mean preventing companies from acting unlawfully, which unlawfulness likely gives rise to liability to third parties – is distinct from risk management in the proper sense of the word.

The latter perspective bears close resemblance to Bainbridge's view that risk management and compliance differ significantly in degree:²⁹³

'[A]t best, an effective risk management program can prevent risks from materializing and perhaps limit the impact of those that do materialize. In contrast, a law compliance program can not only "significantly reduce the incidence of violations of laws," it also can substantially "reduce or eliminate civil lawsuits, penalties or prosecution" when violations do occur.'²⁹⁴

²⁹² Oosterhout 2008, pp 35 and 36.

²⁹³ Bainbridge 2009, p 981 *et seq*, where he brings this together under the heading: 'The significant differences in degree'.

²⁹⁴ *Ibid*, p 982.

Diekman matter of factly subsumes compliance under governance. In 2010, Diekman wrote that whereas compliance is a control function, it is thereby integrated within the corporate governance of a bank.²⁹⁵ In 2012 Diekman first quotes from the OECD definition of corporate governance – ‘[C]orporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.’²⁹⁶ Diekman has this followed by:

‘The compliance function’s purpose is to warrant adherence to law. And, as it is phrased in the OECD definition: ‘*the means of attaining those objectives and monitoring performance*’ can also be seen as an element of the compliance function. The definition from the OECD provides the link between corporate governance and compliance.’²⁹⁷

3.3 ‘Managing the company’ in business economics

Business economics literature yielding no direct references to compliance, I first explore the more inclusive perspective on ‘managing the company’ in business economics, as a precursor to addressing risk as such.

Beckman *et al* designate what they describe as the management cycle by distinguishing three phases: i) planning; ii) execution; and iii) ‘*contrôle*’,²⁹⁸ then to write:

‘Upon the planning follows the execution, that’s to say that what one has intended to do is actually done, or at least it is attempted. Whereas in reality organisations are confronted with insecurities, planning and execution may deviate. We call the confronting of execution with planning, *contrôle*.’²⁹⁹

In Heijnsdijk, this gets a slightly less integrated sheen;

²⁹⁵ Diekman 2010, p 127.

²⁹⁶ Cf OECD *Principles of Corporate Governance*, 2004, p 11.

²⁹⁷ Diekman 2012, p 481.

²⁹⁸ Beckman *et al* 2001, p 388.

²⁹⁹ Beckman *et al* 2001, p 389.

‘Management encapsulates all activities geared towards directing the primary processes such that the formulated targets are attained.’³⁰⁰

Seemingly juxtapositional to a ‘management cycle’, Heijnsdijk discerns a ‘control cycle’, the inception of which is formed by planning; ‘without a plan it is impossible later to check (D: *controleren*) whether the activities have been executed in the correct manner.’ And so, with Heijnsdijk, the aspect of ‘control’ from Beckman *et al*, is labeled: ‘proces control’: ‘comparing the result with the planning’, which is then portrayed as an iterative process.

Keuning & Eppink distinguish between three management functions:

1. Setting the strategy;
2. Designing the organisation(al) structure; and
3. Substantiating, executing and controlling (D: *beheersen*) the processes.³⁰¹

With Keuning & Eppink, we then find a distinction between the Dutch term ‘*contrôle*’ – probably best translated by check – and the English word ‘control’;

‘Measuring the execution and the comparing of the outcomes thereof with the set norms is called the ‘*contrôle*’. This term must not be mistaken for the broader term ‘control’[. . .]’³⁰²

Often, compliance is mentioned in proximity to risk. Compliance is equated to (a mere) risk, for instance in Compliance and the compliance function in banks 2005.³⁰³ Indeed, the following quote from the 2007 FSA Dear CEO letter addressing compliance, illustrates this tendency towards approximation:³⁰⁴

³⁰⁰ Heijnsdijk 2005, p 18.

³⁰¹ Keuning & Eppink 2000, p 16.

³⁰² Keuning & Eppink 2000, p 578.

³⁰³ Compliance and the compliance function in banks 2005, Introduction, para 3.

³⁰⁴ Managing Compliance Risk in Major Investment Banks – Good Practices, FSA Dear CEO Letter 19 July 2007, my source: http://www.fsa.gov.uk/pubs/ceo/compliance_risk.pdf

‘We recognise also that there are certain limitations in the extent to which a firm’s approach to compliance risk can mirror its approach to managing other risks, particularly where the risks in other areas may be easier to quantify. Notwithstanding the limitations of this approach we consider that exercising good compliance judgment can benefit by perceiving compliance as a risk management function.’

This obviates the digression to (i) risk, as well as to (ii) risk taking and risk management.

3.4 Risk

The etymology of the word risk may be traced to the Italian verb *risicare*, which in modern day usage means to run risk, but which evolved from to dare. It is now argued that risk may well be a strategic combination of vulnerability (*ie* danger) and opportunity.³⁰⁵

In finance literature, Crouhy *et al*, make a broad distinction between credit risk as being the ‘classic’ risk in the banking industry, market risk, and ‘diverse risks often grouped together under the term ‘operational risk’.^{306 307} Under operational risk they group inadequate systems, management failure, faulty controls, fraud and human error. Bainbridge, where he quotes Crouhy *et al* on exactly this point verbatim, has this followed by:

‘[R]elated concerns include failure to comply with applicable legal rules, accounting irregularities, bad business models, and strategic planning errors.’³⁰⁸

Interestingly, I cannot glean from the way this is put whether Bainbridge suggests that the concerns mentioned are (merely) ‘related’ to operational risk, or whether they are related to all three ‘classical’ categories. Crouhy *et al* outspokenly admit to the fuzziness of the concept of operational risk, where they suggest that in the context of

³⁰⁵ Cf Simkins and Ramirez 2008, p 577.

³⁰⁶ Crouhy, Galai and Mark 2001, p 3.

³⁰⁷ In similar vein, see Operational Risk Management 1998, p 3: ‘[M]any banks have defined operational risk as any risk not categorised as market or credit risk [. . .]’.

³⁰⁸ Cf Bainbridge 2009, p 969.

a financial institution, operational risk refers to a range of possible failures in the operation of the firm that are not related directly to market or credit risk.^{309 310} This smacks of operational risk as a residual category. According to Crouhy *et al*, operational risk remains a fuzzy concept because it is hard to make a clear-cut distinction between operational risk and the ‘normal’ uncertainties faced by the organisation in its daily operations.³¹¹ Therefore, they suggest that the management of an institution should define what is included in operational risk in order to minimise the degree of conceptual fuzziness. Crouhy *et al* also refer to the key problem of quantifying operational risk.³¹² Crouhy *et al* refer to a 1997 survey by the British Bankers’ Association and (then) Coopers & Lybrand, indicating that modeling and quantifying operational risk generated the most interest from all operational risk topic areas, but that (at that time, of course) banks had not managed to progress very far in terms of arriving at generally accepted models for operational risk. In the ‘typology’ of operational risk which Crouhy *et al* propose themselves – which builds upon the framework from CIBC³¹³ – ‘operational risk is the risk associated with operating a business.’³¹⁴

Just so as to illustrate the possible breadth of approaches, I mention Jorion, who comes up with a different paradigm; see figure 1 below. Under what he terms the ‘galaxy’ of risks, Jorion first distinguishes between business risk and nonbusiness risk. Business risk is defined as the risk the company willingly assumes to create competitive advantage and add value to the shareholder. Nonbusiness risk is subdivided between event risk and financial risk. Event risk is a category of risk depending on negative events outside the control of the company. Jorion writes that ‘institutions pay to mitigate event risks’. Under this category of event risk we find legal, reputational as well as regulatory and political risk. Jorion then categorises operational risk under financial risk. Jorion notes that ‘institutions are paid to manage financial risks.’³¹⁵

³⁰⁹ Crouhy, Galai and Mark 2001, p 475.

³¹⁰ Much like Jorion, who owns up that the definition of operational risk is far from an academic exercise. See Jorion 2001, p 451.

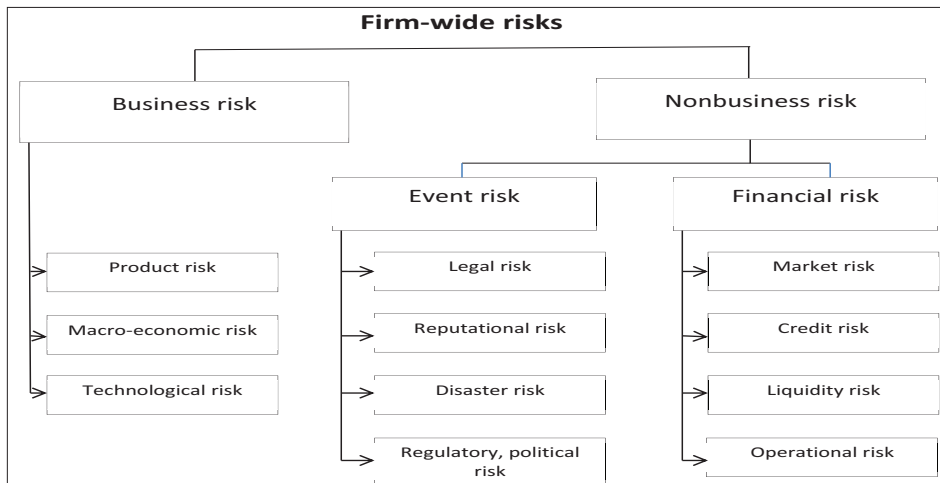
³¹¹ Crouhy, Galai and Mark 2001, p 475.

³¹² *Ibid*, p 476.

³¹³ The company name formed by the acronym of Canadian Bank of Commerce – the authors sharing their professional backgrounds at that bank.

³¹⁴ *Ibid*, p 478.

³¹⁵ Jorion 2001, pp 468 and 469.

Figure 1.³¹⁶

Jorion's classification strikes me as being arbitrary – why should 'legal risk', for instance, in all circumstances lie outside the control of the company? Obviously, where it is within the bank's power to 'calibrate' legal risk, Jorion would then subsume it under business risk. Neither can I readily agree with subsuming operational risk under financial risk. It is, however, beyond my competency to criticise risk management specialists. Jorion's perhaps somewhat unorthodox paradigm is a poignant reminder that there is unlimited variety in ways to approach risk, and, as well, that it is no science. I find it does not help that there is an apparent zest to distinguish innumerate risk denominators. Not only this creates an ever expanding 'galaxy' of risks, but it is likely to cause diffusion and dilution of organisational attention to an infinite number of classes of risks which have thus been separated out and, perhaps in reaction thereto, allocated to distinct departments of the bank. In this regard, we ought not to forget that as early as in 1998, the BIS observed that '[A]ll banks see some form of link between credit, market and operational risk.'³¹⁷

³¹⁶ Jorion 2001, p 468.

³¹⁷ Operational Risk Management 1998, p 3.

3.5 Risk management/risk taking

Monahan defines ‘enterprise risk management’ as a methodology for managing risks associated with strategic objectives of an organisation.³¹⁸ Crouhy *et al* write that risk management is really about how firms actively select the type and level of risk that it is appropriate for them to assume.³¹⁹ Crouhy *et al* then note that the tools to manage risk *ex ante* are:

1. Avoiding risk by choosing to refrain from certain business activities;
2. Transferring risk to third parties through hedging and assurance;
3. Mitigating operational risk through preventive and responsive control measures; and
4. Accepting that certain risks are necessary to generate the appropriate level of return.³²⁰

Strik notes that prior to mounting a(ny) risk management system, the organisation needs to determine on risk appetite and the risk profile.³²¹ She then moots that it is generally held that the choice for the risk appetite and the risk profile are strategic choices, which choices are part of the general policy (D: *het algemene beleid*).³²² This point is taken up and subscribed to by Timmerman, observing in his conclusion to *ABN AMRO* that the risk profile forming part of strategy, derives its relevance from the fact that managing board members (and, in a derived sense: supervisory board members), different than shareholders, may in certain cases also be recriminated for risk management failures.³²³ These choices are thereby ‘business decisions’.³²⁴ Such ‘business decisions’ are, by their nature, a matter of corporate governance. And, this

³¹⁸ Monahan 2008, p 12.

³¹⁹ Crouhy, Galai and Mark 2006, p 88.

³²⁰ *Ibid*, p 88.

³²¹ Strik 2009, p 230.

³²² *Ibid*, p 232.

³²³ Conclusion Timmerman at 3.4.10.

³²⁴ The relevance of this distinction follows from *Citigroup*. Where ‘business decisions’ are at stake, we are within the category of (in English company law terms) directors’ duty to promote the success of the company, as distinct from directors’ duty of care. And, under Delaware law, where business decisions are concerned, these should be ‘insulated from judicial review’; not open to a kind of ‘judicial second guessing’. See Bainbridge 2009, p 984.

brings me to the interesting overlap between ‘risk taking’ on one hand, and ‘risk management’ on the other. Bainbridge puts this as follows:

‘Risk management necessarily overlaps with risk taking because the former entails making choices about how to select the optimal level of risk to maximize firm value. [...] Operational risk management, for example, frequently entails making decisions about whether to engage in risky lines of business and, more generally, determining whether specific risks can be justified on a cost-benefit analysis basis. As a result, it is becoming increasingly “difficult to draw a line between corporate governance and risk management.”’³²⁵

On the matter of risk management and compliance, where he broaches the subject of approaches to models used for risk management, Monahan is outspokenly clear:

‘More generally, I take this opportunity to distinguish between risk management and compliance. Quite simply, risk management is a science and compliance is an exercise. They are worlds apart, and they should stay that way. Failure to comply with something is a risk that you may wish to monitor [...]’³²⁶

I would add that, outside the risk management literature, there is now a view that risk management is an integral part of (the) corporate governance (portfolio).³²⁷

3.6 The Dutch corporate governance code and COSO

Best practice provision II.1.4 of the Dutch corporate governance code provides that the annual report provides a description of the design and effectiveness of the internal risk management and control systems for the main risks during the financial year. To this point, the explanation and notes section of the code adds:

‘[...] it would be logical for the management board to indicate in the description of the design and effectiveness of the internal risk management and control systems

³²⁵ Bainbridge 2009, p 984.

³²⁶ Monahan 2008, p 117.

³²⁷ See, eg, Tricker 2009, p 349: ‘[...] risk analysis and risk management have become an integral part of the corporate governance process.’

what framework or criteria (e.g. the COSO framework for internal control) it used in assessing the internal risk management and control system.’

For clarity’s sake, the text represented above, refers to the COSO framework for internal control, and not to COSO Enterprise Risk Management – Integrated Framework. I cannot see to what extent this is done on purpose, with which I mean that I cannot see whether the draftsmen are particular about the point that where the code uses the term ‘the internal risk management and control systems’, this is equivalent to COSO’s ‘Internal Control – Integrated Framework’ and it is thereby distinct from ERM.

3.7 Choice for a(ny given) framework?

The Dutch corporate governance code appears to depart from a ready assumption that the internal risk management and control system may be conceptualised within a framework. Strik admonishes that the choice for the application of any internal risk management and control framework is a managing board decision. Consequently, where the managing board has taken the decision to opt for a given framework, such framework is thereby capable of being considered an (internal) regulation – the behaviour of directors or supervisory board members may then be measured against it.³²⁸

3.8 Sources of guidance – prevalent frameworks

At this particular juncture we do well to recall that we are at ‘internal risk management and control systems’. Where *compliance* is concerned, there is equally a development towards guidance standards – particularly directed to compliance. For instance, I point to a current effort by ISO, which has released a Working Document comprising ‘a voluntary guidance standard for compliance programs’³²⁹ modeled

³²⁸ Along the lines of *Staleman/Van de Ven*, in which the Supreme Court also mentioned ‘guidelines applicable to the managing board’ as a circumstance to be taken into regard; see dictum at 3.3.1.

³²⁹ ISO MSS Proposal for Compliance programs 2010

(entirely) upon an existing Australian standard.³³⁰ Below, I briefly mention that the OECD refers to Australian guidance in the particular area of risk management. Hence, under the existing Australian standards, apparently compliance is separated out of risk management.

Best practices in internal risk management and control systems are evolving,³³¹ which also goes to explain that there are now quite a number of sources of guidance in the public domain. Strik indicates that whereas American and Dutch companies often apply COSO, English companies often apply the Turnbull Guidance.³³² She also mentions that companies may opt to design their own framework, and she mentions the Ahold Business Control Framework.³³³ Back in 2007, NIVRA outspokenly preferred the Turnbull Guidance as generally accepted practice towards internal risk management and control systems, amended for the specifics of the business and legal environment in the Netherlands.³³⁴ Bainbridge remarks that, despite its having been specifically designed for a banking environment, the Basel II framework has become extremely influential in the risk management industry generally.³³⁵ The OECD also refers to guidance from Australia and New Zealand, and various other sources.³³⁶ I accept that the COSO framework is the most widely used by far.³³⁷ In any case, it is the only one the Dutch corporate governance code explicitly mentions. On these grounds I include a cursory description, which is done by making liberal use of COSO materials.

³³⁰ The (Australian and New Zealand) 3806 Standard for Compliance – ‘AS/NZS3806’.

³³¹ Bainbridge 2009, p 970.

³³² The Turnbull guidance from 1999, is superseded by Financial Reporting Council, *Internal Control, Revised Guidance for Directors on the Combined Code*, October 2005. On substance, COSO and Turnbull do not differ widely. Arguably, Turnbull appears to strike a more principle-based, somewhat less dogmatic, tone. Hence, where COSO defines ‘key corporate objectives’, Turnbull identifies a need to have policies, tasks, behaviours and other aspects of a company ‘facilitate’ and ‘help ensure’ the attainment of the objectives as set by the board as a matter of strategy. Although capable of being confused for wordsmithing, I believe this does represent a cultural difference.

³³³ Strik 2009, p 220.

³³⁴ NIVRA taskforce on Internal Control, *Discussion Paper Risk management and internal control systems*, 5 October 2007, pp 3 and 4.

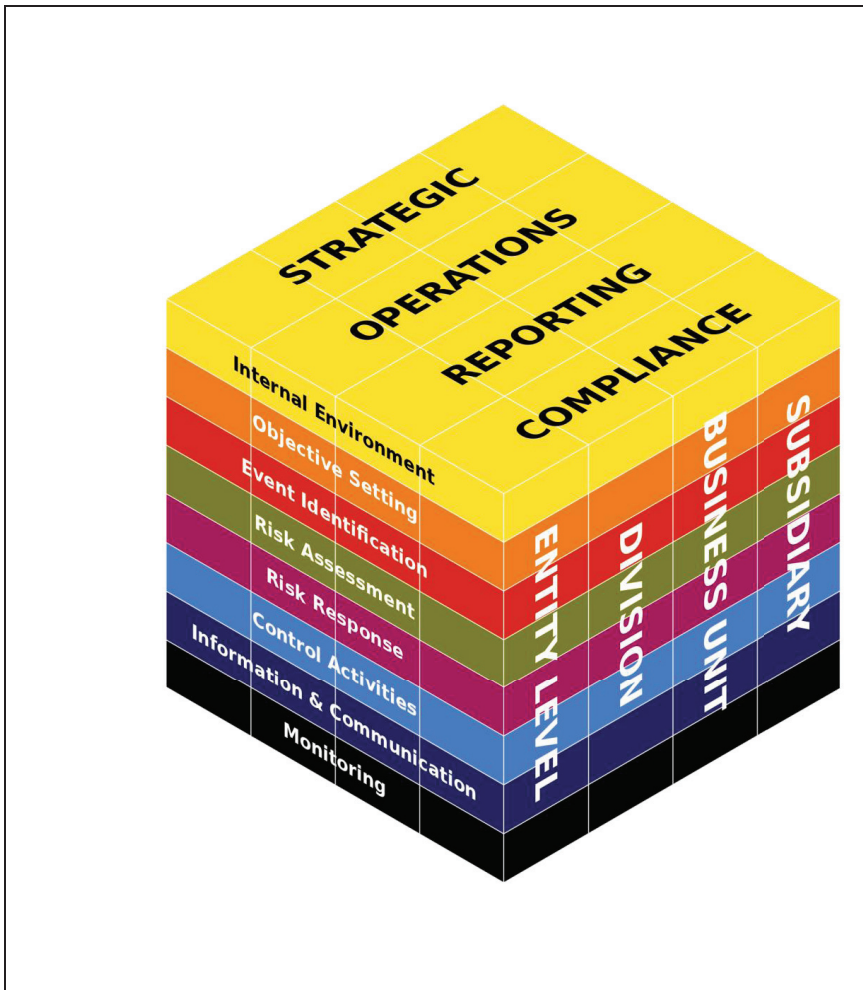
³³⁵ Bainbridge 2009, p 970.

³³⁶ OECD, *Corporate Governance and the Financial Crisis: Key Findings and Main Messages*, June 2009, p 38: AS/NZS4360 – The Australian and New Zealand risk management standard; BS31100 – the new British Standard on risk management; and The IRM/AIRMIC Risk Management Standard.

³³⁷ See, eg U Claassen, *Handboek Risico-management, ERMplus: een praktische toepassing van COSO ERM*, Kluwer, Deventer, 2009, p 20, specifically on the Dutch situation.

3.9 Brief description of the COSO enterprise risk management framework (2005)

Figure 2 below is the famed ‘new COSO cube’, which is the oft referenced graphic representation of the three dimensions of the COSO framework.



Source: COSO Enterprise Risk Management – Integrated Framework, September 2004

3.9.1 COSO definition of Enterprise Risk Management

The COSO defines Enterprise Risk Management as follows:

‘Enterprise risk management is a process, effected by an entity’s board of directors, management and other personnel, applied in strategy setting and across the enterprise, designed to identify potential events that may affect the entity, and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives.’

As I indicated, the COSO itself distinguishes between ‘Enterprise Risk Management’ and ‘internal control’. The COSO defines internal control as:

‘Internal control is a process effected by an entity’s board of directors, management, and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in the following categories:

- Effectiveness and efficiency of operations.
- Reliability of reporting.
- Compliance with applicable laws and regulations.³³⁸

Enterprise Risk Management adds strategy as the fourth corporate objective to the three remaining similar ones in both frameworks. In the COSO’s own words, strategic objectives operate at a higher level than the others.³³⁹ In my view, the COSO’s perception of ‘key corporate objectives’ is capable of being criticised. The original three key corporate objectives are instruments at best – such that they should promote attainment of the strategic objectives. And, even with the latter (new) fourth ‘objective’, I doubt that ‘strategy’ in itself merits classifying as an objective. On these aspects, I attract an analogy to Van Ginniken’s observation that ‘good corporate governance’ is not a purpose in itself – it is no more than a means promoting better functioning of enterprises.³⁴⁰ Of course there is an argument for classifying strategy, operations, reporting and compliance alike as the key objectives of an internal control framework or of enterprise risk management, but that is a different way of approaching matters. Whereas risk tolerance is not a part of internal control, although a pre-condition to it, it is an inclusive concept within Enterprise Risk Management.³⁴¹

³³⁸ COSO, *Internal Control – Integrated Framework, Framework* December 2011, Draft for Public Exposure, para 11.

³³⁹ *Ibid*, para 490.

³⁴⁰ Van Ginniken 2012, p 726.

³⁴¹ *Ibid*, para 491.

The Enterprise Risk Management Framework expands the need to focus on risk such that it prescribes considering ‘composite risks from a portfolio perspective’.³⁴²

3.9.2 Practicality of COSO

Literature voices criticism against such structures of reference as COSO.³⁴³ The OECD expresses it as follows:

‘Neither COSO [Enterprise Risk Management – Integrated Framework, AJK] nor Turnbull provide effective guidance on how to implement their high level models into the reality of a complicated business. COSO retains a high level of following in the US, and Turnbull is widely recognized in the UK. In the view of Anderson (2009), neither provides a helpful approach to the mechanics of creating an effective and lasting risk management and assurance framework over the long term.’³⁴⁴

The OECD finds that the risk definitions are often poorly expressed. Interestingly, it also notes that there is insufficient attention to what it describes as the ‘extended enterprise’; where the company depends on others. This is the dimension I furnished where I observed that under, *eg* the Bribery Act (2010) the company may be liable for persons performing services for or on behalf of it.³⁴⁵

Monahan outspokenly reflects a similar judgment on the matter of COSO as does the OECD; ‘beyond the definition of enterprise risk management, it offers little guidance on how to design and execute an effective enterprise risk management framework.’³⁴⁶

³⁴⁷ Simkins & Ramirez observe that ‘the literature and evidence to date (their paper dating from 2008, AJK) makes (*sic*, AJK) it clear that there is no single ERM

³⁴² *Ibid*, para 492.

³⁴³ Strik 2009, p 221.

³⁴⁴ OECD, *Corporate Governance and the Financial Crisis: Key Findings and Main Messages*, June 2009, p 37.

³⁴⁵ *Ibid*, p 38.

³⁴⁶ Monahan 2008, p 119.

³⁴⁷ See, also, Bainbridge 2009, p 970 and his cautionary advice to the judiciary, esp p 982: ‘[I]f [. . .] courts are perceived as imposing liability on boards for failing to adopt some specific model of risk management, the evolutionary market processes by which optimal best practices emerge may be aborted. Accordingly, courts should be extremely leery about rendering opinions perceived as creating a roadmap for approaching risk management.’

implementation process that works for every board and for every company'.³⁴⁸ For a Dutch perspective, I cannot omit to quote Bier:

'Without the need to delve into further details of the ERMF [COSO Enterprise Risk Management – Integrated Framework 2004, AJK], reading it one gets the feeling that the system, no matter how well construed, is, due to its level of detail, incapable of being used without a crystal ball or an enormous amount of imagination'.³⁴⁹

3.10(Three) Lines of defence

In the light of such criticisms, it is only natural that suggestions are being made towards operational effectuation of internal risk management and control systems. This leads me to 'lines of defence' parlance on approaches to risk management. In literature there are numerous references to 'lines of defence' approaches to risk management. Interestingly, many such sources depart from a ready assumption that 'lines of defence' is 'a well-established concept' or something similarly apocryphal.³⁵⁰ FSA refers to 'three lines of defence', where it indicates that several parties from 15 banks, building societies and investment firms making up an operational risk management expert group in 2010 'employ three lines of defence as part of their operational risk governance and risk management structure'.³⁵¹

Several expert group participants employ three lines of defence as part of their operational risk governance and risk management structure. A strong risk culture, good communication and understanding and a strong sense of risk awareness can provide comfort when used in conjunction with this approach. While, we have seen

³⁴⁸ Cf Simkins and Ramirez 2008, p 586.

³⁴⁹ Bier 2005, p 541.

³⁵⁰ R Pike, *Strengthening the three lines of defense*, CCH 2009, p 2: '[T]he three lines of defense is a well-established concept'; J A Lee en S Sarneel, *De waarde van compliance risk management voor een financiële onderneming*, *TvCo* 2008/4, p 152: where the authors assume the readership to be familiar with what they call the 'known three lines of defence'. *Infra* it will be seen that DNB also departs from an automatism that three-lines-of-defence is a received term (of art) in the financial sector. In its letter to Rabobank of 29 October 2013, it describes a three-lines-of-defence 'model', which, as DNB states, Rabo asserts operating, without DNB expressing a position on whether it deems three-lines-of-defence obligatory or required otherwise. See *infra* p 284.

³⁵¹ FSA, *Enhancing frameworks in the standardised approach to operational risk – Guidance Consultation*, October 2010, para 2.23.

different interpretations of its composition the most common approach is for the three lines to comprise the following:

- i) The first line is provided by the business units – comprising the business units, support functions and embedded operational risk staff.
- ii) The second line is provided by the risk management function – comprising the operational risk management function and the compliance functions. To qualify in this category, the risk management function usually demonstrates the qualities detailed in the operational risk management function section.
- iii) The third line is the audit function. A number of firms have outsourced their audit function. The underlying arrangements and effectiveness of an outsourced audit function should be assessed for its suitability.

From the FSA description, it appears that lines of defence has its role to play in the division of lines of reporting and responsibility as part of a firm's internal operational risk management system.³⁵²

The apocryphal nature of three lines of defence is illustrated in the recent (January 2012) UK Upper Tribunal case *John Pottage v FSA*.³⁵³ The Tribunal states:

“UBS operates a “three lines of defence” model for risk management and control. This was explained to us by Mr Bernard Buchs, UBS AG’s Global Head of Risk and Compliance, as follows:

‘The first line of defence is the business itself, which has primary responsibility for identifying and managing risks within the business. The second line of defence is the control function (including Risk and Compliance), who are responsible for risk control – i.e. the development of an overall risk management framework and ensuring that the business adheres to that risk management framework (e.g. through periodic monitoring and assessment). The third line of defence is Group Internal Audit and the external audit function, which conduct independent testing to ensure that the risk management framework and control are operating effectively.’”

³⁵² *Ibid*, para 2.7.

Two from the three judges in the Upper Tribunal's composition being specialist judges, choosing the formulation: '[T]his was explained', shows that at least they had to be instructed on the matter.

The FSA indicates having seen 'different interpretations of the composition' of three lines of defence. Claassen, whose 'handbook' on risk management professes to yield a more detailed methodology towards implementing COSO ERM so as to eliminate its shortcomings,³⁵⁴ suggests maintaining five lines of defence. His model separates external audit from the internal audit function, and adds, as a fifth line of defence 'the supervisor'. The supervisor may either be internal (he mentions the supervisory board) or external (he mentions regulators but also the Dutch Institute of Chartered Accountants). Diekman indicates that the 'Three lines of defence model' we are told about, is nothing more than a way of thinking and he advocates distinguishing six such lines.³⁵⁵ Whereas, like Claassen, Diekman distinguishes between internal and external audit, he also makes a distinction between internal and external supervisors.

Finally on three lines of defence, I should add that SYSC 7.1.5R(3)³⁵⁶ requires a firm to monitor the adequacy and effectiveness of measures taken to address deficiencies in risk management policies and procedures, as well as to monitor the level of compliance by the firm and its staff with the arrangements, processes and mechanisms. It is in this particular context that FSA suggests that, among other examples explicitly mentioned, documentation consisting of a management framework defining the three lines of defence model may serve to illustrate compliance with this requirement (*ie* SYSC 7.1.5.R (3)).

3.11 Provisional conclusion on compliance and risk

Although there is a view that compliance may be classified as a risk, and although the FSA openly appears to promote that good compliance judgment can benefit by

³⁵³ Upper Tribunal (Tax and Chancery Chamber), Financial Services, FS/2010/33

³⁵⁴ U Claassen, *Handboek Risico-management, ERMplus: een praktische toepassing van COSO ERM*, Deventer: Kluwer 2009, pp 21 and 22.

³⁵⁵ Diekman 2011, pp 482 and 483.

³⁵⁶ The regulatory rules addressing compliance and the function are to be found in the FSA Handbook under *Senior Management Arrangements, Systems and Controls* ('SYSC') 6.1.

perceiving compliance as a risk management function, Bainbridge holds the view that compliance and risk management are significantly different in degree,³⁵⁷ and Monahan plainly presumes that compliance and risk management are ‘worlds apart’.^{358 359}

Making an analogy between compliance and risk management however, renders support to an argument that compliance and corporate governance are getting increasingly intertwined. The most direct formulation of the matter I found came from Crouhy *et al.*³⁶⁰³⁶¹

‘[I]t is becoming increasingly difficult to draw a line between corporate governance and risk management.’

And, it is recalled, the reason it is increasingly difficult to make such distinction between corporate governance and risk management, lies, according to Bainbridge, in risk taking and risk management overlapping. Bainbridge starts from the premise that risk taking and risk management must be distinguished. But, they overlap as risk management ‘entails making choices about how to select the optimal level of risk to maximize firm value.’ Nonetheless, there is a difference; risk management is the operational sequel to *ex ante* choices forming part of setting the company strategy. Where we are at setting the company strategy, we are in the domain of ‘business decisions’.

But, what is clear is that at least one authoritative article from mixed finance and legal academics argues:

‘Corporate governance law does not presently include any particular guidance regarding enterprise-wide risk management.’³⁶²

³⁵⁷ Bainbridge 2009, pp 968 and 981.

³⁵⁸ Monahan 2008, p 117.

³⁵⁹ Later in my thesis I will get to Eijbsbouts, who, yet on different grounds, makes a very deliberate distinction between compliance and risk management; he argues that compliance, as an integral component of corporate governance, next to an aspect of risk management, also has an aspect of value creation. See Eijbsbouts 2010, pp 95 and 96.

³⁶⁰ Crouhy, Galai and Mark 2006, p 87.

³⁶¹ Reflected by Bainbridge 2009, p 984.

³⁶² Simkins and Ramirez 2008, p 594.

And this brings me to legal analysis, which I start by addressing risk management generically (section 3.11.1). I note in anticipation that this area is within the overall ambit of directing the company, which I shall address under chapter 4 as an aspect of corporate governance (*cf infra* section 4.2.7). I also remind that I have already canvassed that financial markets law distinguishes between risk management and compliance (*supra* section 2.2.1.3).

3.12 Risk management at law

Assink notices that regulation by law of risk management is not well developed. Dutch company law regulation, including legislation, is scant and there is little case law. He sees this as being connected to the subject of risk management not being submersed in typically legal elements.³⁶³

As so often in this thesis, there is some terminological difficulty I need to highlight. Where Dutch law addresses the duty to manage the company (the starting point being article 2:129 para 1 BW), it uses the terms *het bestuur* (which I translated as ‘the managing board’) and *het besturen* (which I translated as ‘to manage’). Arguably, where the statute law defines the duty of the managing board, the essence lies rather in ‘directing’, and ‘controlling’ (in the sense of having the power to influence decisions or actions), than in taking measures geared to avoiding risk. As we will see when homing in on the statute law provision addressing ‘risk management’, the terms used there (*beheersen* and/ or *controleren*) are equally capable of being translated into management and controlling. I would add that, in the specific context of financial supervision law, the (first) Memorandum of amendment to Wft of March 2005, does contain an approximation of the Dutch term *beheersen* as running the gamut from defining, directing, monitoring and correcting objectives and processes.³⁶⁴

³⁶³ Assink 2009, p 87. On an aside, I would note that *risk management* as such is in its infancy. From an international perspective there does not appear to exist best practice. For this see Assink 2009, p 86 footnote 223, with reference to Bainbridge 2009, p 970, where it is pointed out that while there are a number of widely used risk management frameworks, none has emerged as a dominant best practice. So, for the avoidance of any doubt, COSO 2004 should not be mistaken for constituting best practice.

³⁶⁴ *Kamerstukken II 2004-2005*, 29 708, nr 10, page 243: ‘Beheersen omvat het gehele traject van vaststellen, besturen, monitoren en bijsturen van doelstellingen en processen.’

Thus, article 2:141 para 2 BW³⁶⁵ provides that the managing board informs the supervisory board at least once a year in writing on the main features of its policy on strategy, the general and financial risks and the management and control system of the company (Dutch: *het beheers- en controlesysteem*)., It is difficult to steer away from the terms ‘management and control systems’ in translating article 2:141 para 2 BW. However, these terms are not being used to describe aspects of directing the company. Instead, they are meant to describe the measures taken to manage risk. From the Explanatory Memorandum it appears that the lawmaker just copied the pair of terms ‘beheers- en controlesysteem’ from an advice from the Social Economic Council, and that it was used to express: the way in which the general and financial risks are being systematically controlled.³⁶⁶ The Dutch corporate governance code refers to ‘the internal risk management and control system.’³⁶⁷ Bier raises that whereas ‘management and control system’ (apparently) refers to two components, it may be asked whether one system comprises the other, or whether these are two systems operating shoulder to shoulder.³⁶⁸ Article 2:141 para 2 BW was introduced into the act in 2004. It is in some ways a pregnant reminder of the fact that some areas of power and responsibility lie with the managing board; where there is a duty to inform, it may be argued that there is no (inherent, or, perhaps better; implied) duty to obtain prior consent.³⁶⁹

Under article 2:141 para 2 BW the statute law law requires the managing board ‘to inform’ the supervisory board. Contrast to this, best practice provision II.1.2 of the Dutch corporate governance code. It requires that the managing board submits the strategy to the supervisory board for *approval*. Similarly, contrast article 2:141 para 2 BW to principle 4.1 of the Banking Code, providing that the managing board shall submit *the risk appetite* to the supervisory board *for approval* at least once a year. The question may be asked to what extent these provisions from the codes cause (the)

³⁶⁵ In Book 2 BW many of the articles on companies limited by shares (Dutch: naamloze vennootschappen – the closest English equivalent being ‘public limited companies’) have pendants in the articles on private companies with limited liability (Dutch: besloten vennootschappen met beperkte aansprakelijkheid). In this given instance, article 2:251 BW is the counterpart of article 2:141 BW for limited

³⁶⁶ *Kamerstukken II*, 28 179, p 27.

³⁶⁷ Dutch corporate governance code, principle II.1, best practice provisions II.1.3, II.1.4, and II.4.5.

³⁶⁸ Bier 2005, p 539.

tasks of the supervisory board to approximate or even to invade those of the managing board. I note that article 2:151 para 2 BW provides that granting approval to ‘specific acts of management’, does not, *eo ipso*, constitute acts of management. The system of the law is that granting approval is not taken to be an integral part of the managing board’s decision taking process.³⁷⁰ But I should add that article 2:151 para 2 BW refers to ‘specific acts of management’. This seems to point to the approval having to concern matters with a degree of specificity. So, especially where setting the strategy is concerned, this is a matter lying with the managing board – the role of the supervisory board being confined to exercising oversight. This is capable of being corroborated by the case law; in *ABN AMRO*; the Supreme Court ruling that:

‘determining the strategy of a company and the enterprise connected thereto is, in principle, a matter for the managing board of the company;

that the supervisory board exercises oversight thereupon; and

that the general meeting of shareholders may express its views thereupon through the exercise of the rights allocated to it in the law and in the articles of association.’³⁷¹³⁷²

The lines in the sand between managing and supervising, and, within this, the way managing and supervisory boards co-exist, are areas of advancing insights. The crux of the matter lies in the answer to the question on whose behalf the supervisory board exercises its tasks. And case law shows the tendency of an evolving orientation on the more encompassing interests than those of the shareholders; Assink describes this as the position of the supervisory board having co-evaluated from supervisor at the behest of shareholders, to an independent company organ directed toward a healthy continuity of the company, in which interests from others than the shareholders, take their part.³⁷³ Consequently, the supervisory board must operate whilst safeguarding a certain degree of autonomy. This almost necessarily induces it to maintain a (comfortable) degree of discretion, especially but not exclusively vis-à-vis the

³⁶⁹ Cf Assink 2009, p 62, where he broaches that the company management holds the independent power to set the company policy – which includes the strategy. He adds that where there is a supervisory board, the managing board (in setting the policy) will not operate in isolation.

³⁷⁰ Cf Assink 2009, p 65.

³⁷¹ *ABN AMRO*, dictum at 4.3.

³⁷² More or less repeated by the Supreme Court in *ASMI*, cf dictum at 4.4.1.

formulation of strategy. Assink also mentions that were this different, the supervisory board were increasingly forced to exercise oversight on its own actions, actions capable of being classified as (co-)management.³⁷⁴

3.12.1 The management and control system v risk taking

Article 2:141 para 2 BW is a lone provision in our civil code explicitly referring to the matter,³⁷⁵ providing that the managing board informs the supervisory board at least once a year in writing on the main features of its policy on strategy, the general and financial risks and the management and control system of the company.³⁷⁶ The Dutch standard terminology used in the statute book for ‘the management and control system’ is: *het beheers- en controlesysteem*. In comparison to their English equivalents, such terms connote mitigating risk rather than *directing* the company and *exercising a power to influence decisions or actions*. A consequence of the hard times we’ve fallen upon may well be a temptation to take such terms to point to defensive (‘risk averse’) behaviour.³⁷⁷ Davies reminds us that: ‘companies are in business to take risks.’³⁷⁸ All of this reminisces of the Supreme Court’s judgment in *Willemsen/NOM*. This concerned a case in which an individual shareholder seeks to call a director to account for the fulfilment of his task.³⁷⁹ The Supreme Court deliberately raises the bar for the serious rebuke capable of being made to the director, so as to serve the company’s interest by preventing directors being guided

³⁷³ Assink 2009, p 67.

³⁷⁴ Assink 2009, p 66.

³⁷⁵ I leave article 2:391 BW aside, as it forms part of the sections addressing the annual accounts.

³⁷⁶ I mention this provision here to indicate that the statute law only contains this almost cursory reference to ‘the management and control system’. I might add here that where supervisory board members, despite certain signals having reached them which may give cause to do so, hardly take any initiative to get adequately informed by the managing board, they do not fulfil their task adequately. This follows from *OGEM II*, dictum at 10. Cf Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 492. Lennarts 2009 (T&C Ondernemingsrecht Effectenrecht) aant 1, art 2:141 para 2 BW suggests that a similar view may be derived from the judgment by the Enterprise Division of 16 October 2003 in *Laurus Enterprise Division*, with a reference to *JOR* 2003/85. This must be an error.

³⁷⁷ Assink observes that it would appear that slowly a pre-occupation with risks and risk management is developing, Assink 2009, p 86. He more or less repeats the argument where he writes that risk management must not lead to false security (the suggestion of *containment*), let alone risk avoidance or, as the case may be, (legal) shirking, such that this stifles entrepreneurship, see Assink 2009, p 91.

³⁷⁸ Davies 2008, p 493.

³⁷⁹ *Je* so-called external liability, as distinct from a director’s liability to the company arising from article 2:9 BW.

by defensive considerations.³⁸⁰ Maeijer notes that such high threshold staves off the phenomenon of overly fearful directors.³⁸¹

3.12.2 Timing; setting the risk appetite v managing risk

There follows yet again a quote from Bainbridge:

‘Risk management overlaps with risk taking because the former entails making choices about how to select the optimal level of risk to maximize firm value. [. . .]. Operational risk management, for example, frequently entails making decisions about whether to engage in risky lines of business and, more generally, determining whether specific risks can be justified on a cost-benefit analysis basis. As a result, it is becoming increasingly “difficult to draw a line between corporate governance and risk management.”’³⁸²

So, ‘risk management’ overlaps with defining the company’s strategies and objectives so as to strike an optimal balance between growth and return goals and related risks. Risk management includes determining an appetite for risk consistent with the interests of the shareholders and identifying, preparing for, and responding to risks.³⁸³ Bainbridge reminds us at exactly this juncture that because risk and return are positively correlated, a company must inevitably take risks to generate a positive rate of return.³⁸⁴ Assink also mentions this in observing that conducting an enterprise presumes a relation between risk and return: the starting point being that the chances of return on investment deviating from the *ex ante* expected/forecast return, are other than nil. The preparedness to take bigger risks – and thereby increasing such chances – often corresponds with the possibility of higher returns.³⁸⁵ Managing the complexity of the *financial risks* resulting from their balance sheets, is sometimes

³⁸⁰ Dictum at 5.3.

³⁸¹ At 2

³⁸² Bainbridge 2009, p 984.

³⁸³ Cf COSO 2004, p 2: ‘Enterprise risk management is a process, effected by an entity’s board of directors, management and other personnel, applied in strategy setting and across the enterprise, designed to identify potential events that may be affect the entity, and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives.’

³⁸⁴ Bainbridge 2009, p 983, where he notes that shareholders prefer high return projects, and that implementing such preference necessarily entails choosing risky projects.

³⁸⁵ Assink 2009, pp 82 and 83.

labeled as banks' core competence.³⁸⁶ Needless to say that where compliance is concerned, almost without regard to the definition of compliance, this is entirely different; it neither is nor should be banks' core competence.

It is precisely the element of discretion and choice (the margin of appreciation) lying with the management of a company that makes it perverse to treat compliance as analogous to risk management. I believe this is what Assink means where he writes:

'The way a certain risk will be dealt with will also depend on its character. Thus, an entrepreneur is not likely to afford varying the chances that binding applicable regulation – for instance concerning financial reporting – will either be complied with or not.'^{387 388}

3.12.2.1 The *ex ante* perspective – management discretion

Where *risks* are concerned, fundamentally, the managing board has a responsibility diligently to identify them, where identified, to analyse them, and thereupon to establish the degree to which the company is willing to accept them (which may be termed 'risk appetite'). Thereupon, the managing board must define the 'controls', duly calibrated on the risk appetite.³⁸⁹ The controls serve to prevent risks which are unacceptable (the latter, of course, in view of the fact that the manifestation of unacceptable risks will frustrate the company from attaining its strategic objectives – whatever those strategic objectives might be). Thus, where *risk* is concerned, we are safely in the domain of *management discretion*; it is a matter for the managing board to decide upon. Decisions taken are, in the proper sense of the word, business decisions.

Where there is management discretion, we are in the domain of the margin of appreciation of management – we may only make reproaches to management, which

³⁸⁶ Adviescommissie Toekomst Banken 2009, p 11. Emphasis from me.

³⁸⁷ Assink 2009, p 84.

³⁸⁸ And, it may be argued that Strik reflects a similar approach where she writes that an enterprise's sales function may well have a higher risk appetite than the enterprise's compliance department. See Strik 2009, p 232.

³⁸⁹ The Dutch translation of controls being 'beheersmaatregelen'.

reproaches have ramifications, such as sanctions or liability, where certain boundaries are evidently trespassed. I find this point aptly illustrated in the recent Delaware case of *Citigroup*, where we find:

‘When one looks past the lofty allegations of duties of oversight and red flags used to dress up these claims [that the directors should be personally liable to the company for failure fully to recognise the risk posed by subprime securities, AJK], what is left appears to be plaintiff shareholders attempting to hold the director defendants personally liable for making (or allowing to be made) business decisions that, in hindsight, turned out poorly for the Company. Delaware Courts have faced these types of claims many times and have developed doctrines to deal with them – the fiduciary duty of care and the business judgment rule.’³⁹⁰

Under Dutch company law, the current position is that where the courts consider whether a director may be held liable for improper fulfilment of his task,³⁹¹ they will seek to establish that the reproach capable of being made against him carries sufficient seriousness.³⁹² In its judgment in *Willemsen/NOM* the Supreme Court worded this such that raising the bar to a high standard for sufficient seriousness for a director’s liability also³⁹³ serves the company’s interest, as it will prevent directors from having their actions determined by defensive considerations to an undesirable degree.³⁹⁴

Under English law, exactly at this point, I find that there is an interesting issue as to whether the standard arises from the director’s duty of care,³⁹⁵ or, rather, from his duty to promote the success of the company.³⁹⁶ The reason for this intriguing point is that it seems that where it comes to deciding on how precisely to pursue the success of the company – *taking business decisions* as meant in the referenced Delaware case of *Citigroup* – we are clearly at the duty to promote the success of the company. He Davies is clear: it lies with the directors to make (such) business decisions. He

³⁹⁰ In re *Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106, 123 (Del Ch 2009), at 124 – my source reference is Bainbridge 2009, p 979.

³⁹¹ The norm from article 2:9 BW, where it concerns the criterion for a director’s liability.

³⁹² My translation of: ‘hem kan een voldoende ernstig verwijt worden gemaakt’.

³⁹³ *Ie*, obviously, next to the director’s own interest.

³⁹⁴ Dictum at 5.3, *NJ* 2009, 21.

³⁹⁵ The norm from Section 174 CA. See *infra* p 173.

³⁹⁶ The norm from Section 172 CA. See *infra* pp 169 - 170.

observes that section 172, CA (the duty to promote the success of the company) does not intend at all to constrain directors' decisions. Importantly, he adds to this that, given that this is left to the directors, they are in turn accountable to the shareholders for their decisions through the company's corporate governance mechanisms, rather than through the courts.³⁹⁷ In contrast, where Davies addresses the duty of care, he covers a duty, applying *even* to non-executive directors, to 'take reasonable steps, to place themselves in a position to guide and monitor the management of the company.'³⁹⁸ Where directors extensively delegate, they must reconcile that with their duty of always being in a position to 'guide and monitor', by ensuring that there are adequate internal control systems in place, which will throw up problems in the delegated areas. In turn, this then leads Davies to mentioning a need for adequate internal controls systems, as was stressed by the report of the Turnbull Committee.³⁹⁹

3.12.2.2 The *ex post* perspective – duty of care

Of course, where, upon the business decisions having been made, it has become clear what risks the company is not willing to accept, the managing board is under a duty to 'monitor', conveniently expressed in terms borrowed from the *Caremark* decision from Delaware, as a duty to attempt in good faith that an adequate company information and reporting system exists.⁴⁰⁰ No matter what words are used to describe this any further, this is the *tail-end* (or: the operational component) to risk management. I find it overly ambitious, if not misleading, to make it appear as if 'monitoring' can be done prior to the actions, such as the business activities, which are the object of the monitoring. This is one reason for which risk management, especially its operational component, is reactive in nature.

3.12.2.2.1 *Caremark* – lack of care when losses occur through non-compliance

³⁹⁷ I quote extensively from Davies 2008, p 511.

³⁹⁸ Davies quotes *verbatim* from the Australian case of *Daniels v Anderson*, see Davies 2008, p 491.

³⁹⁹ Which informed the (then) Combined Code. See Davies 2008, pp 491 and 492. The Combined Code on Corporate Governance, June 2008, has, meanwhile, been superseded by The UK Corporate Governance Code, September 2012.

⁴⁰⁰ A decision under Delaware law, in which the Delaware court sat to approve a proposed settlement of a shareholder derivative suit; *In re Caremark International Inc. Derivative Litigation.*, 698 A.2d 959 (Del.Ch. 1996), at 970 ('Caremark') – my source reference is Bainbridge 2009, p 973 *et seq.*

Bainbridge addresses the difference between risk management and ‘law compliance’ on the basis of his analysis of *Caremark*. Under American federal and state courts, both within and outside Delaware, a ‘Caremark claim’ is an action against boards for failing to take minimal steps to achieve legal compliance.⁴⁰¹ In 1995 and 1996, health care company Caremark International Inc. had settled several proceedings, both under criminal and private law, resulting from alleged violations of a statute law prohibiting payments to third parties in the health care sector. Subsequently, in *Caremark*, claimants asserted a breach of the directors’ duty of care through inattention. It was ruled that: ‘liability for a loss may be said to arise from an unconsidered failure of the board to act in circumstances in which due attention would, arguably, have prevented the loss.’ The decisive dictum then continues to provide that the board of directors’ duty to be attentive to the business of the company:

‘includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.’⁴⁰²

Bainbridge opines that there are significant differences in degree between law compliance (and accounting internal controls) and risk management, but that they do not differ in kind. Among the arguments he moots, is that the benefits of risk management programmes are inherently less certain than those from law compliance programmes. Whereas, at best, a risk management programme can prevent risks and perhaps limit their impact, in contrast, a law compliance programme not only can significantly reduce the incidence of law breaches, but it can also substantially reduce or eliminate civil lawsuits, penalties or prosecution when breaches do occur. Most significant, in my view, is Bainbridge’s argument that ‘risk management and risk taking are inextricably intermingled; just because the company has the ability to reduce risk, that does not mean that it should.’⁴⁰³ Here, in my view, the difference between the *ex ante* and the *ex post* perspectives becomes essential.

⁴⁰¹ Bainbridge 2009, p 973.

⁴⁰² Cited from Bainbridge 2009, pp 973 and 974.

In his conclusion to *ASMI*, Advocate-general Timmerman indicates⁴⁰⁴ that it is to the managing board to set the strategy with the accessory risk profile.⁴⁰⁵ He then continues to point out that setting the risk profile is part and parcel of setting the strategy.⁴⁰⁶ In Timmerman's conclusion, this is immediately followed by:

I find this [setting the risk profile is an integral part of setting the strategy] not without importance, because managing board members of listed companies may, as different from shareholders, in certain cases also be held to account for risk management failures.

This may confuse the timing and the elements concerned in managing risk. The managing board's duty to take reasonable steps to place themselves in a position to guide and monitor the management of the company, which may entail the duty to ensure that there are adequate internal control systems in place which will throw up problems (the tail-end of risk management), is distinct from its *front-end*; setting the risk-appetite.

From an *ex ante* perspective, with which I mean the situation prior to business actions occurring, compliance ought not to belong to risk – on which the directors may take decisions concerning the degree to which they are favourably disposed to accepting them. Compliance is not within the margin of *discretion* of the managing board. Instead, although compliance may come in many guises, compliance is a 'must-have'. What do I mean by this? First and foremost, where the law⁴⁰⁷ is concerned, compliance is not an option. One is not 'at liberty' to choose to operate outside the law.⁴⁰⁸ ⁴⁰⁹ I think that precisely this point is made by the joint draftsmen of the Preadviezen Maatschappelijk Verantwoord Ondernemen 2010, where they write:⁴¹⁰

⁴⁰³ With extensive references from Bainbridge 2009, esp. pp 981 – 983.

⁴⁰⁴ At 3.4.10.

⁴⁰⁵ Timmerman refers for this to the Dutch corporate governance code, particularly to principle II.1. The unofficial translation from the Monitoring Committee uses 'accompanying', instead of 'accessory'.

⁴⁰⁶ For which he refers to Strik 2009, p 232. There, Strik writes that it is generally accepted that the choice for the *risk appetite* and the risk profile constitutes a strategic choice, thus forming an integral part of the general policy.

⁴⁰⁷ Where I use the term law, I refer to the broad and encompassing notion of law.

⁴⁰⁸ It lies beyond this thesis, as much as it is outside my competence, to address situations where the law is immoral and where civil disobedience may be looked at benevolently or even appreciated as being entirely praiseworthy.

⁴⁰⁹ And neither is there any need to declare that one has 'an ambition' to stay within the law.

⁴¹⁰ Eijsbouts *et al* 2010, p 23.

‘[. . .] from the Corporate Social Responsibility (‘CSR’) point of view the opinion of certain law economists - that penalties and compensations for legal offences should be classified as cost, which should be the object of a process of balancing of and resolving on compliance set off against the proceeds of offending against the law - is unacceptable. This approach denies the meaning of the law as the reflection of the values held in such esteem by society that it doesn’t choose to leave the protection of those values to the moral judgment of participants to social relations.’

Where matters outside the domain of mandatory law are concerned – where the company considers where and how knowingly and voluntarily to commit to norms which would otherwise not be binding – this is not a matter of setting an *appetite* for risk, but it is a matter of setting standards. These may be corporate values, codes of ethics, integrity codes, business principles and the like. It is difficult to conceive that such *regulations*⁴¹¹ will go against societal norms of acceptable conduct, as they will invariably seek to reinforce *bona fides*.

The upshot is that compliance is no risk management, which is not to say that there aren’t any analogies. This is evident where we consider the *ex post* perspective. As Davies puts it: ‘[S]ubordinate employees may be fraudulent or negligent and the directors may not discover this in time, but this does not necessarily mean that the directors have been negligent.’⁴¹² Of course, it will depend on the circumstances whether there arises liability, and here, it is likely much will depend on the internal controls. Hence, this addresses what I have already termed the *tail-end* of risk management. The company is under a duty to implement adequate controls.

3.13 Conclusion

The above brings me to the following. First, I distinguished the *ex ante* from the *ex post* perspective. The *ex ante* perspective is about setting strategy. It concerns the situation prior to *conducting* the business. Where risk is concerned, this is the stage where the risk profile is determined – setting the ‘risk appetite’. Where compliance is

⁴¹¹ Classification as ‘regulations’ as a matter of Dutch private law on legal persons.

concerned, a further distinction is relevant. Compliance may concern rules of law. The directors do not have discretion to set an ‘appetite’ for complying with the law. The company is not (even) at liberty to take the business decision that the ‘risk’ that the law will be breached is to be put up with. But, outside and beyond the law, the company may well define rules it wishes to maintain. Where setting such rules is concerned, this is where compliance is, from an *ex ante* perspective, a matter of setting standards.

As compliance is no risk management, it may be recognised as being within the category of corporate governance. Eijsbouts takes the following approach to this:

‘Although compliance is often considered as risk management, I address it as a distinct category, because, as an integral component of *corporate governance* it also concerns the aspect of value creation.’⁴¹³

I would add that Tricker indicates that as a current development in corporate governance, risk management is now ‘an integral part of the corporate governance process.’⁴¹⁴ The way Eijsbouts expresses that compliance is an integral component of corporate governance, reminds us that the more important stage where compliance is concerned, is the *ex ante* perspective to directing the company – in language borrowed from English company law: compliance is rather about ‘promoting the success of the company’, than about ‘taking care’. Compliance is rather about how the company conducts its business than about taking defensive measures.

One way of creating the bridge between the directors’ duties to the area of compliance, is to identify failure to comply with applicable legal rules, as related to operational risk. In this line of argumentation, whereas risk taking is inherent, and perhaps even essential, to driving an enterprise, the company must take an *ex ante* approach to the risks associated with achieving the company’s (strategic) objectives. In doing so, it has a variety of options, including accepting the risk altogether. The directors’ duty is one of care; where it is unto the managing board to define the

⁴¹² Davies 2008, p 493

⁴¹³ Eijsbouts 2010, pp 95 and 96.

⁴¹⁴ Tricker 2009, p 349.

company policy, including the strategy, it needs to have and maintain an insight into the risk profile and it needs to dedicate attention to managing and controlling the company.⁴¹⁵

With the above, there is a natural fit to my next chapter in which I shall explore an inclusive perspective of corporate governance.

⁴¹⁵ *Cf* Assink 2009, para 3.2.1.

4 Chapter 4 – An inclusive perspective of corporate governance at law, a bird’s-eye view

4.1 Introduction

Although my primary interest lies in promoting that, as a matter of law, compliance is a directors’ duty, I contend that a natural sequel to this is formed by the submission that compliance is within the category of corporate governance. As said, I submit that the law is insufficiently outspoken on compliance as a matter of directors’ duties, and, thereby, the law is not pertinent on compliance pertaining to corporate governance. In any case, in my view it is not clear that compliance is a subcategory of corporate governance. This is a consequence of the way Dutch law – and, with that, the Dutch legal community – approaches corporate governance. First, I will analyse the position at law on corporate governance. I then get to formulating why there is an advantage in taking an inclusive perspective on corporate governance, yielding clarity on compliance pertaining to it, alongside all other directors’ duties. The next step is that I define my view on corporate governance, providing the remedy for the identified lack of certainty.

Thus, this chapter addresses the derived research question:

What is the meaning of corporate governance at law?

To this end, I look at statutory law, case law, custom and at authoritative legal literature. When addressing corporate governance as a theme – and this is no different when generic themes of corporate governance form the object of case law or legal academic writing – this invariably happens in a context where the Dutch corporate governance code appears to take centre-stage. My chosen orientation to focus on banks does not make this any different; where banks are concerned, the Dutch corporate governance code is portrayed as carrying swaying authority. Particularly, the Banking Code⁴¹⁶ provides in its preamble that whereas the Dutch corporate governance code applies without restriction to listed banks, for the most part non-

⁴¹⁶ Code Banken, *Stcrt* 2009 nr. 20060.

listed banks adhere to it voluntarily.⁴¹⁷ And so, whereas only KAS BANK N.V. is listed,⁴¹⁸ thereby seemingly defeating the pertinence of the Dutch corporate governance code to banks, apparently it is readily assumed that for the most part non-listed banks adhere to the Dutch corporate governance code voluntarily. More to the point, in view of the Dutch corporate governance code's prevalence whenever corporate governance is the topic,⁴¹⁹ however, in addressing the meaning of corporate governance at Dutch law, I cannot pretermite the debate on the Dutch corporate governance code.

The analysis along the above lines, will bring me to the conclusion that corporate governance is often explained as addressing the division of powers among companies' organs. Thereby corporate governance addresses the (system of the) relationships between those organs.⁴²⁰ This is what Lambooy calls a 'rules of the game' perspective.⁴²¹ Looking at the interaction between company organs risks losing sight of the substance of what it is they do, and, more to the point, what it is that any one or more of them ought to do. This latter approach likely causes omitting an explicit recognition of the responsibilities intrinsically pertaining to the domain of governance. I submit that, failing such explicit recognition being recognised at law, banks will not readily interpret compliance as a matter of corporate governance. The reason they will not do so is that banks, when seeking to be informed on compliance issues, have a natural tendency to take the (statute) law as their point of departure.

Seeking a more inclusive, substantive approach to corporate governance is much helped by identifying certain trends. And that will bring me to equating corporate governance to directing the company; my next derived research question:

⁴¹⁷ Banking Code, preamble under the third bullet.

⁴¹⁸ ING Groep N.V. being a holding company. The other financial holding company SNS REAAL N.V. was taken from the stock exchange in February 2012.

⁴¹⁹ The Dutch corporate governance code as a metaphor for corporate governance.

⁴²⁰ See, for the specific Dutch context, para 3 of the preamble to the Dutch corporate governance code; which suggests the code's provisions 'regulates relations between' company organs. This approach is easily capable of being derived from the OECD description: [C]orporate governance involves a set of relationships between a company's management, its board, its shareholders and other shareholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Cf OECD *Principles of Corporate Governance*, 2004.

⁴²¹ See Lambooy 2010, p 32.

What is, as a matter of law, the meaning of the terms ‘directing’, ‘managing’, and ‘controlling’, as these terms make up the essence of corporate governance? To what extent does the law allow clear distinction between these three terms?

Formulating answers to these questions should allow me to indicate where, within the gamut of directing the company, lies compliance. In approaching the meaning of directing the company, I shall dedicate specific attention to risk management.

As a matter of corporate governance, a natural sequel to this is the way the managing board’s responsibility for compliance relates to other organs’ powers. Hence, the next section of this chapter addresses division of responsibilities concerning internal supervision – to what extent is there discretion to vary such responsibilities?

In view of the focus on banks, I then turn to Wft-specific corporate governance as well as the Banking Code. The section on Dutch law will end with addressing the relevance at law of the Banking Code.

From Section 4.3 I turn to corporate governance at English law, with a specific excursion to directors’ duties.

4.2 Corporate governance at Dutch law

4.2.1 Statutory law and (derived) regulation

As a term of art ‘corporate governance’ appears in article 2:391, para 5 BW.⁴²²⁴²³ The term ‘corporate governance’ entered the statute book with the amendment to Book 2 BW by the Act of 11 December 2008.⁴²⁴ The amendment served to incorporate Directive 2006/46/EC of the European Parliament and of the Council of 14 June

⁴²² The pendant in article 5:86 Wft does not contain the term corporate governance.

⁴²³ At the time of writing, the legislative process of a bill carrying the abbreviated title: ‘Corporate Governance Bill’, was before the First Chamber of Parliament. This concerns intended amendments to Wft, the Act on transferable traffic in securities (D: Wet giraal effectenverkeer), and BW. See *Kamerstukken* 32 014. This Bill will not lead to a definition of sorts of ‘corporate governance’.

⁴²⁴ *Stb* 2008, nr 550.

2006⁴²⁵ into Dutch law. Directive 2006/46/EC does not define corporate governance. It starts from the premise that certain companies must include a statement on corporate governance in their annual reports. Stopping short of defining corporate governance, it contains an indication of the width of corporate governance where it provides that the statement on corporate governance shall at least contain a description of:⁴²⁶

- the main features of the company's internal control and risk management systems in relation to the financial reporting process;
- certain significant shareholdings;
- the holders of any securities with special control rights and a description of those rights;
- any restrictions of voting rights;
- the rules governing the appointment and replacement of board members and the amendment of the articles of association;
- the powers of board members, and in particular the power to issue or buy back shares;
- the operation of the meeting of shareholders and its key powers, with a description of shareholders' rights and how they can be exercised; and
- the composition and operation of the administrative, management and supervisory bodies and their committees.

Article 2:391 para 5 BW then, provides that further [*ie* further to the provisions from the statute law] provisions with regard to the content of the annual report may be set by regulation (a statutory instrument comparable to an order, *ie* made under legislative powers delegated by Parliament). Article 2:391 para 5 BW continues to provide that such further provisions may, more particularly, address observance of a code of conduct to be designated within the Regulation, and that they may address the content, the publication, and the audit of a declaration on corporate governance. Currently there are three (such) regulations. For the purposes of this thesis I leave the

⁴²⁵ *OJ L 224/1*

⁴²⁶ *Directive 2006/46/EC*, article 7.

regulation pertaining to the annual report of insurance companies of 23 August 2011 without discussion.

From the two remaining ones, the Regulation of 10 December 2009,⁴²⁷ designates the Dutch corporate governance code as published in the Official Gazette of 3 December 2009.⁴²⁸ The Regulation of 1 June 2010⁴²⁹ specifically applies to the annual report of banks, I shall address this Regulation where I get to the Banking Code.

The Regulation of 10 December 2009 must be read in conjunction with two earlier ones, the Regulation of 23 December 2004,⁴³⁰ as well as the Regulation of 20 March 2009.⁴³¹ Both (the earlier) Regulations of 2004 and March 2009 define the scope of application as to the intended addressees of the Dutch corporate governance code, and so does the preamble to the Dutch corporate governance code itself. However, as the Regulation of 23 December 2009 does not repeal an(y) earlier version of article 1, article 1 of the Regulation of 20 March 2009 continues to be in force.⁴³² The Dutch corporate governance code (itself), defines its application as concerning ‘listed companies’.⁴³³

- companies with seat in the Netherlands which are listed;
- ‘large’ companies (*ie* companies with a balance sheet value exceeding € 500 million) with seat in the Netherlands which shares or depository receipts have been admitted to trading on a multilateral trading facility or a comparable system.⁴³⁴

But, as said, article 1 of the Regulation of 20 March 2009 is (still) in force. Under the Regulations, addressees of the Dutch corporate governance code are all companies

⁴²⁷ Besluit van 10 december 2009 tot wijziging van het Besluit van 23 december 2004 tot vaststelling van nadere voorschriften omtrent de inhoud van het jaarverslag, *Stb* 2009, 545.

⁴²⁸ *Stcrt* nr. 18499, 3 december 2009.

⁴²⁹ *Stb* 2010, 215.

⁴³⁰ *Stb* 2004, 747.

⁴³¹ *Stb* 2009, 154.

⁴³² Article 1 of the Regulation of 20 March 2009 implemented the newly inserted article 46a into the Fourth Council Directive 78/660/EEC on the annual account of certain types of companies.

⁴³³ And, to this, I should add the scope provision from article 5:86 Wft, which brings institutional investors seated in the Netherlands within scope. The definition of institutional investors does not cover banks.

limited by shares (the nearest English equivalent being ‘public limited companies’); the Regulations therefore do not cover private companies with limited liability. Thus, at the time I write this, the scope of application of the Dutch corporate governance code is different from the (self-proclaimed) scope expressed in the preamble of the Code itself.⁴³⁵ Surely, there is an oversight in that the Regulation should reflect such changes to the applicability of the Dutch corporate governance as appears to be intended by the code’s own preamble. In fact, a footnote to the Dutch corporate governance code expressed that the Regulation of 23 December 2004 had to be amended in order to adapt to the desired change in applicability.

I observed earlier that only a small number of banks operating in the Netherlands falling under this definition of listed companies,⁴³⁶ seemingly defeats the Dutch corporate governance code’s pertinence to these banks. I also noticed that this should not prevent me from addressing the debate in legal practice and academia on the Dutch corporate governance code, since it is this debate which nourishes the meaning ascribed to corporate governance at law.

4.2.2 Case law

In 2007, the Supreme Court ruled *Versatel II*. The Enterprise Division had forbidden Versatel, by way of an injunction (‘granting immediate relief’⁴³⁷), and for the duration of the legal dispute between Versatel and Centaurus to (resolve to) derogate from the Dutch corporate governance code.⁴³⁸ The Supreme Court ratifies the decision from the Enterprise Division. Hence, as the Supreme Court explicitly recognises, the injunction cut off Versatel from the possibility to derogate from the Dutch corporate governance code with the approval from the general meeting of shareholders. Maeijer observes in his note that, as to its authority as a source of law, this puts the corporate governance code on a par with statutory law and company

⁴³⁴ The location of the stock exchange, multilateral trading facility or comparable system is of no consequence.

⁴³⁵ Were there an issue, at law the Regulation(s) prevail(s) over the Code.

⁴³⁶ Strictly speaking only KAS BANK N.V., whereas ING GROUP N.V. and SNS REAAL N.V. are holding companies.

⁴³⁷ Under article 2:349a para 2 BW, the Enterprise Division may grant an injunction with immediate effect, for the duration of the legal dispute, where this is required in view of the legal person’s circumstances, or in the interests of the investigation.

⁴³⁸ OK 14 December 2005, *JOR* 2006, 7, with commentary Ingh.

articles of association.⁴³⁹ Maeijer, in this same note, also quotes Willems as arguing that, in so doing, the judiciary gives the ‘imprimatur’ as a source of law to the Dutch corporate governance code, without the need of any (other) form of ratification.⁴⁴⁰ Maeijer expresses doubt as to whether this was what had originally been intended with the corporate governance code.

In the article cited by Maeijer, Willems addresses that the Enterprise Division seeks to substantiate whether companies may be reproached for having breached elementary principles of responsible entrepreneurship.⁴⁴¹ Given that there is no text book listing such elementary principles of responsible entrepreneurship,⁴⁴² the courts must discover, if not; invent, those principles. In doing so, the courts seek to establish the convictions of law of (the relevant segment of) society. Willems concludes this by writing that the courts will give the ‘imprimatur’ of legal authenticity to some, whereas it will withhold it from other expressions of such convictions of law. Below, where I address books of authority, I will explore this, also on the basis of the views that had earlier been mooted by Raaijmakers.⁴⁴³

Some months before *Versatel II*, the Supreme Court ruled in the stirring ABN AMRO saga.⁴⁴⁴ The central issue was whether Dutch company law⁴⁴⁵ requires that the general meeting of shareholders has a right of (prior) consent, or, alternatively, must be consulted, on the sale by the company of a subsidiary. In making the argument towards its conclusion that Dutch company law does not contain such right or requirement, the Supreme Court rules:

‘A judgment of a different nature is without sufficient support in statute law or general convictions of law prevailing in the Netherlands, as expressed, *ia*, in the Dutch corporate governance code [the Supreme Court refers to the code as published in the Official

⁴³⁹ *Versatel II*, note Maeijer at 3.

⁴⁴⁰ Dutch: ‘aldus wordt de code door de rechter voorzien van het imprimatur van zonder meer geldende juridische regelgeving.’ Willems 2004, p 438. Willems argues that the Enterprise Division may, in granting the applicant’s request, cast, *eg* best practice from the Dutch corporate governance code into ‘pseudo-statutory law’.

⁴⁴¹ The ‘norm’ from *OGEM II*.

⁴⁴² Whereby Willems notes that some leads directing to such principles are to be derived from certain articles from BW, Willems 2004, p 438.

⁴⁴³ I point to Raaijmakers 2004.

⁴⁴⁴ *ABN AMRO*.

⁴⁴⁵ Hence, the question at law had not been confined to one pertaining to article 2:107a BW.

Gazette nr 250 of 27 December 2004, AJK], more specifically principles II and IV, which conviction of law also substantiates:

- i) the demands of reasonableness and fairness, which, according to article 2: 8 BW, those who are connected to the company by law or by the articles of association, owe inter se;
- ii) the demands resulting from the obligation of proper fulfilment of duties owed by executive directors according to article 2: 9 BW.’

On this particular issue, I should also refer to the ruling from the Supreme Court in *ASMI*:

[. . .] the facts of the case amply support that the managing board had engaged in a dialogue with the external⁴⁴⁶ shareholders, had addressed their arguments and that it had dismissed these with well founded and defensible counter-arguments, and that, in doing so, the managing board had considered the interests of all parties taking an interest in the company in the long term, which is in conformity with the preamble under 7 of the Tabaksblat [*sic*, it is obvious from the context and the date that the Supreme Court actually intended to refer to the Frijns Code, AJK] Code having entered into effect on 1 January 2009 [. . .], which, as well as the Tabaksblat Code 2003, forms an expression of the prevailing general conviction of law in the Netherlands [. . .].’

It seems to me that case law lays down that the meaning and remit of corporate governance in Dutch law, is a matter of (establishing the) general convictions of law held in the Netherlands. And this is where the Dutch corporate governance code, as it applies from time to time, may well assume an important, albeit not exclusive, role as a reflection or manifestation of such convictions.⁴⁴⁷ With this, I add two intimately connected observations. First, that the courts appear to be insensitive to the formal

⁴⁴⁶ ‘External’, so as to distinguish from the ‘internal shareholder’, a foundation controlled by the founder of ASMI, holding approximately 21 per cent of the sharecapital. This foundation holds so-called certificates of shares, boiling down to a situation where the voting rights have been stripped from the shares.

⁴⁴⁷ Assink has clear and outspoken reservations. He questions whether the Supreme Court does not show too much ease in assuming that the provisions from the Dutch corporate governance code fill in Dutch company law. See Assink 2009, p 77. He also mentions that, whereas it is true that the norms from the Dutch corporate governance code are in writing, that does not, in itself make them capable of classifying as legally relevant norms. *Op cit*, p 76.

(statutory) status of the Dutch corporate governance code (if there were any such formal status), as they take and interpret it as a reflection of general convictions of law. Second, precisely in view of the fact that the code has its role to play as a reflection of convictions of law, and is not to be confused with the statutory law itself, its so-called anchorage to any given article from the statute law (*ie* BW) is not decisive as to its validity.

Winter notes that the urge evidently shown by the Dutch government, to promote norms originating from the Dutch corporate governance code into the company statute act, is unhealthy and that it serves to undermine the authority of the code. Were the Dutch corporate governance code to be seen as the gateway to legislation, the inclination to take the comply-or-explain mechanism seriously, will reduce.⁴⁴⁸

On a comparative note, I add that the situation in England is not much different. Where Davies addresses the need for adequate internal control systems, he writes that the materials formed by the corporate governance codes are not legislative instruments and that they do not bind the courts. He does assume, however, that, in appropriate cases, the courts' view of what an objective standard of care requires will be influenced by the provisions from such codes.⁴⁴⁹

4.2.3 Custom

The cases discussed above lead me to custom as a source of Dutch company law. The references by the Dutch courts to *societal*⁴⁵⁰ considerations, and, hence, the importance that the societal impact of the law must be taken into account,⁴⁵¹ may – in any case in so far as it concerns private law – be traced back to the judgment of the Supreme Court in 1919 in the *locus classicus Lindenbaum/Cohen*. In this famous

⁴⁴⁸ Winter 2011, p 487.

⁴⁴⁹ Davies 2008, p 492.

⁴⁵⁰ I consciously choose to translate the Dutch term *maatschappelijk* to societal in stead of social. I realise that social has a similar meaning, but it is confusing to a predominantly Dutch readership. I wish to stress that where I write societal, its meaning also points to the structure, organisation and functioning of society. Hence, an institutional rather than an inter-personal connotation. In my view, article 3:12 BW points to a distinction between social interests where one is under an obligation to have regard to personal interests, and, societal interests, where a (potentially) larger circle of parties, less capable of being defined with accuracy, is concerned. The matter of terminology, where it concerns the difference between social and societal is not without relevance to this thesis, in view of the attention paid to corporate social responsibility, especially in chapter 5.

judgment, the Supreme Court explicitly stretches the relevance of the term ‘unlawful’, beyond the confines of statutory law. It goes on to rule that an ‘unlawful act’ may also concern acts breaching the care owed, in societal relations, to another’s person or goods.⁴⁵²

Fundamentally, and unfortunately often undervalued, statute laws and law are not synonymous. Smith aptly illustrates that societal beliefs and convictions have as much a role to play as formal regulation, which is thereby made ‘positive’. Thus, as he phrases it, instead of a clear hierarchy of norms, we have law consisting of legislation next to what is termed as equity⁴⁵³ in England.⁴⁵⁴ Hence, and I find I cannot stress this enough, Dutch law has an important societal component altogether.⁴⁵⁵ ⁴⁵⁶ Next to this, in Dutch private law, the statute law has an *open-ended* character. In company law, this is underscored by article 2:8 para 2 BW; a rule among those concerned in the company, which rule is based on the law, does not apply in so far as this would, under the particular circumstances, be unacceptable under the tenets of reasonability and fairness. In *Versatel II* one fundamental matter under consideration was whether the Enterprise Division when granting injunctions

⁴⁵¹ See also Asser *Algemeen Deel* (1974), pp 3 and 4.

⁴⁵² As an aside, but nonetheless poignant reminder of my earlier point that we should not be overly concerned with the matter of whether a code is (yet) *anchored* to statutory law, I would point to Molengraaff writing in his annotation that the Supreme Court had done what the lawmaker had neglected to do; it [the Supreme Court, AJK] had established that the law was what had been proposed as the law (to be), in the Bill of law.

⁴⁵³ It is too far outside the context of my thesis to address equity under English law. This may well be a fortunate matter, given the apparent impossibility for English legal writers of authority to define equity with any great deal of precision altogether. Pettit writes: ‘[I]t is accordingly not really possible to define it [equity, AJK] successfully; it can only be described by giving an inventory of its content or in [. . .] historical terms [. . .].’ See Pettit (1997), p 1. Smith’s view, however, that ‘equity’ is (all) the law other than, or outside, legislation, is plainly incorrect. Equity, having originated from the jurisdiction (exclusively) exercised by the Court of Chancery, is, and apparently remains to be, a source of English law outside the common law. The latter is, as is a well-known fact, the law as it is enforced by the courts of justice, which will often, but not exclusively, be a matter of applying and interpreting statute laws. Pettit writes that there is a (continued) separate existence of rules of equity and rules of the common law, and he lists examples such as the duality of legal and equitable ownership, that in the law of property legal and equitable rights may have different effects, and that purely equitable rights can (still) only be enforced by equitable remedies. Pettit 1997, pp 10 and 11.

⁴⁵⁴ Smith 2011, p 755.

⁴⁵⁵ De Jongh reminds us that the norms of reasonability and fairness form the manifest expression of a general principle (Dutch: ‘grondnorm’) of Dutch private law, being that to a certain extent everyone owes a duty to have regard to the interests of others. He refers to Van der Grinten and Tjong Tjin Tai. See De Jongh 2011, p 609.

⁴⁵⁶ Another manifestation of the societal construct of Dutch private law is article 3:40 para 1 BW; Dutch law reserves the right to limit the freedom to contract where the consequences of a contract breach the accepted fundamental principles of society, as these principles are reflected in its objective law. See Asser – Hartkamp/Sieburgh 2010, 43.

with immediate effect under article 2:349a para 2 BW,⁴⁵⁷ may diverge from mandatory legal provisions from book 2 BW. The Supreme Court rules:⁴⁵⁸

‘So, the Enterprise Division may, when these conditions have been met [i. a fair weighing of the parties’ interests has occurred with regard to the consequences of the injunction; and ii. the indispensability of the particular injunction has become sufficiently apparent, AJK], for the duration of the legal dispute, appoint a supervisory board member with special powers, diverging from mandatory legal provisions, even where this means that the general meeting of shareholders and the other supervisory board members will, thereby and to that extent, temporarily be sidelined.’

I mention this judgment at this particular junction, because A-g Timmerman’s conclusion to *Versatel II* yields an extremely striking illustration of my point on the open-ended character of Dutch company law. He states:^{459 460}

“In case of injunctions with immediate effect deviating from the statute law, what happens in my view is not much more than an illustration of the proverb: ‘Necessity knows no law’. The Enterprise Division’s jurisdiction sometimes to grant injunctions outside the statute act, relates to the provision in article 2:8 para 2 BW.”

In view of this – the vast realm of law outside the statute book – custom has an important claim to fame, in any case in Dutch private law (and, thereby, in company law). A succinct way of getting from *Lindenbaum/Cohen* in 1919 to article 3:12 BW with one intermediate step only, is to borrow from Nieuwenhuis in 1974.⁴⁶¹ From *Lindenbaum/Cohen* on, Dutch law has it that relations between persons (‘social relations’) are governed by the norm that one owes *a duty of care*. However, sometimes there exist relations where acting with due care is not enough; these are

⁴⁵⁷ The injunctions with immediate effect should be required in view of the legal person’s circumstances, or in the interests of the investigation and may maximally last for the duration of the legal dispute.

⁴⁵⁸ *Versatel II*, dictum at 4.2.

⁴⁵⁹ *Versatel II*, conclusion attorney-general at 3.11.

⁴⁶⁰ Timmerman’s connecting the issue of the Enterprise Division’s power to grant injunctions deviating from the statute law to that of the reasonability and fairness from article 2:8 para 2 BW, is criticised by Eikelboom. She observes that, in its judgment in *Versatel II*, the Supreme Court does not refer to reasonability and fairness. Nonetheless, she does not appear to reject deriving jurisdiction to deviate from mandatory legal provisions from article 2:8 para 2 BW altogether. See Eikelboom 2011, p 490.

cases in which a higher degree of consideration needs to be had for another's interest. These norms are, taken together, often labeled as good faith ('bona fides'), reasonability and fairness. Nieuwenhuis formulates the conclusion⁴⁶² that the terms 'care'⁴⁶³ on one hand, and 'good faith' (reasonability and fairness) on the other, do not have completely distinct meanings, but they merely intend to convey that where good faith is applied, the parties are held to a relatively higher standard.

This brings us to article 3:12 BW, providing that, in establishing the requirements imposed by reasonability and fairness, consideration must be given to generally accepted principles of law, the convictions of law as they exist in the Netherlands and the societal and personal interests of those interested in the matter to hand. With this, we are full circle to the Supreme Court rulings cited above.

4.2.4 Legal writings of distinguished lawyers

Winter⁴⁶⁴ writes that the term corporate governance points to the generality of norms and practices within a company, determining the division of power between the executive board, the shareholders, and supervisory board, as well as the way in which account is rendered of the use of power. I note, before anything else, that, where he writes this, Winter does not seem to profess to define corporate governance as a theoretically legal phenomenon. I would, however, note that, whilst his description illustrates that corporate governance is a category including a host of issues and subjects forming important themes in company law, it seems to be unnecessarily restrictive. Why just the division of power?

In view of case law and custom, Winter's assertion that the Dutch corporate governance code and the way it is anchored in statutory law, introduce a new form of law into company law, is open to discussion.⁴⁶⁵ Along the lines of what I have mooted earlier, I would be inclined to approach this differently; rather than (or;

⁴⁶¹ Nieuwenhuis 1974, p 54. It is interesting to compare this to the 2003 successor to this book. In it, Nieuwenhuis substitutes the word 'care' (Dutch: *zorgvuldigheid*), by 'propriety' (Dutch: *betamelijkheid*) (the latter from article 6:162 para 2 BW), Nieuwenhuis 2003 p 54.

⁴⁶² Nieuwenhuis 1974, p 54.

⁴⁶³ In Nieuwenhuis 2003, p 54, where the author makes exactly the same statement, however he replaces 'care' by propriety.

⁴⁶⁴ Van Schilfhaarde 2009, p 40.

instead of) introducing a new form of law, the corporate governance code manifests a way of giving expression to ‘the convictions of law as they exist in the Netherlands’. But, that does not seem to prevent the courts from exercising uninhibited discretion over the meaning and relevance to be given to it. And, as Assink observes, the courts ought not to show too much of a preparedness to accept norms from the Dutch corporate governance code as filling in Dutch company law – the norms from any such codes are not, *eo ipso*, norms carrying relevance at law. Assink notes that it is hard to deviate from legally required conduct.⁴⁶⁶ In my view, the difficulty in accepting norms from the Dutch corporate governance code as reflecting convictions of law in the Netherlands, simply lies in the fact that, at law, the code is not binding in character. The particular (business and entrepreneurial) community to which the code bears particular relevance, must be assumed to be perfectly aware of this legal position. And, as I indicated above, were the code to be considered as the gateway to regulation, this would undermine the status of the comply-or-explain principle.⁴⁶⁷

In Sanders & Westbrook⁴⁶⁸ the approximation to the phrase corporate governance is an outright admission that there is no uniform definition, but it is suggested that there is consensus on it being essentially concerned with ‘checks and balances in the judicial format (or: the organisation at law) of the enterprise.’ In elaborating on the matter, a distinction is made between oversight of management, so as to prevent it from an overly dominant position on the one hand, and the division of control between the managing board, supervisory board and the general meeting of shareholders on the other hand. As such, the core themes are transparency, oversight and the mechanisms for rendering account. Here too, stopping short of defining corporate governance at law, it rather seems that the editors apply a purposive⁴⁶⁹ approach to the phrase. The phrase is used to jump to the surmised core themes of the ‘debate’ on the matter. This is interesting in a Dutch context, where corporate governance as a term of art is often automatically associated with certain desirables, such as ‘balanced corporate governance’ (*evenwichtig ondernemingsbestuur*),⁴⁷⁰ ‘good corporate governance at stock quoted companies and effective checks and

⁴⁶⁵ Van Schilfgaarde 2009, p 42. Emph from me.

⁴⁶⁶ Assink 2009, especially on pp 76 and 77.

⁴⁶⁷ Cf Winter 2011, p 487.

⁴⁶⁸ Sanders en Westbrook 2005, para 1.5.

⁴⁶⁹ Or, within the context of interpretation: ‘teleological’.

balances' (*goed bestuur bij beursvennootschappen en effectieve checks and balances*).⁴⁷¹ I would, in this context, point to Van Ginneken's observation that 'good corporate governance' is an instrument promoting better functioning of enterprises, but not a purpose in itself.⁴⁷² I couldn't agree more.

4.2.5 Intermediate conclusion

The picture which emerges from the above is that it will be difficult to produce a common denominator for the meaning Dutch law ascribes to corporate governance. At Dutch company law corporate governance is not a received term of art. This should not surprise; although 'the corporate governance debate'⁴⁷³ has its origins in American efforts to reform company law,⁴⁷⁴ from an early moment onward the view was that corporate governance was something better addressed outside the statute book. In the 1992 Cadbury Report,⁴⁷⁶ this is expressed as follows:

'Statutory measures would impose a minimum standard and there would be a greater risk of boards complying with the letter, rather than with the spirit, of their requirements.'

And so, in the Netherlands as much as elsewhere, whereas 'corporate governance' can only exist within the conceptual sphere of the company⁴⁷⁷ - a purely juridical fiction - the development is now more and more informed from sources outside legal practice. In a way, this is strikingly illustrated by the approach taken by the Supreme

⁴⁷⁰ Eg SER Advies 15 February 2008.

⁴⁷¹ Eg Den Boogert 2004, p 133

⁴⁷² Van Ginneken 2012, p 726.

⁴⁷³ Davies uses the phrase 'the corporate governance industry', see Davies 2008, p 410.

⁴⁷⁴ I refer to the developments which have led to the American Law Institute's corporate governance project. The first iteration – Tentative Draft No 1 - of this institute's Principles of Corporate Governance and Structure: Restatement and Recommendations, dates from 1982. But, before that, in a testimony before the Senate in 1976, Goldschmid proposed: 'establishment of governance provisions to assure corporate adherence to law and establishment of a governance structure that would provide an independent board, capable of "checking" senior managers.' Hearings Before the Senate Comm. on Commerce, 94th Cong., 2d Sess. (1976). My source Carney 1988, p 246.

⁴⁷⁵ And, as Tricker writes: '[C]ompany law was the original underpinning of corporate governance.' Tricker 2009, p 8.

⁴⁷⁶ The Cadbury Committee's membership consisted of 12 persons, with one (the President of the Law Society) representative from the legal profession.

⁴⁷⁷ The company is a juridical fiction (with dogmatic roots with Von Savigny, 1779-1861), see Asser – Van der Grinten/Maeijer 1997, 1, as is 'property'. See, on this, Van den Bergh 1979, p 38, where he indicates that where (the definition of) property distilled into the statute law, this was the traditional notion of property from jurisprudence, *ie* from legal theory.

Court; assimilating the Dutch corporate governance code to general convictions of law in the Netherlands. ‘General convictions of the law’, by their very nature, are ‘outside’ the judiciary.

Is it, on the basis of the above analysis, apparent from the Dutch position at law that compliance is within the category of corporate governance? In my view, although there is no indication to the contrary, this remains entirely unclear. And that is the perspective on which I wish to shed more light. What (legal) perspective on corporate governance will yield clarity on compliance pertaining to corporate governance? It will be clear that taking corporate governance to be (primarily) concerned with the relationships between the company’s organs will not get us there.⁴⁷⁸ Rather, the argument in support of my position, starts from the premise of an inclusive, or, substantive view on corporate governance; corporate governance is essentially about *directing* the company. Corporate governance thereby looks at what the directors do, and it comprises their duties.⁴⁷⁹

4.2.6 Corporate governance is about directing the company

It is possible to get to this result simply by looking at corporate governance from a historical perspective. The impetus for the American Law Institute’s Corporate Governance Project was to address the problems with ‘corporate governance and structure’.⁴⁸⁰ Literally, such phrasing actually points to a view that the element ‘governance’ comprises the substance of what it is directors do, whereas the element ‘structure’ points to (the) ‘rules-of-the-game’ aspects. And, this is indeed corroborated by the fact that the original goals of the American Law Institute’s Corporate Governance Project in 1982, were to produce: ‘a restatement [of the law] with recommendations regarding the legal duties incident to corporate management and control.’⁴⁸¹ So, as was to be expected, the Project produced rules governing the nature and extent of the monitoring role of the board of directors, and it was the

⁴⁷⁸ And I recall here that corporate governance focusing on relations between company organs is capable of being read into recital 3 of the Dutch corporate governance code’s preamble.

⁴⁷⁹ Language almost literally borrowed from the UK Corporate Governance Code, pp 1 and 2.

⁴⁸⁰ Carney quotes Herbert Wechsler as having said: ‘that there were important problems in the field of corporate structure and governance, that the Institute [ie the American Law Institute, AJK] could fruitfully address.’, cf Carney 1988, p 243, footnote 15.

Institute's project which mooted a standard for directors' duty of care. Corporate governance substantively encompassing the directors' duties remains true to this day; the 2012 UK Corporate Governance Code makes a direct reference to directors' statutory duties - thereby also signaling the redundancy of 'restating' such duties.⁴⁸²

And it is the UK Corporate Governance Code which imparts essential characteristic to the meaning of corporate governance by reading:⁴⁸³

'Corporate governance is therefore about what the board of a company does and how it sets the values of a company, and is to be distinguished from the day to day operational management of the company by full-time executives.'

This original way of distinguishing governance and management stems from Tricker, who, in his 2009 book, writes: '[. . .] management runs the business; the board ensures that it is being well run and run in the right direction.' Tricker then explains a graphic representation of the distinction thus that governance is: 'the work of the board of directors or other governing body'.⁴⁸⁴ As I shall address later, where I get to 'the management' of the company, Dutch law, and, for that matter, Dutch corporate governance practice, does not comparably distinguish governance from (operational) management. The Dutch corporate governance code, for instance does not make any such distinction. Instead, its preamble rather suggests that governance addresses the regulation of the relationships between the various company organs.⁴⁸⁵

The (more) inclusive perspective on corporate governance is supported by pointing to the trend in the development of corporate governance, identified by Tricker:

'Firstly, corporate governance compliance has increasingly become mandatory, enshrined in regulation or in some cases law. [. . .]. Second, risk analysis and risk

⁴⁸¹ Wechsler, Forward in Tentative Draft No 1 Principles of Corporate Governance and Structure: Restatement and Recommendations, at viii – my source, Carney 1988, p 249.

⁴⁸² *Id* the duties from Sections 170 to 177 CA; see the UK Corporate Governance Code, Supporting Principle A.1.

⁴⁸³ UK Corporate Governance Code

⁴⁸⁴ Tricker 2009, p 36.

⁴⁸⁵ Dutch corporate governance code, preamble para 3: '[T]he Code contains principles and best practice provisions that regulate relations between the management board, the supervisory board and the shareholders [. . .]'

management have become an integral part of the corporate governance process. Thirdly and most recently, corporate social responsibility and sustainability have been added to the corporate governance portfolio.⁴⁸⁶

Hence, in my view, corporate governance encapsulates *directing* the company. As expressed by Clarke - not a legal academic - corporate governance can be taken to cover (the wider issue of) the (entire) system by which companies are directed, managed, led and/ or controlled.⁴⁸⁷ This is corroborated by the etymology of the word governance capable of being traced from to steer, to drive, to act as a pilot (the Greek κυβερναο), and, hence, synonymous to the Latin *dirigere* (to direct, to conduct, to head, to lead). In order that I can address why compliance is within the category of corporate governance, I turn to the meaning of directing the company.

4.2.7 Directing the company – meaning at law

Lest there be a misunderstanding, as much as academics own up to their practical incapacity of defining the parameters of the phrase corporate governance, they avow their difficulty in giving an all-encompassing and conclusive answer to the remit of ‘the management’.⁴⁸⁸

Article 2:129 para 1 BW provides that, unless there are limitations according to the articles of association, the managing board has the duty to manage the company.⁴⁸⁹

Article 2:107 para 1 BW provides that the general meeting of shareholders has, within the boundaries set by the statute law and the articles of association, all power which is not allocated to the managing board or others.

The use in article 2:129 BW of the term ‘duty’, expresses that the managing board does not just have the power to manage the company, but that it is under an obligation to do so. This is also expressed as ‘the instruction to manage’

⁴⁸⁶ Tricker 2009, p 349.

⁴⁸⁷ Clarke 2007, p 1.

⁴⁸⁸ Asser – Maeijer/Van Solinge/Nieuwe Weme 2009, 390, with pointers to Löwensteyn’s thesis from 1959 and Van der Heijden/Van der Grinten 1992, 231 and 232.

⁴⁸⁹ Dutch: ‘[B]ehoudens beperkingen volgens de statuten is het bestuur belast met het besturen van de vennootschap.’

(*bestuursopdracht*).⁴⁹⁰ Characterisation of the management as an instruction is corroborated by article 2:9 BW which provides that each director owes the company a proper fulfilment of his⁴⁹¹ task.

Managing the company comprises both factual and juridical acts, as much as it concerns defining the general policy (*het algemeen beleid*). Setting the strategy, as, in principle, a matter for the managing board,⁴⁹² is encompassed by the management of the company, and it may well be part and parcel of the general policy.⁴⁹³ Huizink notes that where defining the policy and co-ordination are concerned, failing to do so will cause a liability owed to the company.⁴⁹⁴ The term policy (*beleid*) is not just about a consistent line of conduct inferred from the sequence of management actions, but it may comprise as little as one particular management decision showing gross lack of responsibility or even bad faith.⁴⁹⁵ Within the context of management's responsibility for the company's policy, it is opportune to refer to 'elementary principles of responsible entrepreneurship', already mentioned above as the 'norm' originating in *OGEM II*.⁴⁹⁶ Where those elementary principles are breached, at Dutch company law this constitutes 'mismanagement'.⁴⁹⁷

It is up to the managing board to have the power and a duty alike to take initiatives and to anticipate. This encapsulates performing all such acts, with or without the use of the company's financial resources, that may be conducive to realising the company's purpose.⁴⁹⁸ The Dutch Corporate governance code provides that the

⁴⁹⁰ See, eg Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 390.

⁴⁹¹ For the avoidance of doubt; my reference to the director by using the term 'his', is neither purposeful, nor deliberate. I simply sought to translate the provision from the law. However, for the purposes of terminological convenience, I will subsequently use 'he' and 'his' with the understanding that these words refer to both men and women. This is not meant to reinforce sexist attitudes, but purports to avoid diverting the attention from the issues discussed. This is from Cheffins, and I follow suit. See Cheffins 1997, p xlv.

⁴⁹² Cf *ABN AMRO*. Cf, also, the earlier ruling by the Enterprise Division in *Stork*. Note that Assink observes that the company management holds the independent power to set the company policy – which includes the strategy, Assink 2009, p 62.

⁴⁹³ See, eg Huizink 2010, article 2:129, aant 1 en 15, Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 390.

⁴⁹⁴ Such liability arising from article 2:9 para 1 BW.

⁴⁹⁵ *Kamerstukken II*, 16 530, nr 7, Memorie van Antwoord, p 24.

⁴⁹⁶ *Supra* p 124, footnote 442.

⁴⁹⁷ The relevance of making this point is terminologically evident to the Dutch beholder, as 'mismanagement' translates as *wanbeleid*, an antonym of *beleid*, the latter term being the Dutch word for 'policy'.

⁴⁹⁸ Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 390.

managing board's duty to manage the company means, among others, that the managing board is responsible for the attainment of the company's purposes, the strategy with the risk profile pertaining to that strategy, the development of the results, and the corporate social responsibility aspects relevant to the company.

Van Solinge and Nieuwe Weme refine the above assertion from Huizink that managing comprises factual and legal acts as much as it concerns defining the general policy, by writing that, roughly speaking, managing means the day-to-day management, *ie* such acts as are normally likely to be performed by those 'leading',⁴⁹⁹ the company.⁵⁰⁰ This may be expressed by saying that the managing board has the power to run the company, and that the company is headed by the managing board.

Whereas it is possible under Dutch company law to limit the powers of management, the power to manage the company may not altogether be withheld from the managing board. This tenet is referred to as the independence, or, perhaps better, autonomy of (the) management.⁵⁰¹ Maeijer underlines this in his note to *ABN AMRO*⁵⁰² by stating that the managing board is autonomous in exercising the powers conferred to it by statute law and the (company) articles. This particularly intriguing point of the autonomy of the managing board, and, for that matter, the dogmatic relevance of the division of powers among the company organs as a matter of the Dutch company statute law, is strikingly illustrated in *ASMI*. Whereas, for the greater part, the Supreme Court's considerations on the division of powers between the company's

⁴⁹⁹ I note that I find the term 'leading', not without the danger of reading too much into it. Leading has a connotation of the charismatic and perhaps even empathic sharing of a vision, creating enthusiasm and 'following' among, especially, employees (those who are, due to the hierarchical relationships within the company, subordinate to leaders).

⁵⁰⁰ Asser – Maeijer/Van Solinge/Nieuwe Weme 2009, 390.

⁵⁰¹ Impetus to this idea of 'autonomy' originated back in 1955 in *Forumbank*, where the Supreme Court ruled that the general meeting of shareholders may not trespass the boundaries of its competence, as such boundaries are set in the law and in the articles of association. Certain care must be had in such inference, given that the case almost entirely depended on an interpretation of the articles of association. See for this, Hijmans van den Bergh in his note to *Forumbank* at 1. Nonetheless, as Hijmans van den Bergh observes, this judgment now buried the until then persistent view that the general meeting of shareholders constitutes the highest power within the company. See his note at 4. *Cf* De Jongh 2011, p 610.

⁵⁰² *Cf* also Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 413. Earlier, Maeijer had expanded on the meaning of the autonomy of the managing board in Asser - Maeijer 2000, 299. At that place, he indicates that the management may not be given concrete instructions by other company organs, as much as that it is possible to provide in the articles of incorporation that the managing board must act in accordance with another organ's *indications on the broad outlines* of the financial, social, economic

organs in *ASMI*, reflect and contain references to *ABN AMRO*, A-g Timmerman's conclusion contains a comparative analysis of the situation as to the managing board's duty to engage with the general meeting of shareholders on the overall strategy of the company in England, Germany, and France.⁵⁰³ Timmerman notes:

'More so than in Germany and France, in the Netherlands the importance of a constructive dialogue is emphasised, whereas more than in England the managing board's distinct position and responsibility for determining the strategy, is at the forefront.'

There are two points from a comparative law perspective, I wish to highlight at this particular juncture. Although connected in that they both arise from the autonomy flowing from the statute law providing that the managing board has the duty to manage the company, they can be distinguished as:

1. The division of powers mandatorily flowing from company law results in a situation in which there must be a given (minimal) content to the term management – under English law this is different; 'managing' the company means what(ever) the shareholders design it to be in the articles of association; and
2. Under Dutch law, the day-to-day management (Dutch: *dagelijkse leiding*) may never be taken away from the managing board⁵⁰⁴ - under English law, and especially as accepted practice in large companies, directors do anything but occupying themselves with the day-to-day management; this usually being

and human resource policy to be conducted. Especially on the latter point; Maeijer emphasises that indications on the broad outlines is something different than concrete instructions.

⁵⁰³ I should note that from a company organ Timmerman's analysis is almost exclusively orientated on the prevailing corporate governance codes (for the UK, this was the Combined Code 2008 - the current one at the time I write this being the 'renamed' UK Corporate Governance Code June 2010; for Germany the *Deutscher Corporate Governance-Kodex*, 26 May 2010; and for France the *Code de gouvernement d'entreprise des sociétés cotées* décembre 2008), and not outspokenly directed towards company law. The reason I note this, lies in the fact that for Germany and France, I am not in a position to establish the authority at law of such codes. Where the UK is concerned, the Codes are not legislative instruments binding the courts (not taking away from the courts' view assuredly being influenced by these codes). See Davies 2008, p 492.

⁵⁰⁴ Asser – Maeijer/Van Solinge/Nieuwe Weme 2009, 414, where an interesting academic discussion is being mooted; according to Löwensteyn, so long as power of the day-to-day management is left in tact, such other powers rather concerning policy and strategy, may be taken away.

left to senior employees (under the wide powers of delegation granted to the directors).

It may well be that, where Dutch company law seems to depart from the position that managing particularly encompasses performing such acts as are necessary for the day-to-day management ('running' or 'heading' the company), it is notably different from the practical situation under English company law concerning large companies. Under English law, the task of executive management is, otherwise, not for the board but rather for [the] full time senior employees of the company.⁵⁰⁵ The term 'otherwise' means that – and this is made explicit in the the UK Corporate Governance Code – in large companies, the board has the function of setting the corporate strategy and reviewing management performance. The British model set of articles for public companies⁵⁰⁶ gives wide power of delegation of the powers conferred on the board, 'to such person', 'to such an extent', and 'on such terms and conditions as they think fit.'⁵⁰⁷

These differences between the English and Dutch positions may also illustrate some of the terminological nuances to the remit of corporate governance. In the English perception, governance is 'what the board does'.⁵⁰⁸ But, the UK Corporate Governance Code is clear on the board not performing the day to day operational management of the company – very much a matter, under received insights on Dutch law, for the managing board.

4.2.8 Division of responsibilities concerning internal supervision

Where, within the organisation of the bank, lies the judgment that compliance breaches have been committed? I am aware that this is by no means limited to the

⁵⁰⁵ The UK Corporate Governance Code expresses this pregnantly as follows: '[C]orporate governance is [. . .] about what the board of a company does and how it sets the values of the company, and is to be distinguished from the day to day operational management of the company by full-time executives. See the UK Corporate Governance Code, p 1.

⁵⁰⁶ On the relevance and nature of the 'tables' of model articles of association for companies, see *infra* p 164.

⁵⁰⁷ Article 4 of the draft model articles for public companies; see also Davies 2008, p 367.

⁵⁰⁸ See UK Corporate Governance Code, p 1: '[C]orporate governance is therefore about what the board of a company does and how it sets the values of the company, and it is to be distinguished from the day to day operational management of the company by full-time employees.'

company law division into company organs. There may be compliance breaches by employees not leading to compliance breaches by the bank or which do not trigger a possible liability for the managing board. Or this could concern compliance breaches by individual (managing) board members, where – irrespective of the supervisory board’s tasks – it may lie with other managing board members to discipline such breaches. However, I shall confine myself to a constellation of a bank with three company organs: a managing board, a supervisory board and the general meeting of shareholders.

4.2.8.1 The supervisory board

4.2.8.1.1 Tasks and duties at law

Article 3:19 Wft requires a bank to have a supervisory board. The members of the supervisory board are under the obligation to orientate themselves towards the company’s interest and to that of the enterprise connected with it.⁵⁰⁹ The supervisory board must actively exert powers given to it by law and by the articles of association.⁵¹⁰ To a degree, this may be construed as a reflection of the term ‘task’ in article 2:140 par 2 BW; company law imposes a duty upon the supervisory board to exert supervision. ‘Duty’ encompasses ‘power’, but it involves an obligation. The supervisory board is hence under an ‘instruction’ to supervise.⁵¹¹ Lest there be a misunderstanding; this is not to say that the supervisory board were to act as super-management, thereby assuming and usurping managing board power.⁵¹² But, importantly, the supervisory board has autonomy in exercising its duties from the

⁵⁰⁹ Article 2:140 para 2 BW.

⁵¹⁰ Article 2:140 para 3 BW allows for ‘additional provisions concerning the task and the powers of the supervisory board and its members’.

⁵¹¹ I have addressed this earlier with particular regard to the duty of the managing board, see *supra* p 135 (with reference to the Dutch term *bestuursopdracht*).

⁵¹² In so many words from Asser-Maeijer/Van Solinge/Nieuwe Weme 2009, 486. Cf Assink 2009, esp. on p 66. He writes: ‘determining the strategy lies with the managing board and the supervisory board supervises this activity, which means that the supervisory board does not co-determine the strategy.’

law.⁵¹³ A recent pointer in this direction is *ASMI*. The Supreme Court underlines that the Supervisory Board has discretion in setting its policy ('margin of discretion').⁵¹⁴

4.2.8.1.1.1 Obtaining information and signing annual accounts

Article 2:141 BW provides that the managing board timely furnishes the supervisory board with the information necessary for the fulfilment of the latter's duty. The supervisory board may be expected to heed that the managing board complies with such duties the law imposes on it addressing its relationship to the supervisory board.⁵¹⁵ Arguably, this notion is 'modernised' in the Dutch corporate governance code; best practice provision III.1.9 provides that the supervisory board and its individual members have their own responsibility for obtaining all information from the managing board they need to be able to carry out their duties properly as a supervisory organ. The supervisory board members sign the annual accounts.⁵¹⁶ Also in the light of their potential liability resulting from this involvement in making up the annual accounts,⁵¹⁷ they may seek to use the power vested in the possibility to withhold their signature. Using this power is, in fact, as clear a manifestation of exerting supervision as can be; the law is that the supervisory board member is not liable *in personam* for misleading annual accounts where he can prove that such misleading may not be attributed to his failure in exerting supervision.⁵¹⁸

4.2.8.1.1.2 Hiring and firing managing board members

⁵¹³ Systematically, along the same lines as Maeijer's comment to *ABN AMRO* concerning the managing board's position, where he emphasises that, in exercising its powers allocated to it by law and articles of association, the managing board has autonomy, his note to *ABN AMRO* at 2.

⁵¹⁴ Dictum at 4.5.2. See the interesting comment from Van Schilgaarde that the Supreme Court lectures *ex cathedra* on the task, the responsibility and the setting of its policy ('margin of discretion') of the supervisory board; his note to *ASMI* at 8.

⁵¹⁵ Cf Asser- Maeijer/Van Solinge/Nieuwe Weme 2009, 492. Here, it is also admonished that the supervisory board must lay claims on the quality of the information and that it must take an active stance; where necessary, it shall have to obtain the information itself.

⁵¹⁶ Article 2:101 para 2 BW.

⁵¹⁷ Article 2:150 BW creates liability *in personam* of the supervisory board member for a misleading representation. The communicating vessel to this is such member's defence of not having failed to exert appropriate supervision, equally from article 2:150 BW.

⁵¹⁸ Article 2:150 BW.

Where it lies with the supervisory board to appoint the members of the managing board,⁵¹⁹ the degree to which the supervisory board may bring pressure to bear on the managing board and its individual members, is, thereby (naturally) most advanced. This may – but will not as a rule – be the case where the bank is a so-called large company under article 2:154 para 1 BW, and where, in such case, the so-called structure-arrangement were to apply in full. By law, the supervisory board then has the power to appoint the managing board members.⁵²⁰ By law, the communicating vessel to this is that it is also to the supervisory board to suspend or dismiss managing board members.⁵²¹ Apart from this reflection of the furthest reaching consequence of the regime applying to large companies, where a company or a dependent company has a workers' council,⁵²² companies may voluntarily opt for application of (parts from) the structure-arrangement.⁵²³ This may, outside the supervisory board's power to appoint the members of the managing board, cause application of the so-called weakened structure-regime⁵²⁴ and entails, for instance, that the supervisory board must give prior consent to a range of resolutions by the managing board.⁵²⁵ Where suspension is concerned, the default position is that the supervisory board may at all times suspend managing board members, except where the articles of association provide otherwise.⁵²⁶

4.2.8.1.1.3 Remuneration of managing board members

⁵¹⁹ For instance, at the time of writing, article 16 para 1 the articles of association of Van Lanschot N.V., not a bank, but the holding company of F van Lanschot Bankiers N.V., provided that the supervisory board appoints the members of the managing board. It is beyond the confines of my thesis to address the reasons why banks are seldom subjected to the (full) so-called structure arrangement, which encompasses the supervisory board's power to appoint the members of the managing board under article 2:162 BW. Suffice it to say that banks may be subsidiaries of other (holding) companies (which triggers exemption under article 2:153 BW), or may have been granted an exemption under article 2:156 BW.

⁵²⁰ Article 2:162 BW.

⁵²¹ Article 2:134 para 1 BW.

⁵²² Which worker's council is governed by the provisions from the Act on workers' councils.

⁵²³ Article 2:157 BW.

⁵²⁴ See, eg Asser- Maeijer/Van Solinge/Nieuwe Weme 2009, 542.

⁵²⁵ Article 2:164 BW. At the time of writing, the articles of association of ING Group N.V. (holding company of, *ia*, ING Bank N.V.) provided that the members of the managing board are appointed by the general meeting of shareholders (article 19 para 2), but that the range of resolutions listed in article 2:164 BW require the consent from the supervisory board (article 22). The position in ABN AMRO Group N.V. (holding company of ABN AMRO Bank N.V.) is similar, *ie* appointment of managing board members by the general meeting of shareholders (article 18 para 1), and resolutions requiring prior consent from the supervisory board in article 23.

⁵²⁶ Article 2:147 BW.

An important area in respect of the ways the supervisory board exerts its influence with a view to disciplining or sanctioning, is the remuneration of the members of the managing board. With banks, the standard situation is that determining upon the remuneration of the managing board members lies with the supervisory board. The point of departure is article 2:135 BW. The first requirement is that the general meeting of shareholders adopts a remuneration policy. The law opens the possibility that another company organ than the general meeting of shareholders determines the remuneration of members of the managing board, with due observance of the remuneration policy.⁵²⁷ The Banking Code provides that the supervisory board is responsible for the implementation⁵²⁸ and evaluation of the remuneration policy where it specifically concerns the members of the managing board.⁵²⁹ Also in view of the context, this likely signifies that it should be the supervisory board which determines the managing board members' remuneration, as meant in article 2:135 para 3 BW, although expressed in different terms.⁵³⁰ I would point out that the Dutch corporate governance code does use the term 'determines' where it addresses that it is the supervisory board setting the remuneration of the managing board members.⁵³¹ Needless to say that the (lack of) use of the variable component of board members' remuneration, may prove an effective disciplining instrument.⁵³² Thus, in reflection of this, the Banking Code provides in principle 6.4.5 that the supervisory board has discretion to adapt a managing board member's variable remuneration, where exceptional circumstances lead to unfair or undesired outcomes. Given this principle's wording, it seems unlikely indeed that this also intends to grant discretion to increase the variable remuneration. Finally on the remuneration of managing board members, a clear indication that the remuneration powers may serve as a sanctioning instrument, is principle 6.4.6 from the Banking Code; the supervisory board has power to reclaim a variable remuneration having been granted to a managing board member, where the grant was based on incorrect information.

⁵²⁷ Article 2:135 para 3 BW.

⁵²⁸ The official Dutch version of the Banking Code expresses this as *uitvoeren*.

⁵²⁹ Banking Code, principle 6.2.1.

⁵³⁰ And, hence, in my view, unnecessarily confusing.

⁵³¹ Dutch corporate governance code, principle II.2, see especially best practices II.2.1 through II.1.3.

⁵³² I write this in full appreciation of the rapidly decreasing relevance of variable remuneration for bankers.

4.2.8.2 The general meeting of shareholders

4.2.8.2.1 Power(s) at law

4.2.8.2.1.1 Is the general meeting of shareholders under a duty?

Within the confines of the law,⁵³³ the general meeting of shareholders may seek to exert its powers with a view to disciplining or sanctioning both the managing and supervisory boards. In contrast to the allocation and designation of powers to the managing and supervisory boards, where the statute law empowers the general meeting of shareholders, this does not take the form of an instruction. Article 2:107 para 1 BW allocates residual power (in the sense of authority or jurisdiction) to the general meeting, which, empowerment, (at least) on the face of the chosen wording of the law, does not come as a duty.⁵³⁴ Assink explicitly addresses the question as to whether the general meeting is bound by duty/operates under an instruction. He concludes that this cannot be said. His reasoning flows from the wording chosen in the law – the absence of the formulation of a task. In conceding that there is a limited number of situations in which there is an expectation for the general meeting ‘to get into motion’, he then submits that there are certain *ad hoc* tasks to the general meeting, but distinguishes this from a *continuous prospective duty*.⁵³⁵ I add that, in my view, the natural ancillaries to a duty are responsibility as much as liability. Whereas, at company law, managing directors and supervisory board members alike, are under an obligation *properly to fulfil their tasks*, there is no equivalent applying to shareholders. In consequence, whereas I argued above that where the managing board has certain obligations *vis-à-vis* the supervisory board those obligations may be reflected by duties of the supervisory board to seek reciprocity, there is no analogy in the relation between the general meeting of shareholders and the other company

⁵³³ Thus, in contrast to the situation under English law, the general meeting of shareholders is not the highest power within the company. It does not ‘outrank’ any of the other company organs. This is the proposition which evolved as early as in 1955 from *Forumbank*. See *supra* p 136, footnote 502.

⁵³⁴ This has relevance to the interests the general meeting of shareholders take as their compass for orientation. In short; the general meeting of shareholders is not bound by the norm of the company’s interest (‘het vennootschappelijk belang’), whereas the managing and supervisory boards are. The general meeting of shareholders is subject to article 2:8 para 1 BW; it must observe reasonability and fairness in relation to the company and those concerned in its organisation.

⁵³⁵ Assink 2009, p 9.

organs. For instance, where article 2:107 para 2 BW obliges the managing and supervisory boards to inform the general meeting of shareholders, there is no corresponding expectation that the general meeting of shareholders will in fact demand compliance – the latter being at the general meeting’s discretion.

4.2.8.2.1.2 Residual power

The general meeting of shareholders has *residual* power.⁵³⁶ The term residual seeks to indicate that the formula in the statute law is that, within the confines of the statute law and the articles of association, the general meeting of shareholders has all powers not conferred on the managing board or on ‘others’.⁵³⁷ Although it possible under Dutch law to limit the powers of management, the power to manage the company may not be withheld altogether from the managing board.⁵³⁸ In equal vain, I would argue that it will not be possible to withhold the power (and duty) to supervise from the supervisory board. And this is important, given that the supervisory board must exert its supervisory powers with due observation of the company’s interest and the enterprise associated to it.

4.2.8.2.1.3 Granting discharge to managing and/or supervisory board members

By resolution from the general meeting of shareholders next to, but (nowadays)⁵³⁹ distinct from its resolution to adopt the annual accounts⁵⁴⁰ discharge⁵⁴¹ is granted to the managing directors or the supervisory board members. This means that the members of the managing board are discharged from liability for their policies, as

⁵³⁶ Residual but, by no means, ‘higher’ – this is to do with the spheres of autonomy each of the company organs have, which circles are set in the law (and, possibly, in the company’s articles of association). The general meeting of shareholders does not take precedence over, or outrank, the other company organs. See *supra* p 136, footnote 502, with reference there to *Forumbank*.

⁵³⁷ Article 2:107 BW.

⁵³⁸ See Maeijer’s note to *ABN AMRO*, where he submits that the managing board is autonomous in exercising the powers conferred to it by the statute law, and A-g Timmerman’s conclusion to *ASMI*, in which he illustrates this particular point from a comparative perspective.

⁵³⁹ To a degree this is a development from the corporate governance discussion in the Netherlands. For the reflection of this practice see best practice IV.1.6 Dutch corporate governance code. On this, see Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 479.

⁵⁴⁰ Article 2:101 para 3 BW.

these have been conducted, and, where it concerns members of the supervisory board, that they are discharged from liability for the oversight held. Such discharge is limited to the ‘internal’ liability, *ie* liability as against the company from article 2:9 BW.⁵⁴² On a comparative note, I would observe that (this ‘Dutch’ practice consisting of) granting discharge to board members, is absent in the UK. Under the common law, it is, however, perfectly feasible that board members are either authorised *ex ante*, or that actions performed are ratified by the shareholders.⁵⁴³ This reflects the ‘normal principle of the law relating to fiduciaries that those to whom the duties are owed may release those who owe the duties from their legal obligations’.⁵⁴⁴

4.2.8.2.1.4 Hiring and firing of managing and/or supervisory board members

Where the matter of supervision and possible sanctioning is concerned, the furthest reaching powers vested in the general meeting of shareholders will be those enabling it to appoint and to dismiss managing and/ or supervisory board members.

4.2.8.2.1.5 Hiring and firing of managing board members

The default position is that the members of the managing board are appointed by the general meeting of shareholders.⁵⁴⁵ The corresponding vessel to this power is that where it is to the general meeting to appoint, it also has the power to suspend⁵⁴⁶ or to dismiss managing board members.⁵⁴⁷ It may lie with the supervisory board to appoint the managing board. This may be the case where the structure arrangement from article 2:154 BW applies in full, as much as in such cases where, given the existence of a

⁵⁴¹ I could have translated the (customary) Dutch term *décharge* with equal justification as ‘granting relief from liability’. The Dutch statute book refers to yet another term: *kwijting*. See article 2:101 para 3 BW and article 2:138 para 6 BW.

⁵⁴² Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 479.

⁵⁴³ Davies 2008 p 583.

⁵⁴⁴ Almost verbatim from Davies 2008, p 581.

⁵⁴⁵ Article 2:132 para 1 BW.

⁵⁴⁶ The default position on *suspension* is that the supervisory board has this power by virtue of article 2:147 BW.

⁵⁴⁷ Article 2:134 para 1 BW.

workers' council, the company voluntarily opts for the application of the full structure arrangement, *ie* inclusive of article 2:162 BW.⁵⁴⁸

4.2.8.2.1.6 Hiring and firing of supervisory board members

Where the supervisory board members are concerned, the default position is likewise that they are appointed by the general meeting of shareholders.⁵⁴⁹ Comparable to the default position on the managing board, the communicating vessel to the power of appointment is the power to dismiss and suspend supervisory board members.⁵⁵⁰ The general meeting of shareholders' power to appoint supervisory board members is capable of being watered down first by the articles of association providing that, up to a maximum of one third of the total amount of, supervisory board members shall be appointed by 'others' than the general meeting of shareholders. Importantly, the appointment of supervisory board members may be governed by the structure arrangement from articles 2:158 through 2:164 BW. On appointment the consequence is that the majority of the supervisory board members is appointed by the general meeting of shareholders upon the recommendation made by the supervisory board itself.⁵⁵¹ The general meeting of shareholders may turn down the recommendation, but to this certain formalities apply.⁵⁵² In addition, where the structure arrangement applies, one third of the members of the supervisory board are recommended by the workers' council, and there are yet again formalities where it is the intention to differ from the recommendation.⁵⁵³ Where the structure arrangement from articles 2:158 through 2:164 BW applies, article 2:161a empowers the general meeting of shareholders to renounce its confidence in the supervisory board. This results in the dismissal of the members of the supervisory board with immediate effect.⁵⁵⁴

4.2.8.2.1.7 Remuneration

⁵⁴⁸ Article 2:157 para 1 BW explicitly envisages that the company elects for application of the structure arrangement excepting article 2:162 BW.

⁵⁴⁹ Article 2:142 BW.

⁵⁵⁰ Article 2:144 BW.

⁵⁵¹ Article 2:158 para 4 BW.

⁵⁵² See article 2:158 para 9 BW.

⁵⁵³ See article 2:158 paras 6 through 8 BW.

It lies with the general meeting to adopt the remuneration policy for the managing board.⁵⁵⁵ I indicated above that where banks are concerned, the standard situation is that the implementation of the remuneration policy lies with the supervisory board – remuneration of managing board members is determined by the supervisory board. In practice, therefore, there is little room for the general meeting to sanction the managing board through determination of remuneration.

It is to the general meeting of shareholders to grant a stipend to the supervisory board members.⁵⁵⁶ I gather that such stipend may well be addressed in the (legally required) remuneration policy, but this is neither obligatory, nor does it seem to be customary. A traditional view may be that members of supervisory boards need to be fairly compensated for time and effort spent. All the Banking Code has to say on the matter is that the *compensation*⁵⁵⁷ for the members of the supervisory board must be appropriate.⁵⁵⁸ The Dutch corporate governance code provides that the stipend for supervisory board members is determined by the general meeting of shareholders, which stipend may not depend on the company's results.⁵⁵⁹ All in all, the picture which arises is that the remuneration of the supervisory board members is not an area which the general meeting of shareholders would be exploring towards sanctioning.

4.2.9 Corporate governance in Wft

Whereas Wft contains provisions well capable of being categorised under corporate governance, I need to look at them for the purpose of establishing whether they shed light on the character of corporate governance for banks. The gamut of topics addressed under articles 3:8 through 3:28 Wft classifies as pertaining to corporate governance. These provisions range from qualification and reliability of those setting the strategy, through conducting the business with integrity, to the company structure and the organisation of its management. The lawmaker labeled 'reliability' as an

⁵⁵⁴ Article 2:161a para 3 BW.

⁵⁵⁵ Article 2:135 para 1 BW.

⁵⁵⁶ Article 2:145 BW.

⁵⁵⁷ Perhaps the Banking Code's draftsmen thought that the word stipend (*bezoldiging*) in article 2:145 BW is an anachronism, and hence they deliberately chose to use 'compensation' (*vergoeding*). The Dutch corporate governance code remains faithful to the Dutch statute book and does not run away from using stipend.

⁵⁵⁸ Banking Code, principle 2.1.7.

⁵⁵⁹ Dutch corporate governance code, principle III.7.

aspect of ‘personal integrity’, and it is thereby a subcategory of the overall domain of integrity.

Article 3:15 Wft requires that in banks with seat in the Netherlands there must be at least two natural persons setting the daily policy of the bank, and that these persons must conduct their activities performed in relation thereto from the Netherlands.

Article 3:19 Wft requires that where a bank is organised as a company, its supervisory board⁵⁶⁰ must have at least three members. As a consequence of the 2011 Act on management and supervision,⁵⁶¹ it is logical that banks opting for one-tier boards will not have supervisory boards. As at the time I write this, I am unaware of the way these ‘governance’ provisions from Wft will reflect the new situation.

Article 3:16 Wft, provides that where a bank has its seat in the Netherlands, it may not be associated with persons in a formal or factual control structure⁵⁶² lacking transparency such that the control structure (likely) frustrates adequately supervising the bank. In addition, article 3:16 Wft provides that a bank may not be associated with persons in a formal or factual control structure where the law of the non-EU member state applicable to those persons is or may be a hindrance to adequately supervising the bank.⁵⁶³ As Van den Hurk observes, where the control structure (possibly) lacks transparency, the hindrance lies within the bank’s structure itself, whereas where the laws applicable to those persons (possibly) frustrate supervision, the hindrance is external.⁵⁶⁴

Thus, the areas covered by Wft which are in the category of corporate governance, enable distinguishing between:

⁵⁶⁰ Whereby for ‘supervisory board’ there is a cross-reference to article 2:140 BW. I would add that article 2:140 BW now allows for the company having opted for a one-tier board structure, as a consequence of which there will not be a supervisory board as such. The consequence of this may well be that Wft may undergo minor adaptations on this point.

⁵⁶¹ Wet van 6 juni 2011 tot wijziging van boek (sic) 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen, *Stb* 2011, nr 275.

⁵⁶² My translation of ‘zeggenschapsstructuur’ – for a Dutch readership the English term ‘control’ will be readily associated with ‘risk controls’; D: *beheersmaatregelen*.

⁵⁶³ These provisions form the implementation into Dutch law of the recast banking Directive (Directive 2006/48/EC of 14 June 2006, *OJL* 177/1), article 12 para 3.

⁵⁶⁴ A J A D van den Hurk, *Financiële dienstverleners*, in Busch 2010, p 521.

1. An ‘inclusive’ perception of corporate governance – personal integrity as well as conducting the business with integrity; and
2. A ‘rules-of-the-game’ perspective – provisions addressing structure and organisation.

But, to the point of my thesis, Wft does not provide that any one or more of its provisions are about corporate governance. And neither is this even remotely implied. Therefore, Wft provisions possibly touching upon corporate governance, do not hold any sway over the meaning of corporate governance as a matter of Dutch law.

4.3 The Banking Code

4.3.1 Introduction

This chapter is not complete without addressing the Banking Code.⁵⁶⁵ It exists alongside and independent from the Dutch corporate governance code. The Banking Code was adopted by the board of the Dutch Bankers’ Association on 9 September 2009. As this chapter addresses corporate governance from the perspective of law, the issue I need to address in this paragraph is the relevance of the Banking Code as a matter of Dutch law, which is distinct from the question as to whether it is binding for certain banks. I note that the Banking Code is adopted by the board of a Dutch association and that it is possible to bind an association’s members by virtue of its articles of association. Where this is actually provided for, the members may be bound *inter se* as much as they are bound in their relation to the association itself.⁵⁶⁶ However, I do not feel compelled to find out whether there is any such binding, as the Banking Code presumes a ‘comply or explain’ mechanism. On the other hand, I must own up to the consequence that binding achieved by virtue of Dutch law on

⁵⁶⁵ Code Banken, *Stcrt* 2009 nr. 20060. There are now also the Principles on Governance for insurers (Dutch: Governance Principles) from the Dutch Insurers’ Association, dated 15 December 2010, which I will not consider as it lies outside the scope of my thesis.

⁵⁶⁶ See article 2:27 para 4 (c) BW, providing that the articles of association may provide the manner in which members may be submitted to obligations. Article 2:34a BW stipulates that obligations arising from membership (as an ancillary) may only be imposed by or by virtue of the articles of association.

association, and hence through book 2 BW, does mean that there is binding as a matter of law, and, hence, relevance as a matter of (the) law.⁵⁶⁷

4.3.2 Banking Code – selected issues

First, a selected view on some of the content. The Banking Code presumes that the managing board is responsible for the balanced weighing of the interests of all parties concerned in the bank, such as clients, shareholders and employees. In doing so, the continuity of the bank, the societal environment in which the bank operates and law, regulation and codes applicable to the bank will be considered.⁵⁶⁸ The Dutch version of the Banking Code has this followed by providing that ‘giving centre-stage to the customer is an essential condition for the bank’s continuity.’⁵⁶⁹ Interestingly, the informal, and non-binding, English text version from the Dutch Bankers’ Association, sheds a different light on giving centre-stage to the (interests of the) customers; it waters this down to “‘maintaining a continued focus on customers’ interests”. In essence, the two provisions I mention here, confuse directors’ duties, and the standards applying thereto on one hand,⁵⁷⁰ and the conduct of business, and its related standards, on the other.⁵⁷¹ Under the Banking Code, the confusion may well be such that the customers’ interests take precedence over *the company’s interest*, which comprises those of (any) other stakeholders. This concern is corroborated by the so-called declaration on moral and ethical conduct from the Banking Code, which provides:

‘I will carefully weigh all interests involved in the bank, i.e. those of the clients, the shareholders, the employees and the society in which the bank operates. In weighing these interests, I will give centre stage to the customer’s interest [. . .]’⁵⁷²

Albeit somewhat beside the context of this section, I am nonetheless inclined to add that the Banking code’s approach to ‘customer first’ may appear sanctimonious

⁵⁶⁷ This point is also made by Assink, albeit in a different context. See Assink 2009, p 76.

⁵⁶⁸ Banking Code, principle 3.2.1.

⁵⁶⁹ *Ibid*, principle 3.2.2.

⁵⁷⁰ Among which, were the bank held by a company, the standard from article 2:129 para 5 BW, which obliges directors to orientate themselves towards the company’s interest and to that of the enterprise connected with it.

⁵⁷¹ Whereby, needless to say, the bank (as a legal person) is the addressee of the norms.

⁵⁷² *Ibid*, Explanation to principles 3.2.3 and 3.2.4.

where a bank complies with the letter *and the spirit* of anti-money laundering and prevention of terrorism obligations. Arguably, these are areas where banks are forced to give precedence to a duty of integrity at the behest of society at large over its duty of loyalty owed to individual customers.

Overall, from a governance perspective, the Banking Code's – having departed from a deliberate mission to restore the public trust⁵⁷³ – emphasis on the societal dimension is a clear manifestation of the trend towards CSR.⁵⁷⁴ Linking a bank's duty of care and its position in society comes from Dutch case law. This is the development originating from *MeesPierson/Ten Bos*,⁵⁷⁵ where the Supreme Court endorsed the Court of Appeal's ruling that:

[. . .] the function of banks in society brings with it a special duty of care as much towards their clients on account of the contractual relationship with them, as towards third parties the interests of which the bank should take into account by virtue of what is to be regarded as proper under unwritten law.'

Along similar lines, there is the proposition in *Dexia*, where the Supreme Court rules that the special duty of care of an investment company, originating from the tenets of reasonability and fairness, given its function in society, obliges such investment companies to protect private counterparts from their own rashness and their lack of awareness. The duty of care is, as such, a concept rooted in (Dutch) private law. It is one of those areas where Dutch private law orientating itself upon open norms, took its primary development from tort. This has now culminated in a sheer endless string of case law, of which a recent example is *CMI Containermasters*.⁵⁷⁶

⁵⁷³ The Banking Code having been defined by the Dutch Bankers' Association *in response to* a report under the title 'Restoring Trust' of 7 April 2009. This report was drafted by the Advisory Committee on the Future of Banks. In its report, the Advisory Committee formulates as its point of departure that in giving primacy to the clients' interests, banks will improve serving their role in society.

⁵⁷⁴ There is an authoritative view that CSR norms are within the 'normative' domain of corporate governance. For this, see, *eg.* Tricker 2009, p 349, where he writes that corporate social responsibility and sustainability have been added to the portfolio of CSR.

⁵⁷⁵ At 3.6.2.

⁵⁷⁶ This case concerned the duty of care arising from article 6:162 BW even in a case in which a particular provision (*ic* article 6:175 para 2 BW) could be seen as derogating from it.

4.3.2.1 Banking Code – declaration on moral and ethical conduct

At the time I write this, the declaration on moral and ethical conduct from the Banking Code, was well on its way to be ‘anchored’ in Wft; the Bill amendments financial markets 2013 nearing enactment.⁵⁷⁷ Under this Bill, a new paragraph will be added to article 3:8 Wft, providing that there may be a ministerial regulation on an oath to be sworn or promised by persons determining the policy or members of supervisory organs in certain financial institutions. The latest position of the legislative process I have been able to see is that the minister of Finance wrote to the second chamber of parliament that from 1 January 2013 the oath would be obligatory for those determining the policy or in supervisory organs, and that the possible sanction on breaches consists of a prohibition to exercise their functions. The minister was considering further reaching sanctioning measures as well as widening the sphere of application to other employees within the financial institutions.⁵⁷⁸

The template from the Banking Code’s declaration on moral and ethical conduct, suggests that being a banker is a *profession* as much as it is an employment. Of course professions always contain a knowledge element.⁵⁷⁹ But I am confident that in this particular instance the intention was to instil as much as to admonish an ethical dimension to the activity (or dare I say, the profession) of banking. This is illustrated by the text of the Banking Code itself; where formulating the knowledge requirement, it provides that ‘[E]ach member of the executive board shall have thorough knowledge of the bank’s functions in society [. . .]’ The report Restoring Trust⁵⁸⁰ also refers to the need for the societal and moral obligations of bankers to be given greater prominence. Hence, in line with other observations made, by designing being a banker as a profession, the Bankers’ Association must have believed it instilled a public interest element.

⁵⁷⁷ *Kamerstukken* 2013, 33 236.

⁵⁷⁸ *Kamerstukken II*, 2012-2013, 33 236, nr 13.

⁵⁷⁹ See *eg* Banking Code, principles 3.1.2 and 3.1.3 on knowledge and *éducation permanente*.

⁵⁸⁰ Dutch Bankers’ Association 7 april 2009, *Naar herstel van vertrouwen*.

Whereas, I find any comparison with the medical profession out of place,⁵⁸¹ I allow myself an analogy with the position of (Dutch) solicitors,⁵⁸² the legal *profession* in the Netherlands. Indeed, solicitors are sworn into *office*.⁵⁸³ It must have been such aspects which exercised appeal to the draftsmen of the Banking Code.

Back in 1925 the Dutch Bar Association voted on the issue as to whether advocacy was to be regarded as a *nobile officium* or, instead, as a ‘business’.⁵⁸⁴ As a *nobile officium*, it would be understood that the profession was governed by class honour.⁵⁸⁵ The Bar Association voted in favour of the *nobile officium*. Some take this as demonstrating that the Bar Association considered the public responsibility as determining.⁵⁸⁶ At the time I write this, a bill on the reform of the Act on solicitors⁵⁸⁷ is pending. The driver behind the bill is the position of the legal profession. The debate centred on precisely the crux of this argument; the advocacy’s public responsibility. Initially, the draftsmen had proposed to include as a *core value* into the bill that the solicitor has a *public responsibility*. In the draft text for the accompanying explanatory memorandum, this core value had been explained in terms of the solicitors’ duty to consider the possible consequences to society from their actions, which also meant that they should have regard to the justified interests of the adversary, third parties and the attribution of law into account. The distinct core value of this public responsibility has been withdrawn upon the sharp protestations from the Dutch Bar Association. At one side of the current authoritative views on advocacy, we find Huydecoper, who argues, straightforward as ever, that, to the solicitor, only his client’s interest matters.⁵⁸⁸

⁵⁸¹ On the matter of a comparison to the Hippocratic Oath, see the most instructive column by Kimman in *OR* 2012/16. Kimman concludes that the financial sector is not waiting for (such) an atavism consisting of a promise.

⁵⁸² I could equally have chosen to translate *advocaat* as attorney-at-law.

⁵⁸³ Most notably, solicitors swear (or ‘promise’) that they shall not plead causes they do in good faith not consider to be just. *Advocatenwet* article 3 para 2.

⁵⁸⁴ The Dutch term at issue was ‘een zaak van negotie’, which I could equally have translated as ‘a trade’.

⁵⁸⁵ Once more a typically Dutch notion; ‘de eer van de stand’.

⁵⁸⁶ This is the inference made by Loth, see M A Loth, ‘De publieke verantwoordelijkheid van de advocatuur’ (Jonge Balie lezing 2002), *Advocatenblad* 2003, pp 24-30. I got here through Verkijk 2010, p 139.

⁵⁸⁷ Dutch: *Advocatenwet*. The bill is known under *Kamerstukken II* 2009/10, 32 382, nr 2.

⁵⁸⁸ Huydecoper 1998, p 5.

In my view, the analogy with advocacy is a poignant illustration that the simple elevation of the activity of bankers to a profession, with an oath thrown in for good measure, may well prove misguided. Were it inspired by an analogy with advocacy, it suffers from lack of information, and risks being counter-productive. Finally, on this issue, I would note that where bankers are concerned, for those in positions determining the policy of banks, financial markets regulation requires capability as well as trustworthiness.⁵⁸⁹

4.3.2.2 Banking Code – prior consent supervisory board to risk appetite

Where governance is concerned, I would also draw attention to the principle that the managing board shall at least annually submit the bank's 'risk appetite' to the supervisory board, for the latter's prior consent.⁵⁹⁰ In view of the context of the principle, I would assume that 'the risk appetite' is equivalent to the bank's overall risk policy, but this is not clear altogether. More importantly, in my view, provisions such as these blur the lines of demarcation between 'supervision' on one hand, and 'management' on the other. I would recall that the Corporate governance code provides that the managing board shall submit the parameters to be applied in relation to the strategy, for approval to the supervisory board.⁵⁹¹ I would assume that 'risk appetite' is a parameter to the strategy, and, in that case, there is considerable overlap between the two codes.

4.3.3 Dutch Banking Code, relevance at law

As to its relevance as a matter of Dutch law, purportedly, the Banking Code is in an equivalent position to the Dutch corporate governance code.⁵⁹² The Banking Code is

⁵⁸⁹ Articles 3:8 and 3:9 Wft. With the Act of 22 December 2011, Stb 2012, 7, the erstwhile criterion of 'expertise' got substituted throughout by 'capability'. See *Kamerstukken II*, 2010-11, 32 786 nr 2.

⁵⁹⁰ Banking Code, principle 4.1.

⁵⁹¹ Dutch corporate governance code, best practice II.1.2. Somewhat confusingly, as it suggests greater relation between strategy and risk, best practice III.1.6 (b) provides that the supervisory board's supervision comprises both strategy and risk.

⁵⁹² The Dutch corporate governance code is the code of conduct indicated within the Regulation of 10 December 2009, *Stb* 2009, 545.

‘designated’ in the Regulation of 1 June 2010.⁵⁹³ The proposal for the Regulation had first been submitted⁵⁹⁴ to parliament, all this in accordance with article 2:391 para 6 BW.⁵⁹⁵ Hence, by virtue of article 2:391, para 5 BW, the Regulation contains further provisions on the content of banks’ annual reports and those provisions, in turn, address observance of the Banking Code. Article 3 of the Regulation of 1 June 2010 provides:

A bank [. . .] must include a statement on corporate governance in its annual report, in which it pronounces itself on compliance with the principles of the code of conduct designated in article 2 [the Banking Code]. The relevant bank will render a motivated account where it has not complied with those principles, or where it does not intend to comply with them in the current and subsequent book years.

Clearly enough, the Regulation – and, hence, Dutch regulation – thereby allows for non-compliance. In line with the situation concerning the Dutch corporate governance code, all the indication of the Banking Code by the Regulation, requires, is inclusion of a corporate governance statement in the annual report. I paraphrase Raaijmakers, where, in addressing the situation on the Dutch corporate governance code, he writes that the Regulation upholds the non-binding character of the Code and the ‘comply-or-explain’ tenet, and that it does not, in any other manner, confer the status of a statute law to the Code.⁵⁹⁶ In the current Dutch culture, it is sometimes mooted that through the mechanism of article 2:391 paras 5 and 6 BW, the various codes of conduct designated in the regulations, are ‘anchored’⁵⁹⁷ in the statute law. The assumption must be that such anchorage elevates the status and, hence, the authority of such codes. There must, however, not be any misapprehension on the effect at law of naming a code within statute laws, or, for that matter, within delegated legislation; the code does not, thereby, become law. At Dutch law, only

⁵⁹³ Besluit van 1 juni 2010 tot vaststelling van nadere voorschriften omtrent de inhoud van het jaarverslag van banken, *Stb* 2010, 215.

⁵⁹⁴ The rather quaint Dutch term for this is *voorgehangen*.

⁵⁹⁵ Article 2:391 para 6 BW is thereby a procedure warranting a degree of democratic control over certain powers of regulation representing ‘secondary legislation’. This procedure is generically provided for in the *Aanwijzingen voor de regelgeving* (*Circulaire van de Minister-President* van 18 november 1992), *aanwijzing* 36.

⁵⁹⁶ Raaijmakers 2004, p 74.

⁵⁹⁷ This is my translation of ‘verankerd’. I could also have translated this into ‘grounded’. See, *eg* the letter to the Second Chamber of Parliament of the minister of Finance of 9 July 2009, where the

statute laws established in conformity with the constitution,⁵⁹⁸ are statute laws. Equally, where delegated legislation is concerned, this must be done in conformity with the formality required under the constitution.⁵⁹⁹

The above does not mean that codes such as the Banking Code may not have relevance at law.⁶⁰⁰ For this, I confine myself to referring to what I have written above⁶⁰¹ on Dutch case law involving the Dutch corporate governance code. The line taken by the Supreme Court is that the various and subsequent iterations of the Dutch corporate governance code *form expressions of the prevailing general conviction of the law in the Netherlands*.⁶⁰² I repeat what I wrote above; case law lays down that the Dutch corporate governance code, as it applies from time to time, plays an important, yet not exclusive, role in representing a general conviction of law in the Netherlands. This is with almost deliberate, and, in any case, a striking, disregard to the anchorage of the code in the statute law. Thus, such anchorage has no role to play in creating the validity, and hence, authority, of such code, as a matter of law. I would, yet again,⁶⁰³ note that Assink openly questions whether the Supreme Court does not demonstrate too great a preparedness to accept the Dutch corporate governance code as filling in Dutch company law.⁶⁰⁴ In my view Assink is entirely correct in admonishing that the fact that the Dutch corporate governance code contains written norms, does not make that those norms automatically should be taken into consideration as having relevance as a matter of law.⁶⁰⁵

4.4 Corporate governance at English law

minister writes that he will consider how to provide anchorage in the statute law to the Banking Code. See *Kabinetvisie toekomst financiële sector*, p 5.

⁵⁹⁸ Article 81 GW.

⁵⁹⁹ This means that regulations – statutory instruments made under legislative powers delegated by parliament – must be established by a royal resolution, see article 89 para 1 GW.

⁶⁰⁰ Banks which are members of an association may be bound *inter se* by virtue of article 2:27 para 4 (c) BW, see *supra* p 150. Note, in addition, the general point made by Assink that where a company knowingly and voluntarily commits itself to norms other than mandatory rules of law, this causes relevance of such self-binding rules as a matter of law. See Assink 2009, p 76. This is addressed in more detail where I address the company's power to shape its own legal order, *infra*, p 209 *et seq*.

⁶⁰¹ *Supra* from p 124.

⁶⁰² The cases mentioned above culminated in *ASMI*.

⁶⁰³ See *supra*, p 125, footnote 448..

⁶⁰⁴ Assink 2009, p 77.

⁶⁰⁵ Assink 2009, p 76.

4.4.1 Statutory law

The principal piece of legislation covering British company law is CA. This elaborate act of some 1,300 sections and sixteen schedules, although allegedly the longest act produced by the British lawmaker, does not aspire to contain a code of company law.⁶⁰⁶ This yields an interesting illustration of the fundamental difference between English and Dutch law. Book 2 BW *is* the code of company law, although it neither encompasses all aspects of company law, nor professes to do so.⁶⁰⁷ In view of this, whereas under Dutch law it is appropriate to refer to statute law as the source of law taking precedence over any other, in English law there always remains a fine balance to be struck between statute law and common law.

CA only makes literal references to corporate governance in Part 43, addressing transparency obligations and related matters. These references occur in sections 1269 and 1273. Section 1269 provides for an insertion into the Financial Services and Markets Act 2000, allowing for delegated rule-making power beyond central government by FSA, for the purpose of fulfilling European Community law obligations relating to the corporate governance of issuers who have requested or approved admission of their securities to trading on a regulated market. Section 1269 provides that ‘corporate governance’, in relation to such issuers, includes:

- a) the nature, constitution or functions of the organs of the issuer;
- b) the manner in which organs of the issuer conduct themselves;
- c) the requirements imposed on organs of the issuer;
- d) the relationship between the different organs of the issuer;
- e) the relationship between the organs of the issuer and the members of the issuer or holders of the issuer’s securities.

Section 1273 provides, otherwise broadly comparable to section 1269, that the Secretary of State may make regulations for the purpose of fulfilling European

⁶⁰⁶ It should also be noted that CA itself contains references to other Companies Acts, and that it classifies certain parts of CA itself as ‘the company law provisions of this Act’ (*cf* section 2).

⁶⁰⁷ As a matter of Dutch jurisprudence of private law, company law is a specific and specialist area of law, which presumes the applicability in general of private law. Hence, where company law does not go, the natural point of reference is general theory on and the system taken in its entirety, of private law. Prior to companies moving to Book 2 BW in 1976, they were provided for in the Code of

Community law obligations relating to the corporate governance of the same issuers, and this section repeats the areas included in corporate governance reflected above.

Failing other literal references to corporate governance in CA, the meaning and relevance of corporate governance in British company law, are to be derived from the other sources. This is therefore not much different from the Dutch situation, which should, given the conceptual perspective that Dutch law grants far greater preponderance to statute law, not be surprising.

I would add that the absence of explicit references to the phrase corporate governance in statute law, capable also of being explained from an historical point of view, is to a great extent a matter of semantics. Davies writes that corporate governance, whether recognised under that name or not, is a topic which is as old as the large company itself.⁶⁰⁸

4.4.2 Case law

In view of the nature of English law, great significance lies with case law. As has been written above, where it comes to establishing an order between the (primary) sources of law, English law requires that a fine balance is struck between statute and common law. Within the context of directors' duties, this is given particular meaning in view of section 170 CA, paras 3 to 5:

- (3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.
- (4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.

Commerce (D: Wetboek van Koophandel), article 1 of which provides that BW applies in so far as the Code of Commerce does not particularly derogate from it.

⁶⁰⁸ Davies 2008, p 359.

For the present purposes, rather than seeking to cover English case law involving the vast, and surely somewhat disparately defined category of topics that may come under the remit of the term corporate governance, I will only seek to address such cases which may help establishing the nature and meaning of corporate governance under British law. I feel justified in doing so, as it is my purpose to define the character of corporate governance, in stead of defining the outcomes of specific legal disputes in the context of or touching upon any one or more topics capable of being brought under its remit. This is, of course, entirely in parallel with the approach taken to Dutch case law above. Hence, just to illustrate my point, it lies outside the framework of this para to cite *Shaw & Sons (Salford) Ltd v Shaw*,⁶⁰⁹ however much this is the *locus classicus* for the modern doctrine of English company law that the division of powers between the board and the company in general meeting, depends in the case of registered companies entirely on the construction of the articles of association, and that, where powers of management are vested in the directors, they and they alone can exercise their powers. No one will doubt that the rule arising from this case is firmly within the remit of corporate governance. However, the case does not address any questions as to the meaning of corporate governance as such.

4.4.3 Legal writings of distinguished lawyers

As indicated above,⁶¹⁰ books of authority have gained prominence as a source of English law. For present purposes, I shall mainly look at such modern books that appear to be considered as practitioners handbooks.⁶¹¹ I have, however, allowed myself excursions to relatively earlier works, where I find that certain authors bring a great deal of originality to bear, or where the approach to company law is particularly illustrative to the workings of English law. This pertains especially to Cheffins' textbook on Company Law.⁶¹² Cheffins makes a deliberate attempt at combining using economic theory on the one hand, with introducing background to such concepts analysed under English company law on the other hand. His book therefore

⁶⁰⁹ [1935] 2 K.B. 113, CA.

⁶¹⁰ *Supra*, p 26.

⁶¹¹ With great prominence to Davies 2008.

⁶¹² Cheffins 1997.

has a primary focus on legislation and case law which should be familiar to students of British company law.

Davies writes that over recent decades, corporate governance has been a highly fashionable topic in company law and that it has generated too vast an amount of literature to cite within the framework of his handbook on modern company law.⁶¹³ Davies even refers to the existing corporate governance industry, where he makes the point that British company law has traditionally specified very little about how the board of directors should operate other than the central management of the company business necessarily being in its hands. Davies observes:⁶¹⁴

‘However, the question of which functions should be assigned to the board and the question of how the board should organise itself for the effective discharge of those duties were ones that company law did not seek to answer. All that constituted the “internal management” of the company which it was for the shareholders to design.’⁶¹⁵

The view taken on the phrase corporate governance in leading English academic literature is in considerable part influenced by the tradition in English company law. In relative terms, modern English company law allocates lesser weight to the interests of groups other than shareholders who have long term interests in the company (‘stakeholders’), than to the shareholders. The position under English law is expressed by the phrase ‘enlightened shareholder value (‘ESV’) model’ – as opposed to the so-called stakeholder model.

The ESV approach is manifest in section 172 (1) CA:

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company’s employees,

⁶¹³ Davies 2008, p 359.

⁶¹⁴ Davies 2008, p 410.

⁶¹⁵ In similar vein the following quote: ‘However, since British company law, unlike the corporate governance codes, says little or nothing about the structure and composition of the board of directors, the board’s position in company law is deeply ambiguous.’, Davies 2008, p 361.

- (c) the need to foster the company's business relationships with suppliers, customers and others,
- (d) the impact of the company's operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly as between members of the company.

In view of the ESV approach, as a matter of English company law, it is not surprising that the accountability of the senior management of the company to its shareholders is, therefore, made the focal point of the corporate governance debate.⁶¹⁶

From a perspective of comparative law, this above point is not to be underestimated, and it should be brought into context. Davies makes the point that unlike in other jurisdictions, the division of powers as between the board and the shareholders, is a matter for private ordering by the members of the company, rather than something mandatorily flowing from company law. Davies writes:⁶¹⁷

‘It is also a point of some theoretical (even ideological) importance: the directors’ authority is derived from the shareholders through a process of delegation via the articles and not from a separate and free-standing grant of authority from the State. This helps to underline the shareholder-centred nature of British company law.’

Irrespective of whether the orientation is rather towards shareholders than any other (groups of) stakeholders, corporate governance addresses the phenomenon that the management of companies is separated out as a distinct function, such that this function exercises a very broad set of discretionary functions, including the development and implementation of corporate strategy on its own responsibility. Outside the confines of English law, Kraakman *et al*,⁶¹⁸ in approaching the common structure of company law, points out that delegated management is an attribute to nearly all large firms with numerous fractional owners, and that delegation permits the centralisation of management necessary to produce activity. They continue to

⁶¹⁶ Davies 2008, p 360.

⁶¹⁷ Davies 2008, p 366.

⁶¹⁸ Kraakman *et al* 2009, p 13.

label such strategies that depend on the hierarchical elements of the principal-agent relationship arising from the central role of delegated management as ‘governance strategies’.

Cheffins appears to suggest that there is no specific or given meaning at law to the term corporate governance. Instead, where he addresses the 1992 Cadbury Report,⁶¹⁹ he adds that among the complaints about the Cadbury enterprise were that the recommendations were too vague and should have been made more specifically delineated.⁶²⁰ Within the context of Cheffins’ description of the Cadbury Report, making it clear that the Report’s recommendations addressed ‘many of the issues identified as important’ as ‘topical corporate governance issues’, the comment may also be read as illustrative of the fact that such corporate governance reports address topical matters capable of being subsumed under the common denominator of corporate governance, without there being necessarily any preconceived or defined ideas as to the parameters of the term.

Ultimately, the issue may be approached by stopping short of attempting to ascribe (too much of) a magical meaning to the phrase corporate governance, beyond its literal meaning, however much it is granted that words have a certain elasticity of meaning. From a legal perspective, with due appreciation for the wide array of topics spanned by corporate governance, clearly also involving non-legal issues, in plain and unambiguous terms, corporate governance is about managing and the management of the company.⁶²¹ As with the description under Dutch law, I turn to defining the parameters of ‘management’ of the company, to be addressed under the next paragraph 2.2.4.

4.4.4 Managing the company

⁶¹⁹ In 1999, at the time of publication of his book, the actual report was the Cadbury Report and an accompanying Code of Best Practice issued in 1992.

⁶²⁰ Cheffins 1999, p 644.

⁶²¹ Blake & Bond 1985, entitle chapter 12 ‘Governance and management of the company’, in which they illustrate that from the divorce of ownership from ‘control’, flow the principles of company law concerning the allocation of power between the different organs of management. See p 240.

I address British company law in comparison to Dutch law. It is recalled that the Dutch statutory formulation on the management of the company is meretricious⁶²² where it postulates that the managing board has the duty to manage the company.⁶²³ As I have mooted above,⁶²⁴ under Dutch law, management of the company by the managing board is duty and power alike. To the power, there is an aspect of ‘autonomy’. The autonomy aspect emphasises – as a matter of Dutch law – that the power to manage the company may not be confined or limited beyond a certain point. The Dutch like to express this by saying that the managing board’s powers may not be overly undressed. This latter aspect is, notably from a comparative perspective, not without theoretical and, even, ideological importance, illustrative as it is of the partnership origins, and hence shareholder orientation, of English law. The orientation of Dutch law is, rather, that the division of powers is specified mandatorily in the companies legislation.⁶²⁵

In view of the above, whereas in the UK companies are ‘managed’ by (a group of) senior managers who are separate and distinct from the shareholders, these managers not simply doing as the shareholders say but developing and implementing strategy on their own responsibility, it would actually be possible to write that, under British law, ‘managing’ the company means what(ever) the shareholders design it to be in the articles of association.

The assumption under English company law is that the articles may deal with any matter which is not, or to the extent that it is not, regulated through primary legislation, secondary legislation, rule-making by legislative bodies, and the common law. The critical consequence of this is that the division of powers between the shareholders and the board of directors, and the composition, structure and operation of the board of directors are regulated mainly by the articles.⁶²⁶ Davies adds in a footnote:

⁶²² To ‘meretricious’, I could well add: ‘as much as it is circular’; ‘the *managing* board has the duty to *manage*. . .’

⁶²³ Article 2:129 para 1 BW.

⁶²⁴ Para 2.2.5.

⁶²⁵ I have borrowed the phrasing almost verbatim from Davies 2008, p 366. Davies does not reflect on Dutch law particularly, and this justified permitting myself this liberty.

⁶²⁶ Davies 2008, p 62.

‘For listed companies, the Combined Code has now begun to trespass upon the autonomy of the company.’

In a manner perfectly analogous to the Dutch situation discussed above, the Listing Rules⁶²⁷ require UK-registered companies with a primary listing in the UK to disclose in their annual report the extent to which they have complied with the UK Corporate Governance Code and to give reasons for areas of non-compliance (if any).

Thus forming part of the body of British company law – under a perfectly ‘hard’ obligation - Davies classifies the content of the UK Corporate Governance Code as ‘soft’. He continues by stating that the Combined Code on Corporate Governance is the primary example in British company law of a mechanism where rules are in fact only recommendations or exhortations.

The common denominator can, however, be derived from the model sets of articles for both public and private companies,⁶²⁸ where the default provision is:⁶²⁹

‘Subject to the articles, the directors are responsible for the company’s business, for which purpose they may exercise all the powers of the company.’

The model articles give broad power of management to the board, which is then permitted a wide power of delegation.⁶³⁰ The model does not provide what pattern of division of function should in fact be adopted in large companies. Exercise of the delegation power also raises the matter of directors’ fulfilment of their duties; to what extent are directors responsible for the delegates’ acts? Thus, perhaps indirectly, we get to the substantive duties of company directors under English law. However much relevance this has elsewhere, it does not do a great deal to shed more light on the

⁶²⁷ The Stock Exchange has formal status under FSMA as the standard setter for listing requirements for companies. By virtue of FSMA, the Listing Rules have the status of subordinate legislation. See also Cheffins 1997, p 368.

⁶²⁸ English law places great importance on the models, *cf* Davies 2008, p 63. By virtue of section 19 CA the Secretary of State prescribes model articles of association for companies. Section 20 CA confers default status on these model articles, such that on formation the company will be treated as having adopted the model articles, except to the extent that it chooses to have different ones. The current statutory instrument creating the models is The Companies (Model Articles) Regulations 2008.

⁶²⁹ *The Companies (Model Articles) Regulations 2008*, Article 3.

⁶³⁰ *The Companies (Model Articles) Regulations 2008*, Article 5; the directors may delegate *any of the powers* as they think fit..

matter to hand; establishing the positive features and scope of the term ‘management’. In view of what has been said above, this should not come as a great surprise. Under English law, with due recognition of the actual influence of the UK Corporate Governance Code, it is the company itself which governs what it is that directors (should) do. The directors’ powers are conferred to them as a matter of the company’s constitution, rather than as a matter of law (and, hence, a matter of an ‘instruction’ to manage contained in a statute provision).

Whereas Dutch law starts from the statute law position that the managing board has the duty to manage the company, English law does not contain such provision. Approached differently; under English law, ‘management’ is not necessarily and only what directors do, and, to the extent that directors exercise powers, it may well be that they are, thereby, ‘managing’, but there is no forced logic unto any of this.

It may seem that this is mere semantics. Within the context of my thesis, there arises an interesting point. Dutch law is directive in saying: managing is what the managing board does. Although it doesn’t, thereby, provide that no other company organs⁶³¹ manage too, the end result is, to me, that compliance is within the sphere of the managing board’s duties. And, my line of reasoning is: ‘directing’ is ‘governing’. Under English law, the situation may easily differ. Whereas, as a matter of company law, there does not seem to be such an exclusive ‘appropriation’ by the managing board, of ‘management’ within the corporate organisation, thereby greater elements of ‘governance’ may fall outside the sphere exclusive to management. That could well ‘facilitate’ greater spread (beyond the board only) of duties and responsibilities for such tasks capable of falling within the remit of ‘managing’

4.4.5 Provisional conclusion

So, what can be said on the meaning of ‘managing’ the company as a matter of English law? CA provides precious little on the matter. There are no provisions on the functions of the managing board, as this is for the greater part left for the

⁶³¹ Articles 2:78a/189a BW define company organ as the general meeting of shareholders, the meeting of holders or shares of a particular sort, the managing board, the supervisory board and the joint meeting of the managing and supervisory boards.

company to organise through its articles of association.⁶³² It needs to be added, as noted above, that this ‘private ordering’ is, in the case of listed companies, now somewhat qualified by the workings of the UK Corporate Governance Code.⁶³³ It makes sense, towards an approximation of the substantive meaning of ‘managing the company’, to glean the remit of directors’ duties. There is an evident analogy to the Dutch situation, in that, as I noted, under the Dutch statute law, ‘managing’ the company is power and duty alike. In fact, the organisation under the Dutch statute law may be seen as an assimilation of power and duty. I noted that this is expressed as the ‘instruction’ to manage’ (*bestuursopdracht*).⁶³⁴ Davies deftly reasons the orientation upon the directors duties as resulting from the lawmaker’s intention to providing the machinery to have the separation of ownership and control flourish. Hence, as Davies points out, the approach of company law is to allow companies maximum freedom to decide on the division of powers between shareholders and the board and on the function of the board, but then to concentrate on the regulation of the way the board discharges the powers conferred upon it.⁶³⁵

4.4.5.1 Directors’ duties

Where I now turn to the substance of directors’ duties, as it will for the purposes of my thesis suffice to include a high-level description, in the main, it should not be necessary to address sources of English law other than the statute. Under English law, it is often difficult to strike the appropriate balance between the statutory instrument – in our case CA – and the common law. The Act itself seems to portend that the common law is ‘superseded’⁶³⁶ by the statute; Section 170 subsection (3) CA provides that the general duties owed to the company by a director as set out in the Act have effect *in place of* the common law rules and equitable principles. Section 170 (4) CA then provides:

⁶³² Davies 2008, p 47.

⁶³³ UK Corporate Governance Code, September 2012.

⁶³⁴ *Supra*, p 135.

⁶³⁵ Davies 2008, p 47.

⁶³⁶ Davies uses the term ‘replaced’, see Davies 2008, p 478.

The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.

On the face of it, these provisions appear to be confusing and even contradictory. The element of the ‘corresponding common law rules’ refers to (possible) analogies inferred from the duties of persons other than company directors acting in a fiduciary capacity.⁶³⁷ All in all, where I am only interested in the high-level ramifications, the statute having replaced the common law, would allow me to confine myself to the statute. The substantive analysis, however, benefits from the historical perspective; under the common law, directors’ duties could be distinguished as pertaining to either duties of care or duties of loyalty. This distinction is not apparent from the grouping and consolidation of the duties in sections 171 to 177 CA.

CA provides for directors’ general duties, which I group and consolidate under five denominators as follows:

1. Duty to act within powers
2. Duty to promote the success of the company
3. Duty to exercise independent judgment
4. Duty to exercise reasonable care, skill and diligence; and
5. Duty to avoid conflicts of interest

As to 1 Duty to act within powers⁶³⁸

Whilst at first glance, this is almost self-evident, briefly addressing this aspect helps greatly to illustrate fundamental bridges between Dutch and English law.

The first limb of this duty is for the directors to act within the company’s ‘constitution’.⁶³⁹ So, the premise is that the (main) source of the directors’ powers is

⁶³⁷ The evident examples being trustees and agents. See Davies 2008, p 478.

⁶³⁸ Section 171 CA.

⁶³⁹ Section 171 (a) CA.

the articles of association, rather than, say, a statute law. At English law, the division of powers between the shareholders and the board of directors, and the composition, structure and operation of the board of directors, devolve from the articles of association.⁶⁴⁰ In Davies' words:

[T]he British approach can be said to represent the view that the shareholders constitute the ultimate source of managerial authority of the company and [. . .] the directors obtain their powers by a process of delegation from the shareholders, albeit a delegation of a formal type which, so long as it lasts, may make the directors the central decision-making body on behalf of the company.⁶⁴¹

As indicated before,⁶⁴² under Dutch law, the respective spheres of power and influence of the companies' organs, are principally and fundamentally a matter for the statute law, and there is a certain 'autonomy' to the powers of the managing board, upon which the general meeting of shareholders is not to encroach. In a marked contrast, the "members' reserve power" article from the (UK) model articles enables the shareholders by special resolution to give directors instructions as to how they should conduct the management of the company, even in areas where the articles confer managerial powers on the directors.⁶⁴³

The second limb under the statute law is that the director must only exercise powers for the purposes for which they are conferred. This constitutes an objective test – as such, directors having acted honestly⁶⁴⁴ will not exonerate them from liability were they to have acted for another ('improper') purpose than that from which the power is derived.⁶⁴⁵ From case law, and the development of the common law, it is especially interesting to glean such cases where the directors supposedly were acting with multiple purposes in their perimeter. The position is that the court must identify the dominant or primary purpose, to which it must subsequently apply the test arising

⁶⁴⁰ I highlighted this earlier, see *supra*, p 164. I also added there that Davies observes that this is an area where the UK Corporate Governance Code now begins 'to trespass upon the autonomy of the company.' See Davies 2008, p 62.

⁶⁴¹ Davies 2008, p 63.

⁶⁴² *Supra*, pp 136 and 137, with the reference to Maeijer's commentary to *ABN AMRO*.

⁶⁴³ *The Companies (Model Articles) Regulations 2008*, Article 4 para 1.

⁶⁴⁴ *Eg* with the intent to promote the success of the company.

⁶⁴⁵ *Cf* Davies 2008, p 500.

from this statute law proposition. This approach is apparent from *Smith v Ampol*.⁶⁴⁶ On the facts, the Howard Smith directors apparently made a share issue so as to defeat a takeover by Ampol, and not (so much) with a view to raising working capital. The judgment comes close to ruling that directors may never use their powers to frustrate (or, for that matter, to promote) a takeover – such decision (always) lying with the shareholders.⁶⁴⁷ The courts exercise discretion in judging purpose by not limiting themselves to a narrow analysis of the provisions in company articles defining the powers, but by orientating themselves on the (context of the) company's constitutional arrangements in their entirety. Perfectly befitting a law culture with manifestations of a 'purposive' approach⁶⁴⁸ to interpreting statutes. Davies indicates that the articles may in principle shape the directors' powers through limitations of purpose, just as they can do so by not conferring a power on the directors at all.⁶⁴⁹ At the risk of belabouring the point, this is only natural where, as stated before, 'managing' the company means what(ever) the shareholders design it to be in the articles of association, as much as it falls to the articles to shape the division of powers between the shareholders and the board of directors, and the composition, structure and operation of the board of directors.

As to 2 The duty to promote the success of the company⁶⁵⁰

Earlier, I have already mooted the director's general duty to promote the success of the company, representing, as it does, a striking illustration of the 'enlightened shareholder value model' ('ESV').⁶⁵¹ The position section 172, CA reflects, is key in appreciating that English law is shareholder, rather than stakeholder orientated. In fact, the drafters purposefully intended the provision to make it clear that, as a matter of company law the shareholders are to be the primary object of the directors'

⁶⁴⁶ *Howard Smith Ltd v Ampol Petroleum Ltd*, [1974] A.C. 821 at 834.

⁶⁴⁷ Where listed companies are concerned, this exclusively pertaining to the shareholders' domain, flows from the *Takeover Code* in its current version from May 2006. See General Principle 3 and especially Rule 21.1 (a) providing that the board must not, without the approval of the shareholders in general meeting take any action which may result in any offer of bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits..

⁶⁴⁸ See Williams 2006, p 131 *et seq*. The purposive approach to the interpretation of statutory language has courts seeking to identify and giving effect to the purpose of the legislation – in doing so, reference may well be had to 'extraneous' materials, such as Hansard (the Parliamentary record).

⁶⁴⁹ Davies 2008, p 503.

⁶⁵⁰ Section 172 CA.

⁶⁵¹ *Supra*, pp 160 and 161.

efforts.⁶⁵² Equally importantly – especially from a comparative perspective – in Davies’ words, ‘the obligation to have regard to the interests of other stakeholders is clearly subordinate to the central duty to promote the success of the company for the benefit of its members.’⁶⁵³

The duty to promote the success of the company is an evident manifestation of a duty of loyalty which directors owe to the company. It is in this context that Davies notes that, in truth, directors are agents of the company, and that this causes them to stand in a fiduciary relationship to the company. This means that the company is the directors’ principal.⁶⁵⁴

Almost in negation of the assertions that the duty of loyalty is one owed to the company as much as the proposition that whereas the director is an agent, the company is his principal, Davies notes that ‘a requirement that directors must act *in the interests of* “the company” comes close to being meaningless. This is because a company is an artificial legal person and it is impossible to assign interests to it unless one goes further and identifies with the company the interests of one or more groups of human persons.’⁶⁵⁵ I find this of particular interest in view of the position at Dutch company law. The Dutch statute law provides that in the fulfilment of their task, the (managing and supervisory board) directors orientate themselves towards the company’s interests and those of the enterprise connected with it.⁶⁵⁶ At that juncture, I point to the view in Dutch books of authority that ‘the company’s interest’ is an entity in its own right.⁶⁵⁷ I note at that place that, to me, the greatest difficulty lies in imagining the company serving an interest beyond, or perhaps rather, *outside* the interests of any one or more parties that are actually affected by its actions. It strikes me that this is exactly the point made by Davies.

⁶⁵² This follows in so many words from the legislative history. The Minister for Industry and the Regions said in parliament that ‘while a director must have regard to the various factors stated [in section 172 (1) CA] that requirement is subordinate to the overriding duty to promote the success of the company.’ HC Debs, Standing Committee D, Company Law Reform Bill, Fifteenth Sitting, 11 July 2006, cols 591-2. See also, Davies 2008, p 507.

⁶⁵³ Davies 2008, p 507.

⁶⁵⁴ Davies 2008, p 496.

⁶⁵⁵ Davies 2008, p 507.

⁶⁵⁶ Articles 2:129 para 5 and 2:140 para 2 BW.

The statute requires the director to act ‘in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.’ It then non-exhaustively lists six aspects to which directors must ‘have regard’ when acting.⁶⁵⁸ In so far these six aspects name other ‘stakeholders’, importantly, their interests are to be given consideration only to the extent that it is desirable to do so in order to promote the success of the company for the benefit of the shareholders.⁶⁵⁹ The interests of any other stakeholders than the shareholders are subordinate to those of the latter category. A direct consequence, Davies notes that it seems wrong in principle to take it that English company law requires directors ‘to balance’ the interests of shareholders with those of the stakeholders.⁶⁶⁰

Yet again, much helped by Davies’ choice of the verb ‘to balance’, I am offered an illustration of where the positions in Dutch and English law may diverge. In illustrating the Dutch statutory compass for directors’ actions, which will shortly be similar to that for supervisory board members, I will point out that the view that ‘the company’s interest’ is an entity in its own right, is contrasted to the view that the company’s interest is the resultant of the weighing of interests of those concerned with the company activity.⁶⁶¹ Although – as I argued earlier on⁶⁶² – not as a matter of law in the stricter sense, it is apposite to mention here that the Dutch corporate governance code, in its original Dutch version, lays down that the managing board, in the fulfilment of its task, orientates itself towards the interest of the company and the enterprise connected with it and, *to that end weighs the appropriate interests of those involved in the company*.⁶⁶³ Intriguingly, the meaning has undergone considerable change in the (informal) English translation from the draftsmen themselves; ‘[I]n discharging its role, the management board shall be guided by the interests of the company and its affiliated enterprise, taking into consideration the interests of the

⁶⁵⁷ Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 394, elaborates upon the existence of two schools of thought on this matter.

⁶⁵⁸ *Supra* pp 160 and 161, where I included the full text of section 172 CA.

⁶⁵⁹ Davies 2008, p 509.

⁶⁶⁰ Davies 2008, p 509.

⁶⁶¹ *Infra*, pp 197 and 198.

⁶⁶² The code may manifest a way of giving expression as much as prominence to ‘the convictions of law as they exist in the Netherlands, but the courts take unfettered discretion over its meaning and relevance.

⁶⁶³ Emph added, see the Dutch corporate governance code, Principle II.1: ‘[H]et bestuur richt zich bij de vervulling van zijn taak naar het belang van de vennootschap en de met haar verbonden

company's stakeholders.' It would almost seem as if the Monitoring Committee itself felt that the (its?) 'Dutch' notions are incapable of being readily reconciled with an English reference system. I cannot establish whether this has been the consequence of a comparison to English company law. Strikingly, the informal English translation of the preamble to the Corporate governance code is more faithful to the notion that an orientation upon the interest of the company is tantamount to weighing the appropriate interests of those involved in the company. The preamble provides that the managing board and the supervisory board have overall responsibility for 'weighing up these interests'.⁶⁶⁴ I note that here too, the English translation is not totally clear, as it is not precise as to which interests are concerned, although it is most likely that the interests are those of the stakeholders⁶⁶⁵ as they are identified in the preceding text.

As to 3 The duty to exercise independent judgment⁶⁶⁶

Prima facie, this seems a fairly straightforward proposition. However, from a comparative perspective, it is apposite to mention that as much as it is clear that under English law, directors are considered to be 'agents', acting primarily in the shareholders' best interests, the shareholders capable of being classified as the 'principles', this requirement does underline that, where the power exists, the director may not fetter its (*ie* that power's) exercise, for instance by accepting a (*de facto*) mandate. I find that this latter point may be illustrated by the analogy to the position on 'nominee' directors. On the matter, Davies describes the position in the Ghana Companies Code 1973 as 'realistic'; nominee directors may give special but not exclusive consideration to the interests of the nominator. The duty to exercise independent judgment does not frustrate the position under English company law conferring wide-ranging power to delegate to directors.⁶⁶⁷

onderneming en weegt daartoe de in aanmerking komende belangen van bij de vennootschap betrokkenen af.' Emph added.

⁶⁶⁴ Dutch corporate governance code, preamble, para 7.

⁶⁶⁵ The Dutch corporate governance code lists employees, shareholders, other contributors to capital, suppliers, customers, the public sector and society at large.

⁶⁶⁶ Section 173 CA.

⁶⁶⁷ Davies 2008, pp 525 and 526. The liberty to delegate flows from *The Companies (Model Articles) Regulations 2008*, Article 5.

As to 4 The duty to exercise reasonable care, skill and diligence⁶⁶⁸

The statutory standard starts from an objective one; the (reasonable) care, skill and diligence required is, first, held against the standard of the general knowledge, skill and experience of a person carrying out the functions of the director in relation to the company. In addition to that, the statute adds a subjective standard; the director must act with the general knowledge, skill and experience he has.⁶⁶⁹ Davies notes that under CA the subjective standard sets the standard required of the director only if it improves upon the objective one.⁶⁷⁰

In the particular perspective of the comparison to Dutch company law, a key element worthy of highlighting is that it is this standard which permits almost unlimited delegation of (their) management functions.⁶⁷¹ The *locus classicus* for this is the judgment of Romer J at first instance in *Re City Equitable*.⁶⁷² He said that ‘in respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting to that official to perform such duties honestly.’ Earlier,⁶⁷³ I noted that Dutch company law attaches importance to the autonomy of the managing board as an organ of the company.

In close connection to the previous point, however, with equal significance in the context of my thesis, it is also the objective standard of care from section 174 CA, which imposes the obligation on the board of always being in a position to ‘guide and monitor’ the management. Davies brings this in immediate connection to the requirement of ensuring the existence of adequate internal control systems.⁶⁷⁴ In the words of Jonathan Parker J in *Re Barings Plc (No 5)*, the freedom to delegate ‘does

⁶⁶⁸ Section 174 CA.

⁶⁶⁹ Section 174 (2) (a) CA, the objective standard, and Section 174 (2) (b) CA, the subjective one respectively.

⁶⁷⁰ Davies 2008, p 490.

⁶⁷¹ Davies 2008, p 492.

⁶⁷² *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, [1924] *All E.R. Rep* 485.

⁶⁷³ *Supra* p 136, where I mention that under Dutch law, the day-to-day management may never be taken away from the managing board.

⁶⁷⁴ Davies 2008, p 492.

not absolve a director from the duty to supervise the discharge of the delegated functions.⁶⁷⁵

The thread of my thesis is that governance and directing the company are tantamount. Especially in view of this, it is relevant to note that Davies opines that the statutory standard of care in CA will inevitably lead to the courts claiming a greater role in defining the functions of the board, no matter how sensitive they are to the need to avoid the use of hindsight. At the same breath Davies goes on to admonish that, as a result of developments associated with the appearance of corporate governance codes,⁶⁷⁶ there is a body of best practice available, on which, although they are not bound by them, the courts can draw.⁶⁷⁷

As to 5, 6, and 7 Duty to avoid conflicts of interest

The Act addresses directors' conflicts of interest by distinguishing between three positions, in three sections, 175 to 177 CA. All three may be regarded as manifestations of an overall 'no-conflict' tenet; directors must not place themselves in a position in which there is a conflict between their duties to the company and their personal interests⁶⁷⁸ or duties to others.⁶⁷⁹ Davies explains the fairly complex structure of the Act by the truism that the possibilities of conflict situations are endless,⁶⁸⁰ but submits that the distinction thus made finds its rationale in the difference in the conflicts' sources. Also, the Act reflects the rules under each of the three duties having separately developed.

Prima facie a general provision, section 175 CA particularly addresses the exploitation of property⁶⁸¹ or opportunity.⁶⁸² Here, the source of the conflict is excluding the company from using company property or opportunity for the director's own ends. Section 176 CA addresses bribes; the source of the conflict is

⁶⁷⁵ *Re Barings Plc (No 5)*, [2000] 1 B.C.L.C. 433, 489 (per Jonathan Parker J).

⁶⁷⁶ Currently The UK Corporate Governance Code, September 2012.

⁶⁷⁷ Davies 2008, p 494.

⁶⁷⁸ This is by far the preponderate category.

⁶⁷⁹ Duties to others may be relevant – as distinct from his personal interest – where a director is also a director of another company; the result obviously being that the director's duties compete.

⁶⁸⁰ Davies 2008, p 530.

⁶⁸¹ The Act explicitly adds 'information', which I suggest is encompassed by property.

⁶⁸² Section 175 (2) CA.

that the director exercises his powers in the interests of a third party in consideration for a personal benefit, instead of exercising his powers to promote the success of the company. Thirdly, section 177 CA addresses self-dealing, where the source of the conflict is the director being on both sides of the transaction in some manner of form.

From a comparative perspective, notably the position from section 177 CA merits closer analysis. The position in Dutch company law on directors' conflicts of interest has only recently been recast into the statute; article 2:129 para 6 BW;⁶⁸³ where the managing director has a direct or indirect personal interest in the deliberation and decision-taking, which interest conflicts with the interests of the company, he does not participate in those deliberations and decision taking. This position had not been arrived at than upon the development of the law on managing directors' conflicts of interest having seen fundamental development through case law.

In 2007, the law on conflicts of interest had seen *Bruil*.⁶⁸⁴ In it, the Supreme Court defines a conflicting interest as a situation in which the managing director, due to presence of a personal interest or due to his involvement in another interest which does not run parallel to the interest of the company, cannot be deemed to be capable of safeguarding the interest of the company in the manner which may be expected from a managing director acting with integrity and without prejudice.⁶⁸⁵ The Supreme Court added that a situation of a conflict of interest arises where the managing director is confronted with interests so incapable of being reconciled that it may reasonably be doubted that the managing director has orientated himself exclusively upon the company's interest.⁶⁸⁶

The *Bruil* judgment had been widely taken as the Supreme Court turning the page on the 'abstract' approach on the existence of a conflict of interest. Until this 2007 judgment, the mere possibility of a managing director giving prevalence to a personal⁶⁸⁷ interest, would suffice for assuming the existence of a conflict of interest,

⁶⁸³Wet van 6 juni 2011 tot wijziging van boek (sic) 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen, *Stb* 2011, Nr 275.

⁶⁸⁴This case has been elaborated upon in *Café Bar Carribean* (concerning an Antillean case).

⁶⁸⁵*Bruil*, dictum at 3.4.

⁶⁸⁶Equally dictum at 3.4.

⁶⁸⁷Or, for completeness' sake, another interest resulting from his involvement with a third party.

such that the erstwhile article 2:146 BW⁶⁸⁸ applied. From *Bruil*, the law became that all relevant circumstances should point to the actual presence of a conflict of interest, turning the approach from ‘abstract’ to ‘concrete’. The position arising from this point has subsequently been taken to portend that interests have a potential to conflict where they are *serious, carrying great weight and substantial*.⁶⁸⁹ Here, there is room for a certain congruency with the proposition in English law; section 177 (6) (a) CA requiring that the interest must reasonably be regarded as likely to give rise to a conflict of interest. Another way of putting this is, as Davies does where he addresses the common law position, that there must be a conflict of interest which is not just *fanciful*.⁶⁹⁰

On substance, English and Dutch law seem to be fundamentally different. On self-dealing, the English position – arising from the enactment of the CA – is a requirement of disclosure to the board only. Strikingly, section 175 CA, which, as I indicated before, has semblance of a generic prohibition of conflicts of interest, in subsection (3) explicitly carves out conflicts of interest arising in relation to transactions or arrangements with the company. What ‘remains’ on self-dealing may be argued to be neutral and matter-of-fact at the same time.

Thus, whereas still, from a normative perspective, Dutch law departs from the position that a director’s conflict of interest is objectionable, English law appears to concede that it is not necessarily correct or wise that directors should not contract with their company.⁶⁹¹ It seems to me that, in his brief excursion to American law, precisely this difference is underscored in A-g Timmerman’s conclusion to *Bruil*. He remarks that it is *a point of departure* in American law that interested director’s transactions need not be reproachable *per se*.⁶⁹² Beyond this, it must be noted that Dutch company law has seen a marked shift toward ‘neutralisation’ on the issue. The

⁶⁸⁸ Article 2:146 BW by providing that, in a situation of a managing director’s conflicting interest, the company is represented by supervisory directors (*preventing* the managing directors from acting on behalf of the company), boiled down to approaching the issue from a *representation perspective*. See *Kamerstukken II*, 31 763, nr 3, p 10. Article 2:146 BW was repealed by the Act of 6 June 2011.

⁶⁸⁹ I translated these qualifiers from Hof Leeuwarden 27 januari 2009, *JOR* 2009/101.

⁶⁹⁰ Davies 2008, p 530, *emph* from me.

⁶⁹¹ Davies 2008, p 531.

⁶⁹² *Bruil*, at 3.44.

predominant objection against the law had always been that it was ‘formal’ as much as it was ‘abstract’, and thereby it opened too much scope for litigation.⁶⁹³

4.5 Concluding notes

The first matter I address in this chapter is the meaning of corporate governance at Dutch law. I am not able to distil a common denominator for corporate governance as a matter of the law. The Supreme Court, orientating itself upon convictions of law in the Netherlands, appears (thereby) to avow that it is something from ‘outside’ the judiciary. Were one to seek inspiration from the Dutch corporate governance code, which seems to dominate the corporate governance debate in the Netherlands, or from academic writings, there arises an impression that corporate governance is about the relations between company organs – a ‘rules-of-the-game’ perspective.

Is such rules-of-the-game perspective on corporate governance likely to render support to my research objective; *ie* that compliance is within the category of corporate governance? I concluded that this remains unclear. In my view, the better view on corporate governance is one taking an inclusive perspective; corporate governance is about directing the company. It is, thereby, about the work of the governing body. It thereby comprises directors’ duties. My argument is, first, that the inclusive view on corporate governance is rendered support by the historical origins of the corporate governance debate. In 1982, the original goal of the American Law Institute’s Corporate Governance Project was to produce a restatement of the law on the legal duties of company management. Second, I base my argument on the developing trend in corporate governance, finding expression in, *eg*, the 2012 UK Corporate Governance Code; corporate governance is about what the board does and how it sets the values of a company.

Why is it important that the law enables recognising compliance to be in the category of corporate governance? When seeking to be informed on their compliance obligations, it is natural that banks take the (statute) law as their point of departure. Failing clear guidance, banks may, thereby, not readily interpret compliance as a

⁶⁹³ *Eg* for trustees in bankruptcy.

matter of corporate governance. This risks compliance being relegated to the operational day-to-day management of the bank. And where such dismissal of compliance occurs, this causes a likely omission to acknowledge possible liability flowing from compliance breaches – such liability being a matter of company law addressing corporate governance.

Assimilating corporate governance to directing the company made me turn to the position at law of ‘the management’. On managing the company, from *Forumbank* back in 1955, Dutch company law has it that in exercising the powers conferred to it by law, the managing board is autonomous. And, with this, as is noted by Timmerman, the managing board’s distinct position and responsibility for determining the strategy carries relatively more weight than it does in England. Although there appears to be uncertainty and a degree of unease in pinpointing the spheres of influence, Assink is perfectly clear on setting the strategy lying – as an independent power – with the management, which is not to say that the managing board will operate in isolation from the supervisory board (if there is one).

I then came to corporate governance in English law. I quoted Davies who notes there exists a ‘corporate governance industry’. The fundamental difference between English and Dutch company law is that in England the division of power between the board and the shareholders is a matter for private ordering by the members of the company. Dutch law defines the independent and autonomous powers of the company organs – the consequence being that since *Forumbank* it was no longer correct to assert that the general meeting of shareholders constitutes the highest power within the company. Through this fundamental difference, logically, in England the accountability of the senior management of the company to its shareholders makes up the focal point of the corporate governance debate. But, otherwise, the English position on corporate governance is inclusive; corporate governance is the work of the governing body; directing the company. This caused me to look at directors’ duties.

For the purposes of my thesis, two categories of directors’ duties stand out. The first is the duty to promote the success of the company, and the second is the duty to exercise reasonable care, skill and diligence. The reason why the duty to promote the

success of the company stands out when addressing compliance, is that where it is to management to decide on how precisely to pursue the success of the company, such (process of) decision taking is part of the category of business decisions. The directors' duty to exercise reasonable care, permits almost unlimited delegation of management functions – a director is justified in trusting company staff honestly to perform delegated duties. In anticipation; it is this duty of care which imposes on the board the obligation of always being in a position to 'guide and monitor' the management. With this comes the requirement of ensuring the existence of adequate internal control systems.

5 Chapter 5 - CSR

5.1 Introduction

In its 2009 report *Restoring Trust*, the (Dutch) Advisory Committee on the Future of Banks departs from the following.⁶⁹⁴

‘The originally financial crisis has developed to an economic and consequently a societal crisis. Next to the loss of confidence in the banks’ economic function, the confidence in the function they fulfil in society, is seriously damaged.’

This Advisory Committee observes that whereas ‘most banks in the Netherlands have an important public utility function, the societal role they fulfil sets them apart from other enterprises.’ The upshot from the report *Restoring Trust* is that banks, by assuming their own responsibility, promote responsible and sustainable banking and that, in so doing, they improve the fulfilment of their societal role. Ultimately, according to the Report, appropriately fulfilling such societal role is a matter of weighing up the interests of customers, shareholders, employees and society at large, such that the customers’ interest is given pre-eminence.⁶⁹⁵

Thus, especially where banks perform public utility functions,⁶⁹⁶ their role in society features prominently in the current debate. Banks’ societal role is couched in terms of responsibility; banks must discharge these responsibilities by the process of weighing up the interests of certain stakeholders. Earlier, I have addressed the development in Dutch private law cases which has now led to the firm establishment of banks’ special duty of care *by virtue of their role in society*.⁶⁹⁷ And, taking the Advisory Committee on the Future of Banks at its words, where banks discharge this

⁶⁹⁴ Naar herstel van vertrouwen 2009, p 7.

⁶⁹⁵ *Ibid*, p 21.

⁶⁹⁶ Banks do not make up a homogenous group; not all banks perform a public utility function, and, where they do, there is great variety in degree. Nonetheless the Advisory Committee on the Future of Banks readily assumes that ‘most banks’ fulfil a public utility function.

⁶⁹⁷ *Supra* at section 2.3.2.3 esp on p 69.

responsibility, this contributes considerably to ‘responsible and sustainable banking.’⁶⁹⁸

Where the current debate on banks’ responsibility is concerned, the recurrence of terms involving the element ‘social’ or evoking society, conjures up the ubiquitous notion of CSR. Banks’ responsibilities are brought into relation with societal interests.⁶⁹⁹ This is done with such apparentness that certain responsibilities allotted to banks appear to be a consequence of their role in society. The question may be asked whether this is tantamount to banks’ CSR. This question may be framed as whether the responsibilities banks have to orientate themselves upon interests of a broader category of stakeholders than their shareholders in order to discharge their societal responsibilities, make up (the content of) their CSR.⁷⁰⁰ The reason this question readily presents itself is that, as it has been said before, banks’ public utility function distinguishes them from other enterprises. Banks’ responsibility to society at large may form a larger component of their overall category of responsibilities, than is the case for other enterprises, whereas it seems to be recognised that CSR is sector specific.⁷⁰¹

For the above reasons alone, it makes sense to broach CSR in a thesis on compliance and banks. In addition, there is a view that corporate governance nowadays encompasses ‘CSR values’.⁷⁰² I submitted in this thesis that the *ex ante* perspective to compliance is similar in nature to setting the strategy and, thereby, within the

⁶⁹⁸ Where Lambooy mentions that Corporate Social Responsibility has been described as business’ contribution to sustainable development, this points to proximity – if not equitability - between Corporate Social Responsibility and sustainability. Cf Lambooy 2010, p 11. Lambooy also writes: ‘[F]urthermore, CSR aims to include the power of business in achieving sustainable development.’, Lambooy 2010, p 206.

⁶⁹⁹ See, eg Eijsbouts *et al* 2010, p 3, where the credit crisis is mooted as an important trigger for the societal component of business - finding its expression in the term CSR - gaining prominence.

⁷⁰⁰ This seems to me to be the conclusion drawn by the joint draftsmen of the Preadviezen Maatschappelijk Verantwoord Ondernemen 2010; eg on p 10 where they write: ‘[I]t is the entrepreneur’s charge to generate that return [*ie* an increased intrinsic value for the supplier of risk-bearing capital] with simultaneous value creation for the other stakeholders, among which the management and employees, customers, suppliers, the local communities in which the enterprise deploys its activities and the agreed fixed return for the suppliers of borrowed capital.’

⁷⁰¹ Eijsbouts *et al* 2010, pp 18 – 23. In this context, see also that in Preadviezen Maatschappelijk Verantwoord Ondernemen 2010, on p 10, where sector-specific legislation is being highlighted, Wft is explicitly mentioned as containing many prescriptive norms and prohibitions, enforceable through the workings of administrative law; on the sectoral character of CSO cf also, Lambooy 2010, p 10.

⁷⁰² Eg Lambooy 2010, p 32 and Eijsbouts 2010, p 57, who calls this the ‘values approach’.

category of directing the company.⁷⁰³ In doing so, I inferred, by an analogy to the English company law perspective that this also entails that compliance is about ‘promoting the success of the company’. At exactly this place it is apposite to insert a quote from CA:⁷⁰⁴

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company’s employees,
- (c) the need to foster the company’s business relationships with suppliers, customers and others,
- (d) the impact of the company’s operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct [. . .].

This ESV-approach reverberates themes typically associated to CSR – ‘long term’ clearly connotes sustainability; the categories of employees, suppliers, customers, and others could well make up the People-component, and the community and the environment are capable of being assimilated to ‘Planet’.

Norms defined by the bank itself may well be the expression of a bank’s claim on its relevance to society, and this reinforces the analogy to CSR.⁷⁰⁵

What are a bank’s obligations towards society at large as a matter of law? Are such legal norms within the domain of CSR?

I aim to substantiate my view that, where Dutch law is traditionally deeply rooted in the premise of societal acceptability,⁷⁰⁶ Dutch law recognises that banks have a duty

⁷⁰³ *Supra* at section 3.11.3.1.

⁷⁰⁴ S 172 (1) CA.

⁷⁰⁵ Eijsbouts prompts a similar point where he notices that terminological grounds suffice to subject the legal norm of tort, phrased in the statute law as: ‘an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct’, to closer inspection from a CSR-perspective, Eijsbouts 2010, p 83.

to promote the interests of society at large. This is not to say that all so-labeled CSR-norms are within the ambit of (the) law.

As a matter of setting their strategy, banks may well choose knowingly and voluntarily to commit to norms beyond mandatory law.⁷⁰⁷ Later, in chapter 6, I shall broach that banks, organised as companies, are partial legal orders. They thereby have the capacity to determine their own rules, which rules are binding upon those concerned in the organisation.⁷⁰⁸ There I will describe that the bank may make certain corporate resolutions positive for instance by setting values, codes of ethics, integrity codes, or business principles.⁷⁰⁹ The denomination is not decisive as to whether such documents are ‘regulations’,⁷¹⁰ but, when they are, they bind the organisation. The primary motive for defining internal rules may well be facilitating and effectuating the attainment of the strategic objectives. Combined with this, internal rules may form the expression of ambitions and aspirations. In this sense, internal rules may be the expression of what the bank wishes to achieve for its stakeholders. A bank will not be in a position to stake a claim as to what it wishes to achieve for its stakeholders, if it doesn’t identify the parties which it classifies as its stakeholders.⁷¹¹ Doing so must then boil down to the bank owning up to what its place in society is.

Where addressing codes of conduct, Lambooy signals that in corporate governance a ‘Code of Ethics’ commonly contains provisions regulating potential conflict of interest situations. She submits that corporate governance has repositioned itself in that whereas it originally focused on ‘defining the rules of the game’, it evolved into

⁷⁰⁶ See Asser-Hartkamp/Sieburgh 2010, 43.

⁷⁰⁷ For the avoidance of doubt; the fact that a norm is not written into a statute book, does not preclude it from being legally relevant. This is the entire domain of open norms. Eijsbouts admonishes that care must be had not to assume that what may be classified as contrary to societal norms is thereby – by definition – legally wrongful (D: [M]aatschappelijk onmaatschappelijk is nog niet noodzakelijk juridisch onmaatschappelijk’), Eijsbouts p 83. The joint draftsmen of the Preadvieszen Maatschappelijk Verantwoord Ondernemen 2010, state on precisely this point that as the parameters of the statute law are limited, non-codified CSR-norms are and remain to be of great significance, then to cite Gonthier: ‘[B]eyond the formal sources of law, there are common values that inspire and guide its interpretation. The spirit of law complements black letter law. It is not concerned with setting down rules. Rather it reflects the values which a society draws upon its development of legal rules.’, Eijsbouts *et al*, p 23.

⁷⁰⁸ *Infra*, section 6.2.1, p 209.

⁷⁰⁹ Eijsbouts observes that nowadays companies often publish policy statements or policy intentions (D: beleidsuitgangspunten of –voornemens), Eijsbouts 2010, p 86.

⁷¹⁰ A term referred to *eg* in articles 2:8 para 2 and 2:15 para 1 (c) BW.

⁷¹¹ Eijsbouts 2010, p 59 lists the CFO stakeholder inventory by Pitts – the list includes Non-governmental Organisations and ‘governments and authorities’ (Eijsbouts owns up having transposed Pitts’ term ‘regulators’ to ‘governments and authorities’).

what she describes as a ‘more holistic perspective’; it now includes CSR values. She singles out the current best practice provision in de Dutch corporate governance code, that the directors define a CSR policy and consider the CSR aspects material to the business, as a clear indication in this direction.⁷¹² Where a company voluntarily adopts such a code of conduct, Lambooy matter-of-factly observes that it must adhere to it. But immediately thereafter, she questions whether this is a matter of law; “[C]odes of conduct seem to dwell in a legal ‘no man’s land’.”⁷¹³

In what follows in this chapter, I begin by looking at terminology and I shall refer to a normative definition of CSR by the joint draftsmen of the Preadviezen Maatschappelijk Verantwoord Ondernemen 2010. Next I reiterate that Dutch (private) law contains the implied societal norm of the duty of care. Whereas most banks are organised as companies,⁷¹⁴ I then transpose this duty of care to the more specific context of company law. I do so by tracing the tenet of reasonability and fairness in company law to its equivalent in generic private law. In dealing with company law, I will next get to whether company law requires the consideration of the ‘general interest’ (interests beyond those of the parties concerned in a company’s organisation). From there, I deal with responsible entrepreneurship and its proximity to CSR. In analysing the company’s stakeholders, I then address the company itself as a possible stakeholder. In conclusion of the stakeholder inventory under general company law, I look at whether the law explicitly identifies and recognises ‘society (at large)’ as a stakeholder.

The next port of call will be banks’ special duty of care, as developed by Dutch case law. Although I have already addressed this topic in chapter 2, where I addressed this duty as the essential private law precursor to the duty of care flowing from public law, case law forms a particularly apt illustration of the position at Dutch law on banks’ place in society. It is therefore also the logical stepping stone to banks’ duty of care as a matter of financial markets law.

⁷¹² Lambooy 2010, p 32.

⁷¹³ Lambooy 2010, p 81.

⁷¹⁴ With which I mean (the equivalents under foreign law to) *naamloze vennootschappen* (article 2:64 BW) or *besloten vennootschappen* (article 2:175 BW).

The subject of banks' place in society is a perfect trigger for reminding that the subject is at the borderline between the spheres of private and public law. Where regulation of banks is doubtlessly inspired by concerns of the general interest and the public domain, it may well be that the interests sought to be protected, would automatically make the matter of banks' duties and responsibilities toward society at large one of public rather than private law. Why are companies regulated and, related to that question, what is the purpose of company law? From there, the exploration continues along financial markets regulation. This chapter is not complete without reference to the Dutch Banking Code, as this code formed the outcome of the Advisory Committee on the Future of Banks' conclusion that it needed to address a societal crisis.

5.2 Terminology

The joint draftsmen to the Preadviezen Maatschappelijk Ondernemen 2010 write that usual denominations of CSR are 'Triple P: People, Planet Profit', or 'the Triple Bottom Line'. They indicate that CSR aims at 'a more integrated approach in particular of the perspectives of labour, the environment, markets, business relationships and human rights.'⁷¹⁵ The term CSR may not have a clearly established meaning,⁷¹⁶ and this is even less so at law. In the Netherlands, the legal community has developed an interest in CSR, and the 2010 preliminary reports to the Dutch Lawyers' Association bear witness to this.⁷¹⁷ Where approaching a definition at law to the term CSR, the joint draftsmen, whilst arguing that the normative significance of the term CSR must be distinguished from its operational significance,⁷¹⁸ submit the following definition for its normative meaning:

⁷¹⁵ Eijsbouts *et al*, p 4.

⁷¹⁶ Lambooy mentions that legal experts on CSR indicate that they cannot provide a clear definition of CSR because the term has not yet "settled". And in her own view, she then submits that basing research upon one single definition will not improve such research, Lambooy 2010, p 12. Lambooy nonetheless departs from the assumption (formulated by the Dutch Social Economic Council) that CSR means 'balancing the interests of different stakeholders in order to realise a value increase in three dimensions: People, Planet, Profit.' *Loc cit*.

⁷¹⁷ Eijsbouts *et al* 2010.

⁷¹⁸ *Ibid*, p 24. The operational aspect addresses Corporate Social Responsibility in action (what the company does in fact in conducting its business in compliance with norms of Corporate Social Responsibility, and, ultimately, the way the company accounts to society for doing so).

‘The entrepreneur’s responsibility in conducting his enterprise to comply with the justified expectations of society as regards the societal consequences of his enterprise, such as economic, social and environmental consequences for all stakeholders.’⁷¹⁹

5.3 Premise: the societal context of Dutch private law

Using the term CSR, more and more evolving to a ‘term of art’ and, thereby bringing with it meaning and content beyond those words with nothing added and nothing taken away,⁷²⁰ risks deflecting from my purpose. Earlier, I sought to attract attention to the societal context of Dutch private law.⁷²¹

I translate the Dutch term *maatschappelijk* as societal with intention. ‘Social’ has a similar meaning – this may already be obvious from its place in Corporate *Social* Responsibility – but it tends to confuse a Dutch readership. Where I use ‘societal’, the meaning also points to the structure, organisation and functioning of society. Hence, an institutional as much as an inter-personal connotation. In any case, ‘societal’ points to a larger category of objects, than does social. The latter is exactly my purpose. In my view, article 3:12 BW points to a distinction between social interests where one is under an obligation to have regard to personal interests, and, societal interests, where a (potentially) larger circle of parties, less capable of being defined with accuracy, is concerned.

Dutch private law imposes a ‘societal norm’ to have regard to the justifiable interests of others – a duty of care of sorts – in cases where there is no contract, and absent any circumstances classifying as a ‘legal relationship’ outside contract. My purpose is precisely to explore this societal context where banks are concerned. In this particular respect I would reiterate that it is a fundamental – albeit grossly undervalued – tenet that statute laws and law are not synonymous. Societal beliefs and convictions have as much a role to play as formal regulation. Thus, as Smith phrases it, instead of a clear hierarchy of norms, we have law consisting of legislation next to what is termed

⁷¹⁹ Eijsbouts *et al.*, p 28.

⁷²⁰ I borrowed this phrase from Williams 2006, p 127, where the literal rule is addressed.

⁷²¹ See, *eg supra*, p 127.

as equity in England.⁷²² Hence, and I find I cannot stress this enough, Dutch law has an important societal component altogether.^{723 724}

5.4 From private law to company law and beyond

As noted, whilst most banks are organised as companies, my point of departure is company law. Company law is a component of private law.⁷²⁵ Company law is a legal construct towards facilitating the conduct of business activities. At private law the company is equivalent to a natural person.⁷²⁶ At the basis lies that, in conducting its business, the company exercises rights which exist in the domain of free society, and, since it does so in the given context of the pursuit of a business, it partakes in the exercise of (free) market economics.⁷²⁷ This is what Raaijmakers points out in writing that company law is founded on the civil freedoms of enterprise, association and corporation.⁷²⁸ I would stress that, as a consequence, a company may choose whatever it wishes to do and it is free in determining its actions. To me, there are (only) two sets of limitations to this:

1. the company's place in society (as if it were a person like any natural persons); and
2. the company's own, internal rules of engagement.⁷²⁹

⁷²² Smith 2011, p 755.

⁷²³ The duty to have regard to interests of others is classified as a general principle of Dutch private law, see, *ia*, De Jongh 2011, p 609.

⁷²⁴ Another manifestation of the societal construct of Dutch private law is article 3:40 para 1 BW; Dutch law reserves the right to limit the freedom to contract where the consequences of a contract breach the accepted fundamental principles of society, as these principles are reflected in its objective law. See Asser – Hartkamp/Sieburgh 2010, 43.

⁷²⁵ *Cf* articles 3:15; 3:59; 3:79; and 3:326 BW providing for applicability of general tenets of private (common property) law where capable of being reconciled with the particular legal relationship.

⁷²⁶ Article 2:5 BW.

⁷²⁷ See also Busch 2010, p 9.

⁷²⁸ Raaijmakers 2004, p 72.

⁷²⁹ The company is 'purpose-bound'. It must, as a consequence, only take actions which, in the ultimate analysis, may reasonably be taken to be conducive to its purpose. However, such analysis does not lie with any parties outside the company, and where the actions of a company are judged, the courts ought to retain themselves from second-guessing the company. The latter is referred to as the *margin of appreciation* to be left to the managing board. I glean the term purpose-bound from Van Ginniken and Timmerman 2011, p 602.

The question as to where the law limits the company's freedom to act, seems to concern us with the line in the sand between the two aspects I mention above. Between these two areas lie interests from those parties that are affected by the company's acts, but who are not 'concerned in its organisation'.⁷³⁰ I have difficulty in envisaging the company as *servicing* an interest beyond, or *outside* the interests of any one or more parties actually affected by its actions,⁷³¹ and so this is all about establishing the circle of parties whose interests company law takes to heart.

Private law takes the 'societal norm' to have regard to the justifiable interests of others as its point of departure. This is classified, in fact, as the manifest expression of a *general principle* of Dutch private law.⁷³² Where (general) private law requires reasonability and fairness, it points to a higher, more stringent standard. In private law terms, this is explained as resulting from either contract, or where, outside contract, the relevant circumstances classify as a 'legal relationship'. For my present purposes, this deserves being transposed to company law. Company law too, uses the criterion of reasonability and fairness. We are with article 2:8 para 1 BW: 'a legal person and those who, by virtue of the statute law and the articles of incorporation, are concerned in its organisation, must, in such capacity, behave in conformity with reasonability and fairness towards each other.' The reason the legal person itself as much as all parties concerned in its organisation, are held to the relatively higher standard of reasonability and fairness, lies precisely in the fact that they share interests in one and the same legal person. This may be seen as the 'legal relationship' required under (general) private law.

It is important at this stage, to note that where company law is a component of private law,⁷³³ the ascending categories of obligation of the duty of care and or reasonability and fairness from general private law, normally apply to the company. Therefore, so far we have:

⁷³⁰ The wording from article 2:8 para 1 BW.

⁷³¹ Cf Davies 2008, p 507 – I broach exactly this point *supra*, p 170.

⁷³² De Jongh, in so stating, refers to both Van der Grinten and Tjong Tjin Tai, see De Jongh 2011, p 609.

⁷³³ Articles 3:15; 3:59; 3:79; and 3:326 BW providing for applicability of general tenets of private (common property) law where capable of being reconciled with the particular legal relationship, are a clear manifestation of the inter-connectedness of private law as a whole.

1. The company's duty to act with due care for the interests of others affected by one's actions; and
2. The company's duty, as much as the duty of all concerned in its organisation, to act, in such capacity, towards each other, with reasonability and fairness.

Where we are dealing with parties consisting of (groups of) natural persons who 'are concerned in the company's organisation' and who are capable of being defined, this is safely within the remit of the company's own, internal rules of engagement. Where parties are in some manner or form connected to the company's organisation, the law is outspokenly *open-ended*. To illustrate this, I would first point to article 2:8 para 2 BW; a rule based upon the law *among those concerned in the company*, does not apply in so far as this would, under the particular circumstances, be unacceptable under the tenets of reasonability and fairness. This may yet again be seen as entirely befitting in view of company law being a *specialis* to private law. In private law, this open-ended and non-dogmatic character sits naturally with article 6:2 BW, establishing the preponderance of reasonability and fairness between all parties bound *inter se* by obligation, regardless of the origin of the obligation. And, like article 2:8 para 2 BW, article 6:2 para 2 BW expresses that the law must give way where, in the given specific circumstances it would be contrary to the tenets of reasonability and fairness for it to apply.

As is already evident from Nieuwenhuis,⁷³⁴ a distinction is to be made between the 'societal' norm consisting of the duty of care on one hand, and the 'higher degree of consideration' that needs to be had to another's interest represented by reasonability and fairness on the other. In the latter class of circumstances, the more onerous content logically flows from the fact that there exist obligations of some sort *inter se*.

Within the particular context of company law, there is an extra layer; another dimension, over and above the already mentioned ones of the duty of care and reasonability and fairness. For this, I may refer to the Dutch corporate governance code. Its preamble provides that, unlike the managing and supervisory boards, in principle the other stakeholders in the company are not exclusively guided by the

⁷³⁴ Nieuwenhuis 1974, p 67.

company's interest and those of the enterprise connected with it. The code continues by providing that, hence, shareholders may, as a matter of principle, give priority to their own interests, within the framework of reasonability and fairness.⁷³⁵ Advocate-general Timmerman refers to this in his conclusion to *ASMI*⁷³⁶ where he addresses the apparent uncertainty in Dutch corporate governance on the division of (spheres of) power on setting the company's strategy. In Timmerman's view, the prevailing uncertainty on this matter is a consequence of the increased assertiveness of certain shareholders. On the particular issue of the compass for the orientation towards interests, with references to the Bill resulting from the definitive report from the Corporate Governance Monitoring Committee chaired by Frijns,⁷³⁷ Timmerman also quotes from the Explanatory Memorandum to the Bill, in representing the above division; 'the directors and the supervisory board members are bound by the broad guideline of the company's interest. The shareholders are not. Their beacon is reasonability and fairness.'

Were the matter as to the company's duties towards society at large seen as always and necessarily pertaining to (the category of obligation resulting from) the use of directors' powers, this would seemingly make the standard of the company's interest apply. This is neither appropriate nor satisfactory for the overall matter of a company's duties, seen from the perspective of the company itself as an actor in economic life.⁷³⁸ We must, for this, distinguish between the company actions, and the actions performed by directors or supervisory directors.

5.5 The general interest as a matter of company law

⁷³⁵ Dutch corporate governance code, Preamble para 9.

⁷³⁶ At 3.4.12.

⁷³⁷ *Kamerstukken II*, 2008-2009, 32 014.

⁷³⁸ An illustration of the (possible) distinction between these spheres may be gleaned from *OGEM II*; see dictum at 7.4 – entirely in line with A-g Mok's argument in his conclusion; 'mismanagement' is to be seen as pertaining to the legal person as a whole; the legal person's mismanagement. This refuted counsel's argument that mismanagement from article 2:355 BW is not the company's mismanagement but the mismanagement of persons participating in the company's organs. Read dictum at 7.4 in conjunction with Mok's conclusion at 7.2.4.

Does law require companies to have regard to interests *beyond* those of the parties ‘concerned in their organisation’?⁷³⁹ As inferred from the above, where parties choose to be concerned in the organisation of a company, and thereby enter the circle of those mentioned in article 2:8 BW, they do so on their own volition.

But, beyond this, does company law seek to protect⁷⁴⁰ the general interest? It is apposite to consider the purposes of company law. Kraakman *et al*⁷⁴¹ phrase this as follows:

As a normative matter, the overall objective of corporate law – as of any branch of law – is presumably to serve the interests of society as a whole. More particularly, the appropriate goal of corporate law is to advance the aggregate welfare of all who are affected by a firm’s activities, including the firm’s shareholders, employees, suppliers, and customers, as well as third parties such as local communities and beneficiaries of the natural environment. This is what economists would characterize as the pursuit of overall social efficiency.

This postulates it is any branch of the law’s objective to serve the interests of society as a whole. This is, of course, closely linked to the degree to which regulatory intervention is capable of being legitimised. I pointed earlier to regulation finding its legitimisation in the state (government) having weighed up the reasons for and against such intervention, deeming it necessary to intervene in the economic process. From the perspective of economic theory, state intervention is justified where it cannot be taken for granted that private ordering will yield welfare-maximising results.⁷⁴²

There are only two instances in which Dutch company law openly orientates itself upon the ‘general’, or ‘public’ interest. Article 2:345 para 2 BW⁷⁴³ entitles the attorney-general with the Amsterdam Court of Appeal to request the instigation of an

⁷³⁹ Being the parties identified in article 2:8 BW.

⁷⁴⁰ I realise that using the verb to protect, makes this look ‘defensive’. The quote from Kraakman 2009, which follows, is, rather, looking at the facilitating aspects of the law.

⁷⁴¹ Kraakman 2009, p 28.

⁷⁴² See *supra*, p 18, with the reference in footnote 31 to Cheffins 1998, p 127.

⁷⁴³ Trailed by article 2:355 para 1 BW, but this provision does not create a distinct general interest perspective, as, in so far as it concerns the attorney-general, it forms the (potential) sequel to article 2:345 para 2 BW.

investigation into the policy and the conduct of business in a company,⁷⁴⁴ *for reasons of public interest*. Article 2:448 para 1 (b) BW entitles the attorney-general with the Amsterdam Court of Appeal to request the Enterprise Division to order certain companies to make up their annual accounts, their annual reports or information to be added to these, in accordance with directions to be given by the Enterprise Division, *in the public interest*.

The joint draftsmen of the Preadviezen Maatschappelijk Verantwoord Ondernemen 2010, remind that, in the early sixties, the Verdam Committee, the committee which prepared the review of the Dutch company act of 1971, had recommended to include a provision in the statute law that the supervisory board members fulfil their task within the framework of the general interest for the benefit of the aggregate interests of the company and the enterprises connected with it. This suggestion didn't make it and the Preadviezen moot that this had to do with the view ascribed to Boukema that the general interest is incapable of being sufficiently specified and effectuated to be deployed as a legally relevant term. The authors then note that, whereas the general interest did not make it as an expressed term in the company act, it earlier actually had done so. As early as in 1950, the Act on the organisation of business,⁷⁴⁵ expressed that the Social Economic Council was to promote business (trade and industry) serving the general interest.⁷⁴⁶

Maeijer *et al* submit that, as a matter of Dutch company law, the general interest only comes into play indirectly. Their point of departure is that the enterprise has a societal role and that one may assert that the enterprise must be orientated upon the general interest. All this is put into a perspective of the Dutch fabric of society, where production is a matter for private enterprises on one hand, and an important state involvement.⁷⁴⁷

⁷⁴⁴ A so-called enquiry (Dutch: enquête) from article 2:345 para 1 BW and involving the Enterprise Division.

⁷⁴⁵ My translation of Wet op de bedrijfsorganisatie van 27 jan 1950, see art 2: '[D]e Raad heeft [. . .] tot taak een het algemeen belang diendende rol van het bedrijfsleven te bevorderen.'

⁷⁴⁶ Eijsbouts *et al*, p 9.

⁷⁴⁷ Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, nr 22.

5.6 Elementary principles of responsible entrepreneurship

Not as mere semantics, I should point to the similarity between ‘responsible entrepreneurship’ and CSR. For this, *OGEM II* proves to create an excellent point of departure. I recall that in *OGEM II*, the supreme court expressed that acting in breach of ‘elementary principles of responsible entrepreneurship’ constitutes ‘mismanagement’.⁷⁴⁸ In his conclusion, A-g Mok cites Löwensteyn as having coined: ‘conduct observed by the enterprise’s management, which conflicts with the elementary principles of economically responsible policy.’⁷⁴⁹ As Mok admonishes here, the Enterprise Division – the supreme court would now follow suit in this present judgment – threw out the element ‘economically’ from this phrase that subsequently gathered following in its slimmed form. I would remind that The Enterprise Division had done this in its ruling in *Batco*. Strikingly, in *Batco*, the Enterprise Division sets out that mismanagement may, *amongst others*, concern business economics or the social policy.⁷⁵⁰ Hence, in phrasing it precisely like this, I believe that doing away with Löwensteyn’s element ‘economically’ and in doing so, coining the phrase: ‘elementary principles of responsible entrepreneurship’, was done with the intent to pave the way to the social component. From Mok’s conclusion at that time – 1990! – I would emphasise here ‘harming employment’, and that ‘mismanagement may manifest itself at social, commercial and financial levels.’⁷⁵¹

Earlier, I mentioned Willems’ view that, whilst there is no practitioner’s guide to elementary principles of responsible entrepreneurship, some clues are capable of being found in the statute book. I confine myself to pointing out that he points to article 2:8 BW (reasonability and fairness amongst those concerned in the company). Willems adds that the courts must discover, if not invent, elementary principles of responsible entrepreneurship; they will do so by establishing the convictions of law as to what is appropriate in societal relations.⁷⁵² Linguistic nuances aside, this broaches the perspective to an orientation on societal norms.

⁷⁴⁸ Mismanagement as in article 2:355 para 1 BW.

⁷⁴⁹ At 7.2.2.

⁷⁵⁰ Dictum at 2.

⁷⁵¹ At 7.2.1.

⁷⁵² I find it difficult to translate ‘hetgeen in het maatschappelijk verkeer als betamelijk wordt beschouwd’. Interestingly, Warendorf *et al* translate this as: ‘a rule pertaining to proper social conduct.’ See Warendorf, Thomas and Curry-Sumner 2009.

Outside the clues capable of being traced back to the statute book, there is the wide-open area of unwritten rules of company law. Timmerman structures these along four categories, the proportionality principle being of particular interest for my present purposes.⁷⁵³ Timmerman formulates this proportionality principle as requiring that a specific relevant interest may not be excluded from consideration within the weighing up of interests concerned, if such exclusion is not capable of being reasonably defended. Timmerman points out that this proportionality perspective gains prominence for the context of Dutch company law,⁷⁵⁴ in view of the relatively greater plurality of interests. Hence, it may be argued that, given the legal culture bestowing weight upon ‘societal considerations’, the principle of proportionality may oblige companies to consider the effects of their actions on society at large. It should be stressed, all-in-all, that Timmerman clearly advocates a reserved approach to creating a framework of norms for assessing mismanagement. He stresses that he finds it wrong that the Enterprise Division appears to be more eager to cast judgment on company policy. As recently as in 2011, in an article he co-authored, Timmerman embraces that the weight of the concrete interests of stakeholders in determining the company policy, must not be overrated. The primary driver remains to be creating shareholder value. That same article continues to state that the interests of other stakeholders are protected in different concrete ways. It is there that the authors observe that the interests of society at large are protected through legislation.⁷⁵⁵

More recently, Willems pronounced that where the specific matter of elementary principles of responsible entrepreneurship are concerned, forming those, as the subject matter for the enquiry proceedings, is a matter of public interest in that it

⁷⁵³ Timmerman 2003, p 555.

⁷⁵⁴ The proportionality principle gaining prominence is underscored in Van Ginneken and Timmerman 2011, referenced within this thesis on several counts. It would appear to me that the view on the proportionality principle is one in which it is being subsumed under – or made adjacent to – the tenets of reasonability and fairness. In fact, Van Ginneken and Timmerman advocate the proportionality principle as being capable of improving upon the courts’ necessity to deal with reasonability and fairness. They label the latter as ‘a dry norm’ (Dutch ‘droge norm’) on p 603. Although this may well be a matter for the particular context of this observation, it strikes me as incorrect and, moreover, ill-deserved. I propose that the norm of reasonability and fairness is anything but ‘dry’. It opens up the universe of the law beyond the law book. It serves to dynamise the law like nothing else can or will do.

⁷⁵⁵ Van Ginneken en Timmerman 2011, p 606.

affects a far larger circle of concerned parties than merely the shareholders and employees.⁷⁵⁶

5.7 The company's (own) interest

Establishing the circle of parties whose interests company law takes to heart, necessarily leads to an approach from the angle of directors' duties. As said before, this risks confusing the matter of the company's responsibility and liability in any third party relations on one hand, and of directors' duties owed, in the fulfilment of their task, to the company, on the other. However, the company's place in society is seen as the outcome and manifestation of the process in which its directors determine its actions, and hence the outcome of their weighing up the interests of all such parties taking an interest in it. This point may be illustrated with a reference to the preamble of the Dutch corporate governance code, which expresses this apocryphally by stating that in the Netherlands the principle is accepted that a company is a long term alliance and that weighing up the interests must be done in order that the continuity of the enterprise is ensured.

Under Dutch company law, this brings us to article 2:9 BW; each director owes the company a proper fulfilment of his task. With the entry into effect of the Act on the adaptation of rules on management and supervision in public and limited companies,⁷⁵⁷ the new para 5 of article 2:129 BW provides: '[I]n the fulfilment of their task the directors will orientate themselves towards the company's interest and to that of the enterprise connected with it.' Previously, the statute law already had contained this provision where supervisory board members were concerned in article 2:140 par 2 BW.⁷⁵⁸ On exactly the same provision now having entered the Dutch statute book, the legislator confines itself in the explanatory memorandum to

⁷⁵⁶ Willems 2010, p 9.

⁷⁵⁷ *Stb* 2012, 455, see *Kamerstukken II*, 2008-2009, 31 763, nr. 2, Wijziging van boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen.

⁷⁵⁸ In their commonly used translation, Warendorf *cs.* represent this as: '[. . .] the members of the supervisory board shall be guided by the interests of the company [. . .]' *emph* from me. I believe that the Dutch text is done more justice by imposing an active duty on the supervisory board members. Warendorf, Thomas and Curry-Summer 2009, article 2:140 para 2 BW.

observing that it is generally held that the rule for the exercise of the task of the supervisory board, applies with equal force to the directors.⁷⁵⁹

Prima facie, it is tempting to say that the provisions from article 2:9 BW on one hand, and article 2:129 para 5 BW on the other, are tautological. In essence, they appear to point to the relevance of the relationship between the company and the directors. Where the duties are owed to the company, it is the latter's interest which must be served. However, the view was that without the statute law providing that the directors orientate themselves on the company's interest, it would not contain guidance on the way directors should fulfil their task.⁷⁶⁰ Where distinguishing article 2:9 BW from the first paragraph of article 2:129 BW, the legislator points out that the former addresses the task of the ('each') individual director, whereas the latter is concerned with the managing board as a company organ. As much as this may apply to para 1 of article 2:129 BW, which refers to the managing board as such, the text for the new provision in para 5, however, refers to 'the directors'. By so doing, the new provision concerns the individual directors.

In my view the end result lacks organisation. Of course, it may be granted that article 2:9 BW is among the general provisions for (all) legal persons, whereas article 2:129 para 5 BW applies to directors only. Also, there is an argument that the 'norm' from article 2:129 para 5 BW is less neutral than the one from article 2:9 BW; the latter merely establishing the company's right to action. On a normative scale, article 2:9 BW confines itself to requiring propriety, and nothing more. In contrast, the provision of article 2:129 para 5 BW points to a presumption that the company's interest is substantive in nature, capable of being defined.

I now time to turn to the normative substance of 'the company's interest.' The 'traditional view is that under Dutch law there are two views on the matter.'⁷⁶¹ One

⁷⁵⁹ *Kamerstukken II*, 2008-2009, 31 763, nr. 3, page 10.

⁷⁶⁰ In this sense, Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 394.

⁷⁶¹ Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 394. I should mention that, later, I myself 'undermine' the contention there are two views, as I refer to Van Ginniken and Timmerman, broaching in 2011 that the better vision is that the company's interest is a blend of the two opposing views, see Van Ginniken and Timmerman 2011, pp 604 and 605. And, I add that Mendel and Oostwouder list three views with derived variances; (i) the shareholder interest model, (ii) the participants interest model, and (iii) the holistic model (Mendel en Oostwouder 2013, p 1966), then to admonish that the Supreme Court has outspokenly (albeit insufficiently noticed by academia) embraced the holistic

school of thought has it that the company's interest lies in its own healthy existence, expansion and continuation aimed at achieving its set purpose. In this view, 'the company's interest' is an entity in its own right. This view presupposes a causal relation between the existence, expansion and continuation, and achieving the company's set purpose.⁷⁶² The school of thought which is contrasted to this, takes the company's interest to be the resultant of the weighing up of interests of those concerned with the company activity. Within this latter view, the company's continuation is among the interests to be weighed up. For completeness' sake, I would add that Honée and Winter submit that the term 'the company's interest' is without content and hence capable of being dismissed.⁷⁶³

The above distinction between the company's interest as an entity in its own right, and the company's interest as the resultant of the weighing up of interests of those concerned with the company activity, strikes me as theoretical. To me, the greatest difficulty lies in imagining the company, a legal fiction as such, serving an interest beyond, or perhaps rather, *outside* the interests of any one or more parties that are actually affected by its actions. Maeijer, Van Solinge and Nieuwe Weme indicate that Maeijer criticises the view that the company's interest is *the resultant* of the weighing up of interests as it would hide the actual process in which the weighing up of interests takes place, from view.⁷⁶⁴ In my free translation of this notion, the view in support of the company's interest as an entity in its own right, could be labeled as the weighing up of interests in action. Meanwhile, Van Ginniken and Timmerman propose that combining the two positions yields the desired outcome; whereas the company's interest is encompassed by the policy and strategy determined by management, the policy and strategy should be orientated towards creating long-term

model, thus that the company has its own interest which interest has as much claim to legal reality as the company as a legal person itself, but that, in certain circumstances, the company's own interest must yield to the interests of an interested party (this being the case where an interested party's interests may be disproportionately harmed). See Mendel en Oostwouder 2013, pp 1970 and 1971. Although I do not go along with there view, this puts, of course, paid to my deliberately opting for the shareholder's model.

⁷⁶² Within this paradigm, there is enough room for accommodating the opposed views of the stakeholders' model on the one hand, and the shareholders' model on the other. It is the commonly held view that in continental Europe, we embrace a stakeholders' model, whereby the employees' interests are among the various stakeholders. This is also referred to as the Rhineland model. The shareholders' model would see the company's interest as necessarily coinciding with the shareholders' interests. See Asser

⁷⁶³ See Eijsbouts 2010, p 68, Winter 2007, p 132.

⁷⁶⁴ Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 394.

shareholder value. Hence, in these authors' view, the company's interest in its own healthy existence, expansion and sustained existence, in view of its defined purpose, takes with it that the defined purpose is creating long-term shareholder value. And, although the shareholders' interests have their role to play, such role is not exclusive. In order to achieve the purpose, several interests must be taken into account.⁷⁶⁵

5.8 Stakeholders other than shareholders and employees

A fair restatement of the central theme of this chapter is whether 'society at large' is to be considered as a stakeholder. Is, in other words, society at large 'concerned with the company activity'? This is an area where, as a matter of law, there is no consensus.⁷⁶⁶ The preamble to the Dutch corporate governance code provides:

'The stakeholders are the groups and individuals who, directly or indirectly, influence – or are influenced by – the attainment of the company's objects: *ie* employees, shareholders and other lenders, suppliers, customers, the public sector and civil society.'⁷⁶⁷

The Dutch corporate governance code immediately has this followed by stating that the managing board and supervisory board have overall responsibility for weighing up *these interests*. Whilst suffering from contamination - the stakeholders are equated with interests - this does attribute prominence to civil society. It appears to me that the best practice provision requiring the managing board to submit the corporate social responsibility issues relevant to the enterprise to the supervisory board for approval, must be seen in conjunction with this.⁷⁶⁸ However, whereas the Dutch corporate governance code may play an important role in reflecting general convictions of law held in the Netherlands, it should not be confused with the law.⁷⁶⁹

⁷⁶⁵ Van Ginniken en Timmerman 2011, pp 604 and 605.

⁷⁶⁶ See for this conclusion Eijssbouts 2010, p 70.

⁷⁶⁷ Dutch corporate governance code, preamble, para 7

⁷⁶⁸ Dutch corporate governance code, best practice II.1.2 (d).

5.9 Banks' special duty of care by virtue of their role in society

As I addressed earlier, where banks' duty of care as a matter of private law is concerned, there is now a spate of case law⁷⁷⁰ laying down that the position of banks in society brings with it a special duty of care. Briefly – mindful of the overlap with chapter 2 – I recall that this begun in *MeesPierson/Ten Bos*.⁷⁷¹ The Supreme Court ruled:

‘The Court of Appeal has judged correctly that the societal function of banks carries with it a special duty of care, as much as towards its clients on account of the prevailing contractual relationship with them, as towards third parties whose interests it must have regard to on the grounds of what may, according to unwritten law, be appropriate in societal relations.’⁷⁷²

The development in case law has now firmly laid down the principle that banks' special duty of care is founded on the societal position of banks.⁷⁷³

In view of the specific context of this chapter on CSR, surely the most important matter to be addressed is the scope of banks' special duty of care. For this, I would recall the position from *Safe Haven*; claimants⁷⁷⁴ against Fortis Bank had no contractual, pre-contractual or any 'other' relationship capable of being classified as a 'legal relationship' outside contract, which legal relationship is governed by reasonability and fairness with Fortis⁷⁷⁵ whatsoever. They were investors in Safe Haven, a limited company in (the process of) formation. The bank opened a bank account in the name of Safe Haven, and more than forty investors remitted large

⁷⁶⁹ I refer to my earlier observation on p 125, where I also noted that Assink criticises the Supreme Court for appearing overly inclined to accept the Dutch corporate governance code as filling in Dutch company law. The reference (footnote 448) is to Assink 2009, pp 76 and 77.

⁷⁷⁰ The development of duty of care is capable of being traced through the case law listed *supra* in footnote 164.

⁷⁷¹ I addressed earlier that, strikingly, the Supreme Court in so ruling, construes the special duty of care as always arising from the societal function of banks, to which the distinction between contractual or third party relationships, appears to be immaterial. The Supreme Court, in doing so, followed the line of argument from Advocate-general De Vries Lentsch-Kostense.

⁷⁷² At 3.6.2

⁷⁷³ Advocate-general Wissink's recent and up-to-date analysis of banks' special duty of care to *Fortis/Bourgonje* at 3.10. On *Fortis/Bourgonje*, see also Ettema, *OR* 2011/4, p 167 *et seq* and Lindenbergh en Pape 2011.

⁷⁷⁴ Although indirectly – the claims were asserted by an article 3:305a BW foundation; Stichting Volendam.

amounts to Safe Haven's account. Well over £16 million (over €7.2 million) got lost. The Supreme Court, explicitly⁷⁷⁶ quoting the formula⁷⁷⁷ from *MeesPierson* on the foundation of banks' special duty of care on their societal function, acknowledges Fortis's duty to have regard to claimants' interests. It did so by admonishing that certain duties flowing from the public law⁷⁷⁸ also purport to protect the interests of investors such as claimants. As annotator Mok states, banks' duty of care is not purely contractual, hence owed to clients, but also *societal*, and thereby towards third parties.⁷⁷⁹

5.10 The public law dimension – financial markets regulation

It is recalled that the Dutch public law foundation of banks' *duties of care* (the closest public law approximation of the private law *special duty of care* described in my previous section – minus the third-party component) are the Wft provisions specifically addressing *conduct of business* and/ or *investor protection* – whereby the current regime is almost exclusively an incorporation into the statute act of the MiFID.⁷⁸⁰ It is also recalled that, for these provisions to apply, the bank must carry on the (combined) activity of an investment company.⁷⁸¹ It concerns articles 4:14 para 2 (c) and 4:90 para 1 Wft; investment companies' must conduct their business honestly, fairly and professionally, and – yet again honestly, fairly and professionally – they must commit themselves to their clients' interests. As said before, where banks do not perform investment services as defined under Wft, the above provisions do not apply to them.

⁷⁷⁵ More to the matter, with Generale Bank, a predecessor to Fortis.

⁷⁷⁶ *Ie* including the source reference to *MeesPierson* from NJ.

⁷⁷⁷ At 3.6.2.

⁷⁷⁸ The facts of the case occurring between 1996 and 1998, the public law at issue being the then Act on the Supervision on the custody of securities (*Wet Toezicht effectenbeheer*).

⁷⁷⁹ At 2. From Mok's comment, I should also mention that he refers to banks' exerting a degree of oversight on its clients' activities, for instance on the matter of money laundering and financing of terrorism. He classifies this as assisting the public prosecuting

⁷⁸⁰ At the time of writing this, the proposal for MiFID II was published by the Commission on 20 October 2011, see: [*Proposal for a Directive of the European Parliament and of the Council*, 20 October 2011, COM (2011) 656 final], available on the web at:

http://ec.europa.eu/internal_market/securities/docs/isd/mifid/COM_2011_656_en.pdf

⁷⁸¹ See *supra* p 59. At that place, I referred to such banks combining those activities as 'banking investment companies'. Hence, within the system of Wft, as such, banks are not subject to behavioural supervision. See for this, Busch 2010, p 245.

It has also been said before, even where the public law duty of care in the strict sense of the term, does not apply to banks, this it not to say they do not have any duties of care whatsoever. The reason for this is that, where they are so-called financial-service-providers as defined under Wft,⁷⁸² book 4 Wft, except where provided otherwise, applies.⁷⁸³ This entails the overall⁷⁸⁴ applicability of subparagraph 4.2.3. Wft, which subparagraph is entitled [C]areful conduct of business, and applicability of chapter 4.3 Wft, including the providing credit to retail customers.⁷⁸⁵

Why consider the public law dimension when addressing banks' position in society? The first aspect that comes to mind is considering the purposes of Wft. Is there an outspoken intention to promote societal interests, and if so, which? The closest approximation to the expressed purposes of are its articles 1:24 and 1:25 defining prudential supervision, and supervision on the conduct of business ('behavioural supervision'). In literal terms, article 1:25 para 1 Wft, where providing that behavioural supervision covers 'treating clients carefully', comes closest to formulating a societal (and, in any case, *social*) aspect – which is not say that other components from these two provisions may not equally carry societal consequences. For instance, I could argue that the limb 'contributing to the stability of the financial sector' from article 1:24 para 1 Wft, promotes a pre-eminent societal purpose as well; protecting society as a whole against the damage caused by defaulting financial companies. Thus, it may be argued that the purpose of Wft, is altogether societal. This may be illustrated by reminding that the object of financial markets regulation, *ie* the financial markets as such, is seen as a *sine qua non* for overall welfare.⁷⁸⁶ The welfare-argument almost automatically points us to economics. I recall that in chapter 1, I refer to the rationale for state intervention capable of being underpinned by the proven fact that, where markets are concerned, it cannot be taken for granted that

⁷⁸² Wft introduces the neology 'financiedienstverlener' in article 1:1. The financial-service-provider puts, for instance, banking accounts at the disposal of (retail) customers.

⁷⁸³ Article 4:1 para 1 (a) Wft.

⁷⁸⁴ I use this word purposefully – as many provisions from this subchapter, notably those on the client classification, only apply to investment companies.

⁷⁸⁵ As a consequence of the act, where it concerns providing credit, this is confined to retail customers (Dutch: consumenten). This flows from the definitions in article 1:1 Wft.

⁷⁸⁶ See *eg* Busch 2010, p 5.

private ordering will yield welfare-maximising results.⁷⁸⁷ It is this ‘economic rationale’ that leads Llewellyn to concluding that regulation has ‘welfare benefits’.⁷⁸⁸

Cheffins addresses that regulation of market transactions may also be based on non-economic goals.⁷⁸⁹ He mentions the preservation of morality in the market system as one such goal, and he indicates that it must be distinguished from ‘fairness’. He proposes as a working definition that a practice qualifies as immoral if the conduct is sufficiently unethical and improper to undermine public confidence in the market. Hence, this leads to the proposition that intervention is required when business conduct undermines public confidence, which Cheffins illustrates by the English example of insider dealing legislation.⁷⁹⁰ Currently,⁷⁹¹ FSMA lists ‘market confidence’ as the very first regulatory objective.⁷⁹²

In Dutch financial supervision law, (only) some provisions from Wft reverberate confidence - describing ‘integrity’, requiring prevention of certain actions likely to harm the confidence in the financial company or in the financial markets.⁷⁹³ However, it is not an expressed regulatory objective. At the introduction of Wft, the attention devoted to the aspect of confidence was scant indeed. I noted earlier that originally, the three leading perspectives for the overhaul of financial markets regulation were effectiveness, market focus and administrative and financial efficiency.⁷⁹⁴ The explanatory memorandum to the introduction of Wft, seems to mention confidence only in passing, where prudential supervision is explained as

⁷⁸⁷ Cheffins 1997, p 127.

⁷⁸⁸ D Llewellyn, *The Economic Rationale for Financial Regulation*, FSA Occasional Paper, April 1999, p 5.

⁷⁸⁹ Cheffins 1997, p 142 *et seq.*

⁷⁹⁰ Cheffins 1997, p 156-157.

⁷⁹¹ My reference at this place concerns FSMA as it was in force through at least 1 April 2013. Section 2, para 2 FSMA expressed the general duties of ‘the [single] Authority’ and postulated ‘market confidence’ as the first regulatory objective. Under the Financial Services Act 2012, the restatement of the three (new) regulators’ duties is different, and ‘market confidence’ is no longer made explicit. Instead, the new substitutions in FSMA will be regulator specific. For the new Financial Conduct Regulator (‘FCR’) these substitutions promote a strategic objective (‘ensuring that the relevant markets function well’) and operational objectives, among which there is a new ‘integrity objective’, *cf* Section 1D of the amended FSMA.

⁷⁹² FSMA Section 2 para 2 (a).

⁷⁹³ See *eg* articles 3:10 para 1 (b), (c) and (d); 3:17 para 2 (b), under 2, 3 and 4; 4:11 para 1 (b), (c) and (d); and 4:14 para 2 (b), under 2, 3 and 4 Wft.

⁷⁹⁴ This was expanded upon to the greatest extent in Nota Hervorming van het toezicht op de financiële marktsector, *Kamerstukken II* 2001-2002, 28 122, especially pp 3 and 4, and was somewhat remodeled in the Explanatory Memorandum for the Wft, *Kamerstukken II* 2003-2004, 29 708, nr 3, pp 3 and 4.

serving the interests of the consumers of the financial services offered or performed by financial companies, as well as promoting the stability of the financial system and the confidence in the financial sector.⁷⁹⁵

Wft explicitly refers to confidence within the context of integrity, which became a distinct object of supervision in 2002.⁷⁹⁶ Where the aspect of integrity comes into play, the precursor to this legislation was the Memorandum Integrity (within the financial sector of 1997.⁷⁹⁷ This Memorandum provides:⁷⁹⁸

‘The interest of enforcement by all concerned of integrity in the financial markets is substantial. Financial markets and institutions fulfil a central place between supply and demand of capital, and thereby in the allocation of finance within the economy. It is for these reasons that the societal confidence in these markets and institutions, as well as the societal confidence in the payment flows between these institutions, is essential.’

To me, it could not be expressed in a better way; where public law – and hence Wft – addresses financial markets regulation, a key driver is, as it should be, the protection of the confidence of society at large; without any doubt a societal purpose, and, importantly, one beyond the interests of individual or even the aggregate of the financial institutions’ creditors. In view of this, I regret that this key purpose of financial markets regulation, is not expressed the way it is done in England.⁷⁹⁹ Why can’t the statute law provide that ‘market confidence’ (which, dare I add, means nothing other than ‘societal confidence’) is regulatory objective number one? I also regret the indirect approach, *ie* that only through analysing the legislative history on integrity, we arrive at a point where there is such an explicit acknowledgement of the role of financial markets in society, from which the objectives of regulation automatically follow.

⁷⁹⁵ *Kamerstukken II* 2003-2004, 29 708, nr 3, p 29.

⁷⁹⁶ I pointed to this *supra* on p 44. This was with the Act on modernisation and harmonisation of financial supervision, *Kamerstukken II*, 28 373, nr 1.

⁷⁹⁷ Nota Integriteit financiële sector, *Kamerstukken II*, 25 830, nr 2.

⁷⁹⁸ *Kamerstukken II*, 25 830, nr 2, p 4.

⁷⁹⁹ Meanwhile, however, the UK regulatory environment has undergone drastic change, also on this particular point. FSMA section 2 subsection 2 has been substituted by amendments resulting from the Financial Services Act 2012, likely to commence on 1 April 2013. The amended FSMA provides for

5.11 The role of banks in society – the Dutch Banking Code’s perspective

Supra, in section 4.3, I addressed the Banking Code.⁸⁰⁰ I noted that as to its self-proclaimed relevance as a matter of Dutch law, by using a comply or explain mechanism, it purports to be of equivalent working as the Dutch corporate governance code. Hence, in my view, the courts may (this to express that they have discretion to) orientate themselves on such code as an expression of general convictions of law prevailing in the Netherlands, whereby the assumed ‘anchorage’ to the statute law, does not confer a particularly relevant (legal) status to such codes.⁸⁰¹

The Banking Code’s Preamble provides, *ia*, that:

‘A bank’s managing board has a responsibility to consider the interests of all parties involved in the bank, such as its clients, shareholders and employees. In so doing, the continuity of the bank, the societal environment in which it operates, and laws, regulation and codes applicable to it, are taken into account. The client must be treated with care at all times.’

This provision bears resemblance to the wording of the Dutch corporate governance code, where it describes the stakeholders, and in which it explicitly mentions *civil society* as a stakeholder. The consequence from stakeholderhood under the Dutch corporate governance code is that the managing board must weigh up the interests such stakeholder has by virtue of, directly or indirectly, influencing or being influenced by the attainment of the company’s objects. *Prima facie*, whereas under the Dutch corporate governance code civil society is equated to a stakeholder, in the Banking Code it is not.

I would recall – as I began this chapter – that the Advisory Committee on the Future of Banks took the societal role of banks as its outspoken point of departure:⁸⁰² I

specific duties for the distinct new regulators. The erstwhile market confidence objective has disappeared.

⁸⁰⁰ P 149 *et seq.*

⁸⁰¹ I based this upon *ABN AMRO* and *ASMI*.

⁸⁰² *Naar herstel van vertrouwen 2009*, p 7.

believe it is fair to say that these documents point to a view that banking has its role to take in the pursuit of overall social efficiency.

5.12 Conclusion

The question at the start of this chapter was what obligations banks have to society at large, as a matter of law.

Purposefully inserting this chapter allowed me to give due weight to societal interest's fundamental role in Dutch law. A 'general principle'⁸⁰³ of Dutch law is that everyone owes a duty to have regard to the interests of others. As I had mentioned earlier in this thesis, article 3:40 para 1 BW yields an equally apt illustration of this general principle – limitation of the freedom to contract where the consequences of a contract breach the accepted fundamental principles of society.⁸⁰⁴ In this chapter, I sought to chart this principle's effect from its origin to the particular context of banking regulation. At general company law, the stakeholders' inventory yielded that companies have an obligation to consider the effects of their actions on society at large, with the proviso that the weight given to the concrete interests of stakeholders other than the shareholders ought not to be overrated. Van Ginneken and Timmerman admonish that the interests of society at large are protected through legislation, by which they imply that the directors, in weighing up the interests for the determination of the company policy, should not be overly (it may be opportune to express this as: 'disproportionately') concerned beyond creating shareholder value.

The logical precursor to the stakeholder inventory being the directors' activity towards setting the company's activities, the centerpiece to which activity being their weighing up the interests of the parties interested therein, led me to 'elementary principles of responsible entrepreneurship'. It was there that I highlighted that the term of art responsible entrepreneurship was, as early as in 1990, taken by Mok to

⁸⁰³ Cf Dutch: grondnorm, illustrating its value as a fundament to the law.

⁸⁰⁴ Article 3:40 para 1 BW is seen as an expression of the *principle of societal acceptability* (D: beginsel van maatschappelijke aanvaardbaarheid) under Dutch law. Cf Asser – Hartkamp/Sieburgh 2010, 43.

imply that mismanagement may be manifest at social, commercial and financial levels; the social component claiming its stake where assessing the conduct of management is concerned.

Although I had already dealt with banks' duty of care earlier in this thesis, its repeated mentioning in this chapter is due to its particular foundation upon banks' position in society given to it under consistently evolving case law.

The subsequent look at the public law dimension led me to question whether financial markets regulation is outspokenly intent on promoting societal interests. I reminded in passing that the (English) FSMA lists 'market confidence' as the very first regulatory objective. The comparison to the Dutch situation, where confidence is not expressed as a regulatory objective, brought me to the 1997 Memorandum Integrity financial sector, which expressed that societal confidence in financial markets and institutions is essential. I regret that this key purpose of financial markets regulation is not stated by Dutch statute law. I came full circle by referring to the Dutch Banking Code and noted that in diversion from the Dutch corporate governance code, it does not classify civil society as a stakeholder.

The second limb to my question was whether such legal norms are within the domain of CSR. In my view they all are. CSR is, as such, not a legal term of art, but it does cover all legal obligations capable of being subsumed under the avowedly open-ended category of CSR-themes. Where a bank commits to norms beyond mandatory law, these norms may well become legally relevant. This is especially the case where, regardless of their denomination, they classify as regulations under company law.

6 Chapter 6 – Setting internal norms and internal sanctioning

6.1 Introduction

Compliance is literally a matter of adherence to rules. It is therefore natural to analyse the consequences of non-adherence. A common consequence of non-adherence to rules is sanctioning –⁸⁰⁵ literally: punishing in reaction to (the) non-adherence. There is an argument that sanctioning improves the chances that further or other non-observance is prevented. This argument may go together with other arguments, for instance that it may be useless to define rules if there were no sanctions to disobedience.⁸⁰⁶

Article 21 Regulation prudential rules Wft provides that the compliance department has the task of checking the adherence to legal and internal rules having been drafted by the bank itself. A distinction presents itself:

1. Compliance may concern legal rules, classified as ‘external’, as it may concern internal rules – the internal rules may have relevance as a matter of law;⁸⁰⁷ and
2. For each of these two categories of rules, it must be established what sanctioning mechanisms exist – although there is the likely presumption that where internal (‘self-binding’) rules are concerned, sanctioning (primarily) takes the form of internal measures, it must be established whether breaching internal rules may (also) have external consequences.

Where I get to dealing with the sanctioning mechanisms, I must address whether it matters that compliance pertains to corporate governance; does the reply to the question whether there are sanctions to compliance breaches change depending on compliance being in- or outside corporate governance?

⁸⁰⁵ The term sanctioning should not be confused with the area of sanction measures which finds its legal basis in the Sanctions Act 1977.

⁸⁰⁶ Here too, there are many sides to the argument. There is, for instance, a moral aspect; non-observance must be seen to deserve manifest indignation. But there may also be the contrary argument; the acceptance of a norm as a moral imperative ought not to depend on a sanction to non-observance.

⁸⁰⁷ Cf Assink 2009, p 76.

I distinguish between sanctioning from an internal and an external perspective. With the ‘external’ dimension to sanctioning I designate sanctions imposed outside the (powers of the) bank; the initiative to instigate measures coming from a third party. The external perspective follows in chapter 7. I anticipate that actions instigated by *shareholders* shall be addressed in this chapter 6, as case law assimilates them to the internal dimension.

I begin this chapter on the internal perspective by looking at the form in which the bank’s internal legal order is shaped (section 6.2). From there, I look at the boundaries the law imposes on shaping the internal legal order (section 6.3). As the next step, I will explore whether (internal) resolutions breaching the company’s legal order may, thereby, be impaired (as a matter of validity) (section 6.4). And I shall then address sanctioning from an internal perspective; possible liability vis-à-vis the bank (organised as a company) or shareholders (section 6.5). I shall dedicate particular attention to such liability arising from company law. This chapter will contain the issue of a director’s liability to the shareholder (subsection 6.5.2). In my conclusion, I shall formulate that where the bank breaches internal compliance regulations, this yields a ready assumption of improper fulfilment of directors’ duties (section 6.6).

6.2 Setting internal (‘self-binding’) norms

Compliance may either concern legal rules or internal rules having been drafted by the bank itself. This description is also contained in article 21 Regulation prudential rules Wft. Obviously, where the law designates ‘internal rules having been drafted by the bank itself’, this may also comprise rules of a self-regulatory nature to which the bank openly commits itself. Any such internal rules may be relevant as a matter of law – Assink puts it as follows:

‘Logically, the matter is different where the company voluntarily commits to compliance with non-judicial norms, or where the company has raised a justified

expectation of such compliance; those norms thereby change character – by virtue of article 2:8 BW – to legally relevant norms.’⁸⁰⁸

With particular relevance to the subject matter of compliance I must first establish how banks may ‘regulate’ for themselves. This will concern both the form in which the bank’s internal legal order may be shaped, and the boundaries the law imposes on the liberty to do so. Whereas the greater majority of banks is organised as companies limited by shares (*naamloze vennootschappen*)⁸⁰⁹ I confine myself to that part of company law facilitating companies limited by shares.

6.2.1 The bank as a partial legal order

Companies limited by shares are referred to as *partial* legal orders (systems of law).⁸¹⁰ Looked at this from within the company, there is a legal order which is specific to the company, and which may thereby be distinguished from the legal order in society at large.⁸¹¹ This is meant to express that the company has the capacity to determine its rules, which rules bind all those who by virtue of the law and the articles of incorporation, are concerned in its organisation.⁸¹² The matter to hand is the institutional character of the company, which concerns the point that the company is not explained as a vehicle with a contractual nature, whereby its founders are bound among themselves as much as vis-à-vis the company by contract. Rather, the co-operation model is ‘internally’ institutionalised.⁸¹³ Thus, under the Dutch model, the company is no (longer a) contractual form.⁸¹⁴ I would note that this particular point yields highly interesting comparative material to English company law. The position at English law is expressed by Davies:

⁸⁰⁸ Assink 2009, p 76.

⁸⁰⁹ Title 4 BW, articles 2:64 through 2:174a BW.

⁸¹⁰ My translation of the term *deelrechtsorde*. See, eg Van Schilfgaarde 2009, p 18.

⁸¹¹ See, eg Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 11.

⁸¹² This being the formula from article 2:8 para 1 BW. Note also the phrasing in article 2:8 para 2 BW, where it is presumed that there is a category of rules with application among all such parties – *inter se* – as opposed to *erga omnes*.

⁸¹³ I borrow the term internally institutionalised from Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 11.

⁸¹⁴ This is the outcome of an evolutionary process. Previously, companies limited by shares were governed by article 15 Code of Commerce, which provided that companies were governed by the parties’ contracts.

The common law tends to classify the rule-books of associations, whether they are clubs, trade unions, friendly societies or other, as contractual in nature. The articles of association are no exception to this principle, though in this case the classification is done by the Act [CA, AJK]. Section 33 of the Act provides that “the provisions of the company’s constitution bind the company and its members to the same extent as if there were covenants on the part of *the company and* of each member to observe it.”⁸¹⁵

This point is a striking illustration of the proximity of the English company to its shareholders; the shareholders constitute the ultimate source of managerial authority within the company.⁸¹⁶

6.2.2 Articles of association

Where the company forms a distinct and individual legal order, it has the power and duty alike to define its own rules.⁸¹⁷ The primary formal document⁸¹⁸ in so doing is the articles of association. In Asser, it is formulated thus:

Together with the corporate resolutions taken based upon the articles, which resolutions are taken by the company organs, the articles of incorporation form the particular regime of law of the company as a legal person. The founders, as much as any subsequently acceding shareholders and the company, are bound by this regime of law.⁸¹⁹

6.2.2.1 The purpose clause, as expressed in the articles of association

According to article 2:66 para 1 BW, the articles of association comprise the purpose clause of the company. Whereas the definitions clause of Wft defines a bank as the

⁸¹⁵ Davies 2008, p 65.

⁸¹⁶ Almost verbatim from Davies 2008, p 63.

⁸¹⁷ And, perhaps needless to add within the context of what I’m writing here, where the company thus knowingly and of its own volition, commits itself to any norms which are, by themselves, not capable of being classified as legal norms, those self-imposed norms thereby become legally relevant norms. See Assink 2009, p 76.

⁸¹⁸ Note, however, that the law does not require that the articles of association are contained in a written document – this follows *expressis verbis* for associations from article 2:52 BW. See Asser – Van der Grinten/Maeijer 1997, 35.

⁸¹⁹ Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 46.

person who undertakes the business to receive repayable funds from the public⁸²⁰ and to grant credits for its own account, banks are likely to comprise the element of being a bank within their purpose clause. The law does not impose any other boundaries on the purpose clause than that it may not be in breach of public order.⁸²¹ Hence, whereas the purpose clause will evidently mention the most important activities, this is no requirement. And, with this, there is also the understandable consequence that purpose clauses tend to be open-ended.⁸²²

6.2.3 Regulations

The internal organisation of the legal person may be provided for by regulations.⁸²³ The law does not define ‘regulations’, whereas the term appears in several articles, notably articles 2:8 para 2 and 2:15 para 1 (c) BW. More apposite; it does not become clear what a regulation is from the law.⁸²⁴ All that becomes evident is that, in the greater scheme of things, regulations by any name, are subordinate to articles of association, and that they (may well) outrank corporate resolutions.⁸²⁵ Den Tonkelaar and Lennarts distinguish between resolutions and regulations by stating that a resolution sets a rule for one case or a specific number of comparable cases, and that a regulation sets rules for an undefined number of comparable cases.⁸²⁶ Clearly, regulations may be corporate resolutions made positive. In Asser/Maeijer we find:

⁸²⁰ I borrow ‘public’ from the definition in the recast Banking Directive at article 4 para 1 (a), as a consolidation of ‘outside a closed circle’ and ‘from others than professional market parties’.

⁸²¹ Cf article 2:20 para 2 BW.

⁸²² Thus, purpose clauses of banks articles of association contain phrases such as: ‘[. . .] as well as to engage in all transactions, activities and services which may relate or be conducive thereto, all in the widest sense’, and: ‘to foster the direct and indirect interests of all involved in the company and of the enterprise(s) associated therewith.’ See, eg, ABN AMRO articles of association 1 April 2010, article 2.

⁸²³ My translation of the term *reglementen*. This is equally capable of being translated by rule-books or by rules and regulations. The terminology is of relative importance, given the open-ended system of the law – there is liberty as to the denomination chosen, so long as the company at least has articles of association as meant in article 2:66 para 1 BW, which articles of association duly cover all required items required by the statute book.

⁸²⁴ Asser – Van der Grinten/Maeijer 1997, 35.

⁸²⁵ Although I might note that from Asser – Van der Grinten/Maeijer 1997, 132 one could argue that where any resolution conflicts with a regulation on substance (as distinct from a resolution being taken in breach of a regulation addressing the formal requirements for the creation of resolutions), the resolution *in itself* constitutes *an amendment* of the regulation. This line of reasoning demonstrates the open-ended character of regulations (also in their relation to resolutions). But, there is scope for misuse *ad absurdum et ad infinitum* and concluding that resolutions will never conflict with regulations. Hence, in my view, resolutions may only be interpreted as amendments to (pre-existing) regulations if it is their outspoken purpose to do so and if it is taken by the company organ duly authorised to make such amendment.

⁸²⁶ Lennarts 2009, (T&C Ondernemingsrecht Effectenrecht), Inleidende opmerkingen Titel I Boek 2 BW, aant. 2b.

We choose to describe the regulations as the aggregate of rules outside the articles of association, which concern the functioning of the legal person and its organs.⁸²⁷

And Maeijer is straightforward on the end-result; regulations which have been defined with due observance of the internal rules on competence, are binding unto the legal person.⁸²⁸ It flows from the liberty to define its own (internal) legal order, that defining competence to set regulations is a matter for the company itself. Maeijer points out that the authority at law of the company resolution is founded upon the legal person's own positive law.⁸²⁹

6.2.3.1 Policy documents may be in the category of regulations

A bank's policy documents, however denominated or entitled, may well be regulations in the above sense. Where, for instance, a bank's policy⁸³⁰ required under article 3:10 Wft, is made positive in the form of a written document, whatever the name given to such document, it may constitute a regulation. The category of (typical) bank regulations may, at least, cover any internal *policy* documents *under and by virtue of* articles 3:10 and 3:17 Wft. With this, I do not refer to the subordinate regulations indicated within the text of the provisions from Wft itself – which regulations constitute secondary legislation. I refer to such written documents as the bank defines in furtherance of these provisions from the law. The Regulation prudential rules Wft requires that the policy in furtherance of article 3:10 Wft, is reflected in 'procedures and measures'.⁸³¹ In this regard, we may also think of the internal definition of the organisational structure as required by article 17 para 3 Regulation prudential rules Wft.

⁸²⁷ Asser – Van der Grinten/Maeijer 1997, 35. See also *ibid*, 258, where it is suggested that the difference between the articles of association and (any) regulations is that the articles are the consolidation of rules determining the organisation of the legal person and regulations are made in furtherance to the articles on the functioning of the legal person and its organs.

⁸²⁸ Asser – Van der Grinten/Maeijer 1997, 132.

⁸²⁹ *Ibid*, 126.

⁸³⁰ For clarity's sake; I am not suggesting that the policy exclusively consists of any written document. Policy also refers to actions, and actions cannot be 'contained' in or 'constrained' in a document.

⁸³¹ Article 10 para 2 Regulation prudential rules Wft.

In this context, we may also think of the ‘code of conduct’ meant in best practice provision II.1.3 (b) of the Dutch corporate governance code, and of the ‘principles forming guidelines for the behaviour of bank employees’ meant in principle 3.2.4 of the Banking Code. Denominators coming to mind are corporate values, codes of ethics, integrity codes, and business principles. Also, as I have remarked earlier, many of the internal measures towards promoting compliance taken by banks will consist of procedural requirements. The example I gave is a bank regulation requiring prior written consent from the compliance department for certain transactions. The latter reflects such procedures and measures required, *eg*, under articles 10 and 17 Regulation prudential rules Wft.

6.3 Boundaries to liberty to shape legal order

6.3.1 Purpose clause

Article 20 para 2 BW provides that where a company’s purpose breaches public order, the company will be dissolved at the request of the public prosecution authority, but the company may be given an opportunity to amend its purpose such that it no longer conflicts with public order. But, as I already have mentioned earlier, outside this area, the law does not impose any boundaries on the purpose clause.

6.3.2 Resolutions or regulations breaching *bona fides* or public order

Article 3:40 para 1 BW provides that a juridical act breaching *bona fides* or public order, whether by content or by purpose, is null and void. It is argued that the term juridical acts in article 3:40 BW only seeks to pertain to such juridical acts concerning proprietary interests – and, hence, the term does not encompass the category of juridical acts formed by internal company resolutions.⁸³² However, there is common ground for the position that where a company resolution *seeks to effect or*

⁸³² Kortmann and Schim, in Busch 2010, pp 949 and 950 – where they apply this contention to article 3:40 para 2 BW. I do not see any reasons to assume that the term juridical act in article 3:40 para 1 BW has a distinct meaning than the same term in para 2 of the same article.

to underpin a juridical act breaching *bona fides* or public order, such resolution may be deemed null and void.⁸³³

6.3.3 Resolutions or regulations in breach of the law

The company has discretion in setting rules on its organisation. Thus, in principle, the company is at liberty to shape and design its legal order. Of course, this liberty is not without limitation. Article 2:14 para 1 BW provides that resolutions (and this includes regulations, where these are resolutions made positive) in breach of the law or of the articles of association are null and void, unless where the law provides differently.

6.3.3.1 Interlude: does article 1:23 Wft override article 2:14 para 1 BW?

Article 1:23 Wft, provides that the legal validity of private law juridical acts performed in breach of Wft, is not capable of being affected *for that reason* [emph from me, AJK]. It may be asked whether resolutions classify as juridical acts as meant in article 1:23 Wft. And, if resolutions classified as juridical acts under article 1:23 Wft, would this then set aside article 2:14 BW? Would resolutions breaching Wft taken by banks, not be null and void by virtue of article 2:14 BW? In other words; does article 1:23 Wft override article 2:14 para 1 BW?

Kortmann and Schim conclude that, in principle, article 1:23 Wft has analogous application to resolutions made by companies.⁸³⁴ They own up to the lawmaker not appearing to have considered whether company resolutions may come within the remit of the *private law juridical acts* mentioned in article 1:23 Wft. They venture that this may have been overlooked, as the lawmaker in drafting article 1:23 Wft focused on article 3:40 para 2 BW entirely.⁸³⁵ Article 3:40 BW para 2 provides that a juridical act breaching a provision of mandatory law is null and void. Article 3:40

⁸³³ *Ibid*, pp 951 and 952.

⁸³⁴ On the nature of resolutions at law, see Asser - Van der Grinten/Maeijer 1997, at 125; a juridical act *sui generis*, purporting to create or amend the juridical relations within the legal person. This is of course not to say that company resolutions are, thereby, not capable of being classified as *private law juridical acts*, which is the term from article 1:23 Wft.

BW, although addressing ‘juridical acts’, seeks to pertain to juridical acts concerning proprietary interests only.⁸³⁶ Kortmann and Schim come to their proposition on two grounds. The first is that the certainty of law, being the primary rationale for article 1:23 Wft, must bring that it also finds application to company resolutions. In this context, they point to the fact that it will hardly be possible to unwind the consequences of certain juridical acts.⁸³⁷ On this first reason, I am not sure whether Kortmann and Schim haven’t overlooked that the lawmaker had already faced up to, and hence, provided for this difficulty under (the common private) company law; article 2:16 para 2 BW provides that where a (company) resolution is a condition precedent to a juridical act towards third parties, its nullity may not be invoked against that third party where the latter neither was aware nor could have been so of the defect. The second reason they propose is that Wft itself contains instances of specific cases where resolutions violate Wft – two instances in which company resolutions breaching Wft-requirements are, thereby, voidable.⁸³⁸ Here, their argument is an *argumentum a contrario*; whereas the statute book explicitly provides for cases where resolutions are voidable, the lawmaker must not have intended that resolutions which are not mentioned, share that fate.

6.3.4 Resolutions or regulations conflicting with reasonability and fairness

Companies are governed by reasonability and fairness; this is the fundamental tenet from article 2:8 para BW; a legal person and those who, by virtue of the statute law and the articles of incorporation, are concerned in its organisation, must, in such capacity, behave in conformity with reasonability and fairness *towards each other*. Where regulations conflict with reasonability and fairness, they may either not be invoked against the legal person or a party concerned in its organisation,⁸³⁹ or they may be invalidated.⁸⁴⁰

⁸³⁵ Kortmann and Schim, in Busch 2010, p 950.

⁸³⁶ This may be inferred from article 3:40 BW being positioned in Book 3 of the Civil Code, which book addresses the law of property, proprietary rights and interests. Kortmann and Schim make this observation that article 3:40 BW juridical acts are confined to proprietary interests, in Busch 2010, pp 949 and 950.

⁸³⁷ *Ibid*, pp 950 and 951.

⁸³⁸ *Ibid*, p 951, addressing articles 3:104 para 2 and 5:52 Wft.

⁸³⁹ Article 2:8 para 2 BW.

6.3.5 Conclusion on boundaries to liberty to shape legal order

The boundaries to a company's discretion to shape its own legal order must be understood in the light of the analogy with the *principle of societal acceptability* from the Dutch system of contract law. Dutch law reserves the right to limit the freedom to contract where the consequences of a contract breach the accepted fundamental principles of society, as these principles are reflected in its objective law.⁸⁴¹ Under the common private law this finds its expression in article 3:40 para 1 BW providing that a juridical act breaching *bona fides* or public order, whether by content or by purpose, is null and void. *Bona fides* refers to societal norms, and where there is a difference in opinion on the boundary between what is and what is no longer acceptable, the courts must choose between societal views exerting a certain appeal in society. The prevailing view is that there likely exists broad consensus as to where certain boundaries are trespassed.

I should add that where the bank defines its own rules with the aim of addressing areas typically associated with compliance, such regulations are unlikely capable of being judged contrary to *bona fides*. Probably, in most cases such rules reverberate societal norms of acceptable conduct. Where such norms purport to have an ethical component, they specifically seek to reinforce *bona fides*.

6.4 Validity of resolutions breaching internal legal order

6.4.1 Resolutions breaching the articles of association

Article 2:14 para 1 BW provides that a resolution breaching the articles of association is null and void, unless where the law carries a different result.

6.4.2 Resolutions breaching regulations

⁸⁴⁰ Article 2:15 para 1 (b) BW.

⁸⁴¹ See for this principle Asser – Hartkamp/Sieburgh 2010, 43.

By virtue of article 2:15 para 1 (c) BW a resolution⁸⁴² made by a company organ breaching a company regulation, exposes the resolution to invalidation (voidability).

There is authority for the proposition that a resolution in breach of substantive provisions from a regulation, is, *eo ipso*, a resolution amending the regulation.⁸⁴³ In isolation, this could almost be perceived as an invitation to violate regulations. Hence, my suggestion is that company resolutions may only be interpreted as amendments of (pre-existing) regulations, if their outspoken purpose is that they do, and if the decision to amend the regulation is taken by a company organ with adequate authority to do so.

Annulment of a resolution by virtue of article 2:15 para 1 BW can only be constituted by a court of law, which may pronounce the annulment upon the claim filed against the company. The claim may be brought by anybody with reasonable interest in the observance of the violated obligation. The generic tenet that no one without proper cause may bring a suit, applies.⁸⁴⁴ The claimant's interest must be his own.⁸⁴⁵

Where the annulment of the resolution cannot be of consequence, the claim for annulment lacks the required reasonable interest.⁸⁴⁶ The latter seems to me to form an important obstacle to the likelihood of any claims for the annulment of resolutions breaching company regulations by virtue of article 2:15 para 1 BW. As a consequence of Article 2:16 BW para 2 BW, juridical acts affecting proprietary interests, which juridical acts depend on an underlying company resolution, are not impaired by the invalidation of that underlying resolution.

Whereas the violation of the regulation must (potentially) harm the claimant's proper interest, it is unlikely by itself that any individual members from company organs will claim for annulment under article 15 para 1 BW.

⁸⁴² I use 'resolution' as the translation of the Dutch term 'besluit'. As such, a resolution is a juridical act *sui generis*, purporting to create or amend the juridical relations within the legal person. See Asser – Van der Grinten/Maeijer 1997, 125.

⁸⁴³ *Ibid*, 132.

⁸⁴⁴ Article 3:303 BW (application in company law arises from 3:326 BW – company law forms a *specialis* to private law as the *generalis*). Maeijer proposes that article 2:15 para 3 (a) absorbs application of article 3:303 BW, Asser – Van der Grinten/Maeijer 1997, 136.

⁸⁴⁵ *Ibid*, *loc cit*.

⁸⁴⁶ *Ibid*, *loc cit*.

6.5 Liability for breaches of compliance obligations arising from company law – where company law addresses corporate governance

I now turn to internal actions directed against the bank on the basis that the bank breaches compliance rules.

Within the particular context of the public law addressing banks, the lawmaker points out that the consequence of breaching the duty originating from article 3:17 Wft, is a matter for the common company law. In its explanatory memorandum to the Regulation prudential rules Wft, the lawmaker states:⁸⁴⁷

‘A controlled conduct of the business is primarily the financial company’s own responsibility and it is in this company’s own interest. This is why the rules contained in this regulation are predominantly “principle based”. According to company law (article 9 of Book 2 BW) the managing board is obliged properly to fulfil its task. The managing board must therefore, by virtue of the Civil Code, take care that the rules on the conduct of the business are being complied with.’

The above is a particularly apposite illustration of the intimate relation between compliance and corporate governance. The effects of compliance deficiencies find their consequences in common company law. As I argued earlier, where directors’ duties are concerned, these pertain to the domain of corporate governance.⁸⁴⁸

6.5.1 Internal liability of director/managing board to the company

Article 2:9 BW provides that each director owes the company a proper fulfilment of his task. This provision concerns the liability of the director in his relation to the company and it is hence classified as the internal liability. Article 2:9 BW does not contain a norm imposing strict liability; the director is held to make the effort which may reasonably be required in view of the particular circumstances. Consequently,

⁸⁴⁷ *Stb* 2006, 519, p 76. *Cf* Strik 2009, p 216.

⁸⁴⁸ *Supra*, p 134. This is hence where company law addresses corporate governance.

there is wide recognition that there ought to be a margin of appreciation. Where the company claims against the director for breaching article 2:9 para 1 BW, this presupposes an apparent, clear shortcoming.⁸⁴⁹ Where the courts consider whether a director may be held liable for improper fulfilment of his task, they will seek to establish that the reproach capable of being made against him carries sufficient seriousness.⁸⁵⁰ Although concerning a case of external liability, in *Willemsen/NOM* the Supreme Court worded this as follows:

‘Accepting a high threshold for a director’s liability to the company he manages, also⁸⁵¹ goes to serve the company’s interest, as it will prevent directors from having their actions determined to an undesirable degree by defensive considerations.’⁸⁵²

Annotator Maeijer’s comments resonate and amplify this phrasing. He notes that the development in case law is one deliberately seeking to shape ever more distant substantive judging of a director’s behaviour. So doing goes to stave off the phenomenon of overly fearful directors.

6.5.1.1 Liability for breaching articles of association

On the facts, *Willemsen/NOM* is particularly illustrative for my purposes. Under the *Willemsen Holding B.V.* articles of association, its managing board was under an obligation to obtain consent from both the supervisory board and the general meeting of shareholders for resolutions filing for bankruptcy or moratorium. The director of *Willemsen Holding B.V.* filed for moratorium, without prior application for consent from the general meeting of shareholders. Hence, *Willemsen/NOM* concerns the issue whether a director may be seriously reproached for acting in breach of a provision from the articles of association. The Supreme Court rules that a director breaching provisions from the articles of association seeking to protect the company, *in principle* triggers the liability of the director to the company. I should note that

⁸⁴⁹ Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 445.

⁸⁵⁰ My translation of: ‘hem kan een voldoende ernstig verwijt worden gemaakt’. This criterion got firm authority as a matter of case law from 1997; cf *Staleman/Van de Ven*. It had existed already, see Maeijer’s comment to *Staleman/Van de Ven* at 1.

⁸⁵¹ Obviously, next to the director’s own interest.

⁸⁵² *Willemsen/NOM*, dictum at 5.3.

liability to the company must rest upon the fact that the provision from the articles of association seeks to protect the company. This is the aspect of relativity from article 6:163 BW. In this ruling in *Willemsen/NOM*, the Supreme Court explicitly refers to its earlier judgment in *Schwandt/BPF*.⁸⁵³

6.5.1.2 Circumstances to be considered

The threshold of sufficient seriousness in case law garnered sure footage in *Staleman/Van de Ven* in 1997. To get to this threshold, all circumstances relevant to the matter to hand, are to be considered. In *Staleman/Van de Ven* the Supreme Court lists certain (categories of such) circumstances:⁸⁵⁴

- The nature of the company's activities;
- The risks generally resulting from such activities;
- The division of tasks within the managing board;
- The guidelines applicable to the managing board, if there are any;⁸⁵⁵ or
- The information available to the managing board, or the information it should have possessed at the time of the decisions or actions.

In a context of banking, all these categories carry weight. I home in on *guidelines* applying to the managing board. Such guidelines may encompass indications on broad outlines of the policy to be conducted, as indicated in article 2:129 para 4 BW. In view of the above paragraphs, we can think of regulations as meant in articles 2:8 para 2 and 2:15 para 1 (c) BW. *Willemsen/NOM* concerns a case of breaching a procedural requirement from the articles of association. Often, the managing board of a bank will have a set of internal regulations aka 'rules of procedure'. In my view it is self-evident that this category may encompass any of the internal measures towards promoting compliance in the form of procedural requirements. In his note to *Staleman/Van de Ven*, Maeijer moots that the Supreme Court's choice of the term 'guideline', is not void of relevance. He submits that the Supreme Court may not be willing to hear of the possibility of 'concrete instructions'. Surely, this is to do with

⁸⁵³ *Willemsen/NOM*, dictum at 5.4.

⁸⁵⁴ *Staleman/Van de Ven*, dictum at 3.3.1.

the autonomy of the managing board, settled from 1955 as a matter of Dutch company law through *Forumbank*. As addressed before in this thesis, the managing board is autonomous in exercising the powers conferred to it by statute law and the company articles. From this, Maeijer wrote in 2000, it follows that the managing board may not be given concrete instructions by another company organ. Thus article 129 para 4 BW opens the possibility for the articles of incorporation providing that the managing board must act in accordance with another organ's *indications on the broad outlines* of the policies to be conducted. And Maeijer indicated that it is important to distinguish 'indications on the broad outlines' from 'concrete instructions'.⁸⁵⁶

As to the particular point of breaching internal guidelines, Strik starts from an assumption that, where risk management is concerned, the courts have a likely preference to look for concrete, internal guidelines.⁸⁵⁷ Strik goes on to formulate that where directors breach provisions from the articles of association or internal guidelines, *in principle* this yields seriously reproachable conduct. Strik comes to this conclusion helped by the Supreme Court's reference to 'applicable internal guidelines', among the categories of circumstances to be taken into consideration, in *Staleman/Van de Ven*.⁸⁵⁸ And it is at precisely this point where compliance meets corporate governance. Picking up on the argument from Strik that, where risk management is concerned, the courts have a likely preference to look for concrete, internal guidelines, there is no reason to believe that this is otherwise where we are at the matter of compliance. A bank's internal guidelines on compliance, be they concrete or otherwise, likely are capable of being classified as written policy in furtherance of article 3:10 Wft.⁸⁵⁹ As duly observed in the explanatory memorandum to the Regulation prudential rules Wft, ensuring compliance with the responsibility to warrant conducting the business with integrity, is to be effectuated through the mechanisms of company law.⁸⁶⁰

⁸⁵⁵ Cf article 2:129 para 4 BW.

⁸⁵⁶ Asser - Maeijer 2000, 299.

⁸⁵⁷ Strik 2009, p 284.

⁸⁵⁸ Strik 2009, p 312; where she also refers to *Schwandt/BPF* and *Willemsen/NOM*.

⁸⁵⁹ Which, it is recalled here, requires the financial company to conduct a policy, adequately to warrant conducting the business with integrity.

⁸⁶⁰ *Stb* 2006, 519, p 76.

6.5.1.3 Failure to act/to take measures

What about the director who fails to take measures – in this context we may think of the director who fails (adequately) to take compliance measures. Generally, it may be assumed that the director may be liable for improper fulfilment of his duties where he failed to act. This flows from the simple fact that the task of managing the company, allocated to the managing board by virtue of article 2:129 para 1 BW, is one encompassing acting as well as failing to act, where this is called for. For instance, as I addressed earlier, Huizink notes that where defining the policy and co-ordination are a duty flowing from the instruction to manage, the failure to do either thereby gives rise to a liability owed to the company.⁸⁶¹ Where they derive illustrations from case law on relevant circumstances to be taken into consideration, Maeijer, Van Solinge & Nieuwe Weme mention a case in which the claim against the director was based on an omission to act.⁸⁶² Strik notes that where there is no ‘internal risk management and control system’, this yields a breach of best practice provision II.1.3 of the Dutch corporate governance code, and that, where banks are concerned, the lack of ‘an information system enabling the effective management of the business processes and the risks’, yields a breach of article 20 Regulation prudential rules Wft.⁸⁶³

I would add that there is also a roundabout way of arguing that failure to act may trigger the liability for improper fulfilment. This may be done through reference to the text of the statute law where it addresses disculpation. In so far as is relevant for my present purposes, article 2:9 para 2 BW provides that where the director has not been negligent in taking measures to avoid *the consequences of improper management*, he is not liable.⁸⁶⁴ Strik, where she discusses the consequences of directors’ liability for breaches of internal guidelines by other directors or by subordinate employees, approaches this in comparable fashion. First, she points to a tenet from common criminal law; the awareness of criminal offences causes a duty to

⁸⁶¹ Huizink 2010, art 2:129 BW, aantt 1 en 15.

⁸⁶² Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 447. The case is *Van Dooren/Hendriks*, in which the claim got rejected.

⁸⁶³ Strik 2009, p 287.

⁸⁶⁴ The new text of the provision in the added para 2 to article 2:9 BW from the Act on management and supervision. Wet van 6 juni 2011 tot wijziging van boek (sic) 2 van het Burgerlijk Wetboek in

take measures. And she has this followed by writing that as a matter of company law, the awareness of wrongs obliges to take action.⁸⁶⁵

6.5.1.4 Nature of this internal liability

The liability resulting from article 2:9 BW is presumed to concern the managing board collectively – its para 2 postulating that each director owes responsibility for the general conduct of the company’s business, and that he is jointly and severally liable. Article 2:129 para 1 BW allocates the duty to manage the company to the managing board in its collectivity.⁸⁶⁶ A practical difficulty will be that the action from article 2:9 BW claiming responsibility for improper management, must be instigated by the company, normally represented at law by its managing board.⁸⁶⁷ Where the managing board has not changed composition,⁸⁶⁸ instigating this action triggers a conflicting interest.⁸⁶⁹ The normal regime for conflicting interests will apply; and, possibly, article 2:129 para 6 BW brings the supervisory board into play.⁸⁷⁰

6.5.2 Liability of the director to the shareholder

The action from article 2:9 BW is not open to the shareholder. Were the shareholder to consider claiming against individuals from within the bank for having breached compliance obligations, he must found such claim on (the law of) tort. To be awarded, the commission of a tort by that director (individually) must be

verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen, *Stb* 2011, nr 275.

⁸⁶⁵ Strik 2009, p313.

⁸⁶⁶ Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 445.

⁸⁶⁷ All this in abstraction from the possibility of a one tier board structure, created by article 2:129a BW – this latter article having come into the law with the Act on management and supervision, Wet van 6 juni 2011 tot wijziging van boek (sic) 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen, *Stb* 2011, nr 275.

⁸⁶⁸ See also Strik 2009, p 278, where she raises that it may be doubted that successors will instigate the action, to which she couples the matter whether failing to instigate the action against other directors (in function or not) may in itself constitute improper fulfilment of the director’s duty. Strik does not answer the question.

⁸⁶⁹ Cf Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 445.

⁸⁷⁰ This paragraph having been added to article 2:129 by the Act on management and supervision, *Stb* 2012, 455, see *Kamerstukken II*, 2008-2009, 31 763, nr. 2, Wijziging van boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen.

established.⁸⁷¹ Fundamentally, a director cannot be held personally liable for acting or failing to act, where this may only be attributed to the company. There is cause for an exception, where the director personally commits a tort vis-à-vis the (claimant) shareholder and the tort is capable of being held against him.⁸⁷² The director's tortious act must be considered with specific regard to the claimant shareholder. The norm invoked by the claimant must seek to protect his interest.⁸⁷³

This brings us to *Willemsen/NOM*, already mentioned where I addressed the norm for improper fulfilment of the director's task. In his conclusion, Advocate-general Timmerman makes the point that were the bar for reproachability under article 6:162 BW lower than the one from article 2:9 BW, this would encourage shareholders to avoid bringing about the company itself instigating the action for improper fulfilment of duty from article 2:9 BW.⁸⁷⁴ Thus, he promotes explicit convergence,⁸⁷⁵ establishing that in order that a director may be held (externally) liable to shareholders, the high threshold of sufficient seriousness ought to apply.⁸⁷⁶ The Supreme Court rules that where a shareholder claims against the director, the standard for the seriousness of the reproach capable of made to him from article 2:9 BW has similar application. The Supreme Court does this by outspokenly advocating the protection of the company's interests through preventing directors having their behaviour influenced to an undesirable extent by defensive considerations. And the Supreme Court then creates commitment of the shareholders to such high threshold, originating from company law, through article 2:8 para 1 BW; the tenet of reasonability and fairness, which also binds the shareholders. The Supreme Court allows itself doing so by invoking shareholders' voluntary engagement with the company.⁸⁷⁷

⁸⁷¹ Cf Strik 2009, p 330.

⁸⁷² This situation – where the director's actions are to be equated to the company's actions – must be distinguished from a situation in which the director's actions are primarily attributable to himself, and only secondarily to the company. For the latter position, cf *Costa Blanca* dictum at 3.4.2; “[F]or such director's liability – which does not concern a deficient or improper fulfilment of a director's duty, but is founded on a distinct duty of care, isolated from a director's duty [. . .].”

⁸⁷³ The requirement of relativity from article 2:163 BW.

⁸⁷⁴ Through exerting their powers as shareholders; the action from article 2:9 BW is not open to shareholders.

⁸⁷⁵ Usage of this term inspired by Asser – Maeijer/Van Solinge/Nieuwe Weme 2009, 441.

⁸⁷⁶ Conclusion Advocate-general in *Willemsen/NOM* at 5.8.

⁸⁷⁷ Dictum at 5.3.

As I had already indicated above, *Willemsen/NOM* concerns the issue whether a director may be seriously reproached for acting in breach of a provision from the articles of association. By reference to *Schwandt/BPF*,⁸⁷⁸ the Supreme Court rules that a director breaching provisions from the articles of association seeking to protect the company, *in principle* triggers the liability of the director to the company. Obviously, in view of the matter to hand, for the action by a shareholder to succeed, such provisions from the articles of association must seek to protect the shareholder. The Supreme Court makes the bridge from protection of the company to protection of the shareholder; where provisions from the articles of association protecting the shareholder are breached, this causes an in principle liability of the director to that shareholder.⁸⁷⁹

And this brings me to concluding, with Strik, that, generally, it is unlikely that actions initiated by shareholders stand a material chance of success. Obligations to adhere to compliance rules, regardless of whether these flow from external rules (notably Wft) or whether they have an internal character, do not seek to protect the interests of the shareholder, in any case not directly. Strik adds to this that it will have been the company which incurred damages as a consequence of breaches, whereas the damages incurred by the shareholders are derived damages.⁸⁸⁰

This paragraph is not complete, however, without mentioning the February 2012 judgment from the Utrecht district court in *Kortekaas/Lippens*.⁸⁸¹ Injured investors⁸⁸² in so-called units in the combined Dutch and Belgian holding companies Fortis NV and Fortis SA/NV claimed for a ruling pronouncing that Fortis, as well as two named members from the unitary one tier board,⁸⁸³ and the CFO⁸⁸⁴ who did not sit on the one tier board but who was in the so-called executive committee, have committed a

⁸⁷⁸ In *Schwandt/BPF* see dictum at 3.4.5; where an action is performed in breach of provisions from the articles of association, which provisions seek to protect the company, this in principle triggers liability of the director.

⁸⁷⁹ Dictum at 5.4.

⁸⁸⁰ Strik 2009, p 330.

⁸⁸¹ *Kortekaas/Lippens* has been appealed against but at the time of closing this manuscript I was unaware of the outcome.

⁸⁸² Given that these investors held Fortis N.V. cum Fortis S.A/N.V. securities I afford myself making a parallel with 'shareholders'. This is distinct from those classifying as 'depositors' – the latter category are surely to be classified as 'clients' of the bank.

⁸⁸³ *Sc* Maurice graaf Lippens en Jean-Paul Votron.

⁸⁸⁴ *Sc* Gilbert Mittler.

tort against them by breaching Wft. The alleged breaches from Wft concerned committing market manipulation⁸⁸⁵ and breaching the requirement promptly to disclose market-sensitive information.⁸⁸⁶ The district court ruled that Fortis and two of the named individual defendants are liable to the investors. Where the two named individuals are concerned this ruling is the first ever case in which individual managers have been held liable to investors for breaching Wft provisions purporting to protect them.

Naturally, *Kortekaas/Lippens* very much hinges on the particular facts and circumstances. The first matter deserving highlighting is that the alleged breaches concerned provisions from part 5 from Wft, addressing market conduct. Compliance rules more likely concern rules from parts 3 (prudential supervision) or 4 (conduct of business) from Wft, both parts not easily being brought in direct connection with the protection of shareholders. I would also add that the prohibition of market-manipulation applies to everybody individually, which makes it relatively more easy to claim against individuals directly.⁸⁸⁷

6.6 Conclusion on internal liability

As I illustrated with a quote from the explanatory memorandum to the Regulation prudential rules Wft, it is left to common company law to address the internal consequences of breaching the bank's duty under article 3:17 Wft to conduct its business in a manner warranting the controlled conduct thereof, and this conduct to be with integrity. This is in and of itself a striking illustration of the intimate relation between compliance and corporate governance. The effects of compliance deficiencies find their consequences in common company law. Where directors' duties are concerned, these pertain to the domain of corporate governance.⁸⁸⁸ So, it is here that compliance meets corporate governance.

⁸⁸⁵ Article 5:58 para 1 (d) as was Wft.

⁸⁸⁶ Article 5:59 as was Wft.

⁸⁸⁷ The district court mentions this aspect in the dictum at 4.7.

⁸⁸⁸ *Supra*, p 134. This is hence where company law addresses corporate governance.

Thus, this took me primarily to the directors' duty owed to the company properly to fulfil their task – a duty flowing from the norm under article 2:9 BW. Having established that the director may only be liable where the reproach capable of being made against him carries sufficient weight, I then addressed that where the director acted in breach of a provision from the articles of association seeking to protect the company, there is a ready assumption that the director may be seriously reproached.⁸⁸⁹ More importantly for the purposes of my thesis, where directors act in breach of internal guidelines applicable to the managing board, there is a ready assumption of breaching the duty properly to fulfil their task.⁸⁹⁰ It is this category of guidelines applicable to the managing board which merits special attention. Given the wide-ranging and open-ended formulation of the term 'regulation', any internal document defined with due observance of the internal rules on competence, which document seeks to address aspects of the functioning of the legal person and its organs, will be binding and will therefore be within this category of guidelines.

Consequently, where the bank breaches internal compliance regulations, such as policies, standards, procedures or measures, which have been designed under the internal rules of the allocation of competence, this yields a ready assumption of improper fulfilment of the directors' duty and it thereby becomes sanctionable under article 2:9 BW.⁸⁹¹

A director may have acted in breach of article 2:9 BW where he has failed to act. An apposite example could be where the director has failed to take compliance measures. I finally mentioned that it will be a particular difficulty with the liability to the company that the action under article 2:9 BW must be instigated by the company – in normal circumstances through its managing board.

I then addressed directors' potential liability to the shareholder. In order to get to liability, it is required that the norm alleged to be violated, seeks to protect the (claiming) shareholder's interest. I concluded that it will be difficult to construe that compliance norms seek to protect the shareholders' interests. However, I noted that

⁸⁸⁹ *Schwandt/BPF*

⁸⁹⁰ *Staleman/Van de Ven*.

⁸⁹¹ This position is expressed in Kersten and Diekman 2014, pp 253 and 265.

Kortekaas/Lippens, a ruling by the Utrecht district court, constitutes the first case in which individual members from the management have been held liable for breaching Wft provisions vis-à-vis investors in Fortis shares.

7 Chapter 7 – External sanctioning of compliance shortcomings

7.1 Introduction

In this chapter, I explore the possible sanctions of compliance breaches from an ‘external’ perspective. With ‘external’, I mean that (the) sanctions are being imposed outside the (powers of the) bank. ‘Outside the powers of the bank’, is meant to express that this chapter presumes that the initiative to instigate measures possibly leading to sanctions, lies with a(ny) third party. In view of this, regulators are obviously comprised in the category of third parties. From my description of ‘external’, it will be clear that I contrast it to the internal perspective – sanction measures relating to compliance breaches instigated within the bank itself, as addressed in the previous chapter. Where I addressed the internal perspective, I included actions instigated by shareholders. Admittedly, where a shareholder founds his action on tort law, this may be seen as ‘external’. However, as was seen, *Willemsen/NOM* strikingly illustrates that shareholders have a special relation to the company; their involvement in the course of events is a matter of their own volition.⁸⁹²

The first step is sanctioning through private law (section 7.2). Next I will address sanctioning through public law (section 7.3), whereby I shall first look at administrative law (section 7.3.2), and I shall finish this chapter with common criminal law (section 7.3.3).

7.2 Private law actions against the bank

I start by looking at the direction case law has taken from addressing banks’ duty of care. Although the duty of care is a blanket private law norm, it bears resemblance to and thereby ‘reflects’ the public law norm addressing the duty to act honestly, fairly and professionally in accordance with the best interests of the clients. Case law openly recognises conduct of business requirements type breaches by the bank being

⁸⁹² Almost verbatim from *Willemsen/NOM*, dictum at 5.3.

grounds for private law claims. Where financial markets regulation does not evidently seek to protect such interests – think of rules addressing market conduct – breaches may not lead to private law claims.⁸⁹³ Subsequently, I explore the extent to which banks breaching their own compliance norms possibly leads to liability towards third parties. This will bring me to the conclusion that it should not make a difference whether the norm breached is an external or an internal norm. I will submit that internal compliance norms seeking to protect the interests of (specific) market parties, may be invoked by such parties in civil law actions.

7.2.1 Private law actions concerning duty of care

What actions are open to those seeking to claim against the bank for breaches of compliance obligations? Earlier, I addressed the development in case law on the particular matter of duty of care. This duty of care owed by banks as a matter of private law is an open norm, which aims to accommodate all relevant circumstances of a given situation, and the norm is taken to be owed not only to clients, but also to third parties. Case law accepts that through the concept of societal care the provisions on conduct of business from public law, take effect in private law.⁸⁹⁴ Where public law duties demonstrably also seek to protect investors' interests, such public law duties are *thereby* capable of being invoked in a civil law suit.⁸⁹⁵ This hinges upon the doctrine from tort law entitled *relativity*.

The doctrine of *relativity* under tort law has been developed in case law from 1928.⁸⁹⁶ *Relativity* finds its codification under article 6:163 BW⁸⁹⁷ on the heels of the general provision on tort in the statute book. For the purposes of this section in my thesis, it is settled that parties in contractual relationships (ranging from investors, depositors, customers, clients etc – this is the terminology found in the law, sometimes within a specific statute law context) to banks, may also found private law claims filed against

⁸⁹³ See Busch 2010, p 1027.

⁸⁹⁴ See Knigge en Bakker 2010, p 55. Cf Busch 2010, pp1014 through 1018.

⁸⁹⁵ Breaching the provisions of Wft does not *for that reason (alone)* impair the validity of private law juridical acts. This is article 1:23 Wft. Thus, where a private party seeks to invoke protection by a provision from Wft, this needs to be postulated in a civil law suit. Closely related to the provision of article 1:23 Wft is article 1:75 para 3 Wft, which provides that where the regulator issues an instruction, this does not impair contracts between the addressee of the instruction and third parties.

⁸⁹⁶ *De Marchant et d'Ansembourg*.

banks on the grounds that a financial markets law norm seeking (also) to protect their interest, has been violated. Obviously, for this to apply, the public law norm must have become an (implied) norm *within* the contract.⁸⁹⁸ Mok explains that public law duties will be reflected *within* contractual relationships through article 6:248 par 1 BW.⁸⁹⁹ Van Baalen submits that where financial markets' regulation is concerned, the 'hurdle' of relativity is possibly lower than it would appear *prima facie*; since, from the moment a public law rule also purports to protect the customers' interests, relativity is a given.⁹⁰⁰

The body of case law making up law suits under common private law against banks, invariably addresses banks' *special* duty of care. Where I addressed this, it became clear that banks owe a special duty of care to such parties with which they have contractual relationships, in which category the special duty of care originates from the tenets of reasonability and fairness, as well as to third parties – *ie* where there is no (near)⁹⁰¹ contractual relationship – where banks' duty of care is founded on their function in society.

7.2.1.1 Claims based on contract law

Where third parties who are in a contractual relation to the bank claim on the grounds that the bank falls short in the observance of its obligations, private law provides for the following actions:⁹⁰²

- a. fulfilment of the obligation(s);⁹⁰³

⁸⁹⁷ Article 6:163 BW provides: '[T]here is no obligation to pay damages where the violated norm does not purport to protect against the damages which have been suffered by the injured party.'

⁸⁹⁸ Thus, somewhat beside the matter discussed in this section, it is not a matter of *relativity*. See Kersten en Diekman 2014, p 261. Norms which have been formulated by the bank within compliance measures and procedures and which have as their purview the clients' protection, thereby enter the contractual relationship.

⁸⁹⁹ In his note to *Safe Haven*, at 2.

⁹⁰⁰ Busch 2010, p 1015.

⁹⁰¹ With this addition I point to the fact that there is a wide category of relationships recognised in case law as being governed by reasonability and fairness – see *supra*, p 65 footnote 188 with reference to Asser – Hartkamp/Sieburgh 2010, 398.

⁹⁰² See Asser – Hartkamp/Sieburgh 2009, 380.

⁹⁰³ Article 3:296 BW

- b. fulfilment and (supplementary) compensation for damages in case of non-fulfilment;⁹⁰⁴
- c. (substitutionary) compensation for damages in case of non-fulfilment;⁹⁰⁵
- d. dissolution of the contract on the grounds of non-fulfilment;⁹⁰⁶ and
- e. dissolution with compensation for damages.⁹⁰⁷

The lawmaker has explicitly avowed that customers may invoke error⁹⁰⁸ or deception,⁹⁰⁹ both of which cause voidableness of the contract. Where the contract is actually voided, it is deemed to have been null and void from the beginning.⁹¹⁰ Where contracts are voided on these grounds, the party against which the voidableness has been invoked, may be under an obligation to compensate from damages. This obligation arises from tort.⁹¹¹

7.2.1.2 Claims based on tort law

Outside the category of common private law claims in connection to (near) contractual positions, there remain claims on the basis of tort. Where a claim is based on tort law, the underlying obligation is – outside any other pre-existing or presumed obligation – orientated towards compensation of damages.⁹¹² In view of what I have written on banks' special duty of care, I confine myself to observing that it will be

⁹⁰⁴ Article 6:74 para 1 BW.

⁹⁰⁵ Article 6:87 para 1 BW.

⁹⁰⁶ Article 6:265 BW. For completeness sake, I would add that *dissolving* a contract presumes the contract being reciprocal – article 6:261 BW *et seq.*

⁹⁰⁷ Article 6:277 para 1 BW.

⁹⁰⁸ Error being an important category for financial markets law; Scheltema and Scheltema point out that given the underlying purpose of financial markets law being the prevention of asymmetrical information, the matter as to what information should have been disclosed and the degree to which the financial company ought to be aware of its counter party's position, gains prominence. See Scheltema en Scheltema 2009, p 78.

⁹⁰⁹ *Kamerstukken II*, 2005-2006, 29 708, nr 19, p 393. Error is addressed in article 2:228 BW. For deception, see article 3:44 para 3 BW.

⁹¹⁰ Article 3:53 para 1 BW.

⁹¹¹ Article 6:162 BW. Obviously, such obligation – where it exists - is founded on tort, as the agreement is deemed never to have existed. See Asser – Hartkamp/Sieburg 2010, 400.

⁹¹² See Asser – Hartkamp/Sieburg 2009, 380.

this (category of) obligations, which must lie at the basis of a claim for damages on the grounds of tort.⁹¹³

7.2.2 Liability for breaching the bank's compliance rules

7.2.2.1 Liability of the bank

As I illustrated before, where financial markets regulation impacting duty of care is concerned, there is a low hurdle of relativity; protection of customers' interests is almost a given.⁹¹⁴ May third parties claim against the bank on the grounds that the bank has acted in breach of (its own) compliance rules? In view of the above, I believe it is clear that if it may be proven that where such rules (also) seek to serve to protect the claimants' interests, this will have a reasonable chance of success. In my view, it should not matter whether the alleged breach concerns external rules or whether these concern compliance rules self-imposed by the bank. I would first point to Van Baalen, who moots that where provisions from Wft are categorised as conduct of business rules, this yields a *prima facie* presumption of proof that they have been written with a view also to protecting the interests of one or more specific (market)parties.⁹¹⁵ Van Baalen specifically mentions the provisions on the internal conduct of business and the provisions on conducting the business with integrity.⁹¹⁶ Although Van Baalen admonishes there that it is not evident whether, and the degree to which, such provisions have an effect in civil law relations,⁹¹⁷ his overall conclusion is, however, that, where it concerns (such) rules where this is less clear, the decisive factor is to establish the provision's purpose (*ie* what risk the rule seeks to protect against, and whose risk it is).⁹¹⁸

⁹¹³ See, in this regard, Van Baalen, who adds that it is important to distinguish between duty of care on the one hand, and market conduct on the other. Where market conduct is concerned, these norms do not purport to protect the interests of third parties, but, rather, to protect the interests of the fair rules of the game, and, hence, the level playing field. See Busch 2010, p 1027.

⁹¹⁴ For this, see Van Baalen p 1015 – where rules from Wft are concerned, the moment these also seek to protect customers' interests, relativity is a given; in Busch 2010, p 1015. In *Safe Haven*, the Supreme Court derives this from the *travaux préparatoires*.

⁹¹⁵ *Ibid* p 1019.

⁹¹⁶ As Van Baalen focuses on investment companies, where he refers to the rules on conducting the business with integrity, he merely refers to the Regulation supervision of conduct of business Wft provisions addressing the conduct of business with integrity, and not those from the Regulation prudential rules Wft.

⁹¹⁷ *Ibid* p 1020.

⁹¹⁸ *Ibid* p 1021

Does this allow the stretch to rules the bank has set itself (or voluntarily has committed to) in furtherance of any norms from the statute law seeking (also) to protect the interests of (certain) third parties? I am convinced that it does, and I illustrate my position by raising two perspectives which I phrase as questions:

1. Should the (internal or voluntary) rule being invoked have a clearly traceable foundation within financial markets law; and
2. Are there any instances leading to an indication that self-binding rules yield protection at civil law.

As to 1 Clear foundation in (a) financial markets law (provision)

To start with the first matter, the reason for which this consideration may be relevant, is that it gives prominence to the matter as to whether norms being invoked in private law actions, need to have a certain degree of specificity. Thus, it might be required that internal rules clearly express that they are formulated in furtherance of requirements from financial markets law and that they are, say, ‘procedures and measures’ in furtherance of article 3:10 Wft. In the authority known in Dutch as the *effectenlease* cases, the Supreme Court departs from unwritten law rather than taking public law rules as a starting point.⁹¹⁹ Van Baalen indicates that there is an important distinction between rules addressing conduct of business⁹²⁰ on one hand and those addressing market conduct on the other. Rules on market conduct do not concern care for another. He derives from this that where rules on market conduct are concerned, for a civil law suit based on tort to stand a chance, breaching provisions from the statute law is to be taken as the primary point of departure. This to a far greater extent than taking unwritten law pertaining to social conduct as the premise.⁹²¹ Hence, this may be taken to illustrate that where the civil law suit is founded on duty of care, this is capable of being interpreted widely; duty of care as an open-ended norm from true civil law origins. Therefore, I submit that it is not necessary that the norm being invoked is capable of being traced to a specific rule from financial markets law.

⁹¹⁹ *Ibid*, p 1015.

⁹²⁰ *Ie* the rules addressed by part 5 from Wft.

⁹²¹ Busch 2010, p 1027.

As to 2 Self-binding rules or voluntary commitments

Cortenraad writes that, over and above the ‘special duty of care’ developed under Dutch case law, banking consumers are protected by Wft and subordinate legislation, by conduct of business supervision by the AFM, by article 2 from the General Banking Conditions 2009 and by various codes of conduct upon which banks orientate themselves by way of self-regulation.⁹²² In so writing, obviously Cortenraad presumes that banking consumers may therefore invoke such codes of conduct.

Another instance to illustrate this, is article 115 Regulation supervision of conduct of business Wft. It requires credit providers to define criteria for considering credit applications, so as to prevent them from over-crediting. Whereas the market for credit providers has collectively reacted to this ‘open norm’, by issuing the Code of Conduct for Mortgage Loans,⁹²³ credit providers could also have opted for individually setting (internal) criteria. No doubt such measures are aimed at protecting the credit consumers, hence, any such internal compliance measures may be invoked in a civil law claim against the bank.

I believe it will be unlikely that a bank’s *creditors* will be successful in founding claims on breach of compliance rules. I moot that this derives from the criterion of relativity; a bank’s compliance rules are unlikely to be seen as seeking to protect the interests of creditors.

Finally, on the matter of the possible liability of the bank, it may be asked whether the above conclusions may vary as a consequence of or depend on compliance pertaining to corporate governance. The form of liability I looked at here concerns the bank as such. When establishing whether the bank may be liable, although the actions of the bank must be capable of being attributed to it (which means that the actions may be held against the bank – the bank must accept it has been represented), it is irrelevant which company organ held responsibility for the actions as a matter of the internal division of powers. To this given position it is, thereby, immaterial whether the managing board or an(y) individual director has breached a duty (which duty is a matter of company law on corporate governance).

⁹²² Cortenraad 2012, p 709.

7.2.2.2 Liability of the individual director to the third party

It may, finally, be asked, whether third parties (other than shareholders), might be successful in claiming against individual directors for breaches of compliance rules.

Fundamentally, a director cannot be held personally liable for acting or failing to act, where this may only be attributed to the company.⁹²⁴ There is cause for an exception, where the director personally commits a tort vis-à-vis a third party which tort may be held against him.⁹²⁵ The director's tortious act must be considered with specific regard to the claimant. Where the director was aware or should have known that the conduct caused or permitted through his doing would result in the company not fulfilling its legal or contractual obligation, and that the company would not offer redress, this could be grounds for a serious personal reproach against the director.⁹²⁶ In *Ontvanger/Roelofsen*, the Supreme Court phrases it thus:

‘[. . .] in general, it may only be assumed that the director has committed a tort against the company's creditor, where, also in view of his duty of proper fulfilment of his task as meant in article 2:9 BW, the reproach capable of being leveled against him, is sufficiently serious.’

Establishing the individual director's external liability in a claim based on article 2:162 BW, is done on the basis of the same norm as the norm applying to the individual director's liability to the company. This is what the Supreme Court rules in so many words in *Willemsen/NOM*.⁹²⁷ But, importantly, the commission of a tort by the director (individually) must be established.⁹²⁸ The claimant must therefore

⁹²³ D *Gedragcode Hypothecaire Financieringen*.

⁹²⁴ See, eg, conclusion Advocate general in *Costa Blanca* at 4.2: ‘The point of departure is that the company is primarily liable for the damage incurred by the third party.’

⁹²⁵ Cf the recent case of *Costa Blanca*, where there arises an inverse perspective in that the tort personally committed by the director was found capable of also being attributed to the company; dictum at 3.4.2.

⁹²⁶ Defined as one of two classes of cases by the Supreme Court in *Ontvanger/Roelofsen*, see dictum at 3.5, see also Asser - Maeijer/Van Solinge/Nieuwe Weme 2009, 469.

⁹²⁷ Dictum at 5.3; ‘[. . .] essentially this concerns the question whether the [. . .] norm for internal liability will find similar application where an individual shareholder claims against a director for the way he has exercised his duties. The answer to this question is affirmative.’

⁹²⁸ Cf Strik 2009, p 330.

admonish proof of unlawfulness of acts which are particularly capable of being attributed to the defendant director.

The above leads me to broaching that – except in cases where an individual director got caught *in flagrante delicto*⁹²⁹ – it is unlikely that third parties, be they customers of the bank or otherwise (eg creditors), will claim against individual directors for compliance breaches. Where a third party incurred damages as a consequence of an alleged breach of compliance obligations, claiming against the bank as opposed to claiming against an individual director, will surely have a higher probability of success. The threshold for imposing liability of the bank is lower than that applying to the liability of the individual director. This may be illustrated by an *a contrario* reasoning inspired by Timmerman’s conclusion to *Willemsen/NOM*. Timmerman argues that were the threshold for reproachability under article 6:162 BW, when claiming against individual directors, not to be equivalent to the standard of article 2:9 BW, as a consequence of which ‘unqualified reproachability’ would remain, this would put article 2:9 BW under pressure.⁹³⁰ Hence, where claims against the bank are based on article 6:162 BW and not on article 2:9 BW, the ‘unqualified reproachability’ remains – this unqualified reproachability applying, of course, to the bank.

7.2.3 Collective actions

The section on sanctioning under common private law is not complete without a cursory reference to (the relevance of) collective actions.⁹³¹ Here, we must distinguish:

⁹²⁹ An illustration may be seen in *Costa Blanca*. The director, in his (direct) relationship to a third party, has acted in breach of a duty of care personally owed by him – the reproach made to him thereby conforms to the normal standard arising from tort and it does not need to adhere to the standard from, *ia*, *Ontvanger/Roelofsen*. See *Costa Blanca* dictum at 3.4.2: “For such director’s liability – which does not concern a deficient or improper fulfilment of a director’s duty, but is founded on a distinct duty of care, isolated from a director’s duty – the common tort rules apply. In particular it is then not required that the director is capable of being made a sufficiently serious approach.”

⁹³⁰ *Willemsen/NOM*, conclusion Advocate-general at 5.8.

⁹³¹ At the time of writing, collective actions is an area strewn with developments. I confine myself to mentioning that on 4 October 2011, the First Chamber of Parliament adopted the *Act preliminary questions Supreme Court*, as a consequence of which courts may submit preliminary questions on, eg mass claims, to the Supreme Court. See *Kamerstukken II*, 2011, 32 612, nr 12. See for recent developments T M C Arons, *Rondom het nieuws*, FR 2011, nr 12, p 384, and Schonewille (2011).

1. The *action* initiated by a foundation or association with full legal capacity, which action purports to protect *third party* comparable interests, in so far as its articles of association proclaim taking care of these interests from article 3:305a BW; and
2. The arrangement from the Act Collective Settlement Mass Damages,⁹³² where a similar foundation or association representing the interests of *injured parties*, agrees on *compensation of damages* caused by an event or comparable events.

The impossibility of claiming monetary compensation of damages under the article 3:305a BW action,⁹³³ led to the lawmaker's issuance of the Act Collective Settlement Mass Damages.⁹³⁴ This Act enables a court of law declaring that an agreement fixing damages is binding on all parties, and this for all injured parties or a defined group from such injured parties. So, the crucial difference is that the second avenue enables obtaining an award for monetary compensation. The other important difference between the two class action avenues is that the arrangement from the Act Collective Settlement Mass Damages, applies, in principle, for all parties pertaining to the collective category and not just for those having 'opted in'.⁹³⁵

Collective action is gaining prominence in the particular area of damages from investment. Such collective claims typically invoke duty of care. I have already addressed the Supreme's Court's ruling in *Safe Haven*, which concerned a class

⁹³² My translation of *Wet Collectieve Afwikkeling Massaschade* ('WCAM'), *Stb* 2005, 380, which Act was incorporated into the statute book (articles 7:907 through 7:910 BW and articles 1013 through 1018 Code on Civil Process) and took effect on 27 July 2005.

⁹³³ The reason for this is that, where the action explicitly concerned the interests of parties *other than* the claimant foundation or association, payment of damages should be done to the persons actually injured. See Stolker 2011 (T&C BW), art 3:305a BW, aant 4a.

⁹³⁴ *Kamerstukken II*, 2003-2004, 29 414, nr 3, pp 5 *et seq*, see also Stolker 2011 (T&C BW), art 3:305a BW, aant 4b.

⁹³⁵ Whereby I should mention that WCAM provides for the possibility 'to opt out' – article 7:908 para 2 BW. Where a party opts out, this means that he is not barred from his individual right to claim as a matter of the common private law. This is an important issue, which is very aptly underscored in *Dexia*. The Supreme Court ruled that it may not be reconciled with the right to opt-out from article 7:908 para 2 BW, that, in deciding on an individual case, the court must orientate itself upon the arrangement agreed upon under article 7:907 BW. See dictum at 4.9.2.

action instigated against Fortis Bank by *Stichting Volendam*, a foundation admissible under article 3:305a BW.⁹³⁶⁹³⁷

Article 3:305a BW requires that the claim asserted must concern ‘comparable interests’. Whereas, typically, duty of care hinges on the particular circumstances of a given case, it may be questioned how this is capable of being reconciled in case law.⁹³⁸ In *Stichting/Plazacasa*, the Supreme Court, ruling that comparability from article 3:305a BW presumes the interests lending themselves for bundling, so as to promote *an efficient and effective* protection at law on behalf of the interested parties, then to add:⁹³⁹

‘Thus it is possible to consider within one lawsuit the contentious issues and claims, without the necessity to include the particular circumstances from the part of the individual interested parties.’⁹⁴⁰

The Supreme Court further nuances this by ruling that it does not matter that a considerable number of the parties whose interests the lawsuit seeks to protect, does not agree with (the purpose of) the lawsuit, or even takes the opposite view. And, to this, I would add that the Advocate-general Huydecoper adds yet another gloss. Huydecoper attracts the attention to the fact that the interests of the parties concerned materially differing yet does not preclude founding the collective claim on the (remaining) common denominator.⁹⁴¹ For this, Huydecoper points to *Stichting/World Online*. *Stichting/World Online* concerned a claim by virtue of article 3:305a BW bundling the interests of investors in World Online who might have been aware of alleged incorrect and/or incomplete disclosures on the one hand, and investors not in a position to have been aware thereof on the other. The defendants had argued that these two categories were incapable of being reconciled and, hence, their interests were incapable of being classified as (sufficiently) comparable. For this, defendants

⁹³⁶ *Safe Haven*, dictum at 4.6.2, and, particularly, at 4.34.2.

⁹³⁷ *Safe Haven* is an apt illustration of the particular difficulties arising from the fact that an article 3:305a BW foundation cannot claim on the basis of rights or entitlements which the *third parties* only (may) have in individual cases – see dictum at 4.31.

⁹³⁸ Cf Schonewille 2011, p 9.

⁹³⁹ *Stichting/Plazacasa*, dictum at 4.2, see also Stolker 2011 (T&C Burgerlijk Wetboek), art 3:305a, aant. 1.

⁹⁴⁰ *Stichting/Plazacasa*, dictum at 4.2.

⁹⁴¹ *Stichting/Plazacasa*, conclusion A-g at 16.

contended that it is impossible to conclude that investors have been misled, if it is not established that those investors have taken notice of the misleading disclosures.⁹⁴²

The Supreme Court is prepared to assimilate the two positions, by taking the claim on its bare fundament; the *objectum litis* of this collective action *exclusively* seeks to obtain a ruling on whether the behaviour of the claimants had been tortious. The Supreme Court explicitly adds that in answering that particular point, it could disregard the particular circumstances on the investors' part.⁹⁴³ In her comment to *Stichting/World Online*, Vletter wonders whether defendants weren't entirely correct in pointing out the distinction; the investors who had subscribed prior to the misleading disclosures were incapable, as a matter of fact, to have been wrong-footed by such disclosures.⁹⁴⁴

Hence, as to the element of comparability, case law underwrites an approach which is outspokenly geared to *efficiency and effectiveness*. Upon *Stichting/Plazacasa*, Snijders attempts to wrap it up:

'It is decisive [. . .] whether it concerns an important number of individual cases which are so similar, or – put differently – not so diffuse, that they are capable without any objection, of being consolidated in one judicial ruling.'⁹⁴⁵

Which Snijders immediately has followed by his observation that this was indeed the matter under *Stichting/World Online*; as it regarded the matter as to whether defendants had acted tortuously in the sense that they had misled the investors.⁹⁴⁶

On the second avenue, actions by virtue of the Act Collective Settlement Mass Damages, I confine myself at this junction to mentioning the Amsterdam Court of Appeal's ruling from 2007, declaring the so-called Duisenberg-arrangement to be binding on all parties under article 7:907 BW.⁹⁴⁷ In June 2005, Dexia Bank ('Dexia')

⁹⁴² *Stichting/World Online*, dictum at 4.7. See also, on this point, Vletter's comment, *ad* (ii), p 124.

⁹⁴³ *Stichting/World Online*, dictum at 4.8.1.

⁹⁴⁴ See Vletter, comment *ad* (ii), p 124.

⁹⁴⁵ Snijders' note at (a).

⁹⁴⁶ Snijders' note at (a).

⁹⁴⁷ Hof Amsterdam 25 januari 2007, *NJ* 2007, 427.

and four big collective action groups⁹⁴⁸, agreed upon an article 7:709 BW arrangement. The most prominent reproach made to Dexia for the losses incurred by investors in security leasing agreements, was that the investors had not been adequately informed and warned against the risks, prior to their entering into such security leasing agreements. The Amsterdam Court of Appeal rules that Dexia thus had failed in complying with its special duty of care.⁹⁴⁹

7.3 Sanctioning under public law

7.3.1 Introduction

Sanctioning under public law takes two forms. The first is sanctioning through administrative law and the second through common criminal law. The lawmaker is outspoken on administrative sanctioning taking precedence over enforcement through common criminal law to enforcement.⁹⁵⁰ As much as this is to be seen in the perspective of the modernisation of administrative law, this should also be seen in light of the fundamental tenet that the criminal law is a matter of last resort.⁹⁵¹ Literature addresses the key aspects that must be considered in arriving at such choices, which will deal with legality, proportionality and effectiveness. Doorenbos admonishes to this that prosecution of breaches of regulation by virtue of Wft will only occur where and in so far as the administrative law apparatus falls short. He adds that such falling short is not likely to be assumed.⁹⁵² In view of this, it is apposite to mention that administrative fines are now potentially a multiple of criminal law fines under the common criminal law. To put matters in perspective, the maximum criminal law monetary fine is at € 760,000 for legal persons.⁹⁵³ As will be seen later, the administrative law maximises the nominal amount of administrative fines at € 8 million and higher amounts are possible by doubling the perpetrator's actual advantage where this exceeded € 2 million. Where financial markets law is

⁹⁴⁸ Admitted by the Court as capable of classifying under article 7:907 BW, and, hence, admissible in their request – see the Amsterdam Court of Appeal's ruling at 5.28.

⁹⁴⁹ Amsterdam Court of Appeal, ruling at 6.9. The formula used by the Court smacks of the formulae seen from *Rabo/Everaars* onward.

⁹⁵⁰ *Kamerstukken II*, 2003-2004, 29 708, nr 3 p 18.

⁹⁵¹ See *ia* Franken 1999, p 444.

⁹⁵² D R Doorenbos, *Strafrechtelijke handhaving van de Wft*, Busch (2010), p 919.

sanctioned through administrative law, there is now⁹⁵⁴ also⁹⁵⁵ the possibility to prosecute natural persons for management *de facto* of criminal offences committed by a legal person.⁹⁵⁶ The reason this may be particularly relevant in the context of my thesis, is that where liability to management *de facto* may consist of knowingly refraining to act or sitting around doing nothing, the regulator may well reproach those senior managers in banks who take responsibility for the internal control systems, for failure to act.⁹⁵⁷

I note here that the *una via* principle, which I explain later under the administrative fine,⁹⁵⁸ will not prevent concurrent investigation. As will be seen, *una via* will only apply from a certain degree of formality to prosecution. Doorenbos gives the example that the regulator may inform the supposed perpetrator of its intended punitive resolution. The supposed perpetrator issues a written reaction which may bring the regulator to mend course and to transfer the matter to the prosecution service. Doorenbos continues by suggesting that the regulator may wish to do so where along the way the view that more proof will be needed arises, and that such proof may best be obtained through the intervention of authorities with formal investigation powers under criminal law.⁹⁵⁹ Obviously, the common criminal law puts further reaching means of coercion at the disposal of such formal instances, than may be brought to bear by the regulators operating by virtue of their powers under Awb in combination with Wft.

7.3.2 Administrative law

⁹⁵³ Article 23 para 4 Criminal Code – the amount representing the sixth category. Criminal law fines for natural persons will not exceed € 76,000.

⁹⁵⁴ As a consequence of a fairly recent development in administrative law, the so-called Fourth tranche of Awb. This Fourth tranche became part of Awb with effect from 1 July 2009 – Wet van 25 juni 2009 tot aanvulling van de Algemene wet bestuursrecht (Vierde tranche Algemene wet bestuursrecht), *Stb* 2009, 264.

⁹⁵⁵ Under common criminal law, this possibility has already existed for a long time. It has developed through case law, traceable to the Supreme Court's ruling in Johannes Arie B, HR 2 maart 1982, *NJ* 1982, 446, m nt A C 't Hart.

⁹⁵⁶ Fairly indirectly; article 5:1 para 3 Awb refers to article 51 paras 2 and 3 Code of Criminal Procedure.

⁹⁵⁷ *Cf* A Doets and A J P Tillema, *Bestuursrechtelijke handhaving van de Wft*, Busch (2010), p 888.

⁹⁵⁸ *Infra* at para 7.3.2.6.

⁹⁵⁹ Busch 2010, p 921.

7.3.2.1 Generic duty to co-operate with the regulator

Where a bank breaches its generic duty to co-operate with the regulator in exercising the latter's duties,⁹⁶⁰ the regulator may impose a charge under penalty (see below, para 7.3.2.5).⁹⁶¹ The regulator may also impose an administrative fine (see below, para 7.3.2.6).⁹⁶² In addition, the Act on economic offences classifies acting in breach of this generic duty to co-operate, as an economic offence, which opens the way to criminal law sanctioning.⁹⁶³ Ultimately, by not complying with an order or a request made by such persons from the persons appointed as supervisors,⁹⁶⁴ banks may commit a common law crime.⁹⁶⁵

7.3.2.2 Instruction

The first sanction is an instruction, which presumes that a breach of Wft or subordinate legislation has occurred *de facto*.⁹⁶⁶ The instruction specifies the required line of conduct from the addressee. I would point to article 1:75 par 3 which provides that where the regulator issues an instruction, this does not impair contracts between the addressee of the instruction and third parties.⁹⁶⁷ This poses the interesting problem whether the regulator may instruct to end a contractual situation in order to comply with Wft. From the (scant) case law addressed by Doets and Tillema, I infer that the regulator must have such power, and that the use thereof is to be interpreted

⁹⁶⁰ Article 5:20 para 1 Awb.

⁹⁶¹ Article 1:79 para 1 (d) Wft. The 'charge under penalty' is defined in article 5:31d Awb as a sanction imposing an obligation to repair the offence, failing which the penalty will be levied.

⁹⁶² Article 1:80 para 1 (d) Wft. On administrative fines, see article 1:81 Wft, with its implementation regulation of 11 June 2009, *Besluit bestuurlijke boetes financiële sector*.

⁹⁶³ Wed classifies breaching article 1:74 para 1 Wft as an economic offence. Article 1:74 para 2 Wft provides that article 5:20 Awb is of similar application. This is a roundabout manner to bring breaching article 5:20 Awb under Wed.

⁹⁶⁴ In a roundabout way, categories of officials with DNB and the AFM are indicated as persons tasked with supervision on compliance with financial markets law. See article 1:72 Wft and its derived regulation Indication of supervisors of 21 December 2006.

⁹⁶⁵ The offence of article 184 Criminal Code.

⁹⁶⁶ Article 1:75 Wft.

⁹⁶⁷ Which provision carries semblance to article 1:23 Wft providing that the legal validity of private law juridical acts which are performed in breach of Wft, is not capable of being affected *for that reason* [emph from me]. The rationale for this provision is another, however. Kortmann and Schim point out that article 1:75 para 1 Wft seeks to limit the regulator's powers. See Busch 2010, p 949.

as making an end to the continued violation of Wft as opposed to nullifying the underlying contract.⁹⁶⁸

7.3.2.3 Appointment of 'trustee(s)'

Article 1:76 provides that the regulator may decide to appoint one or more 'trustees' in relation to all or certain organs or agents of a financial company, where that financial company does not comply with Wft. Such decision may only be taken where:

- i) the financial company has not obeyed an instruction as described above;
or
- ii) the violation of Wft seriously threatens the adequate functioning of the financial company, and that financial company has been given the opportunity to give its view on the intended decision; or
- iii) the violation seriously threatens the interests of clients or customers – again, the financial company has been given the opportunity to give its view on the intended decision.

In a somewhat roundabout, and hence barely satisfactory, manner, the powers of the trustee may be gleaned from Wft. The normal situation appears to be that the trustee *de facto* takes over the acts of representation of the organ or agents in relation to which he has been appointed, or in any case obtains a power to give instructions to these. However, the decision may be that the relevant organs or agents may perform certain legal acts without consent from the trustee.⁹⁶⁹ The powers of the trustee are also capable of being gleaned from the Explanatory Memorandum to Wft, providing that the organs or agents must function whilst having regard to the trustee's instructions, and their resolutions will only take effect within the company upon the trustee's consent.⁹⁷⁰ The decision comprises a description of the interests towards which the trustee must orientate himself. The appointment is for a maximum of two

⁹⁶⁸ Busch 2010, p 875. An example is where the institution has attracted funds in breach of article 3:5 Wft. The regulator must, of course, have the power to instruct the institution *no longer* having such funds at its disposal. Hence, it is inferred that the instruction has as its objective to cause the discontinuation of the breach, as opposed to the repair of the situation from the past.

⁹⁶⁹ See article 1:76 paras 5 and 6 Wft.

⁹⁷⁰ *Kamerstukken II*, 2003-2004, 29 708, nr 3, p 44.

years, which term is repetitively renewable for terms of one year each.⁹⁷¹ The upshot of an appointment of a trustee is that the trustee is there to prevent the possible consequences of the violation of Wft from materialising. The lawmaker commented that the trustee is to be put into a position where it is, as yet, not opportune to terminate the activities, to revoke the licence or to request the emergency procedure.⁹⁷² Also, the lawmaker indicated that it should concern multiple violations within a relatively short time span. Where there were only one violation, the tenet of proportionality should bar the appointment of a trustee – under such circumstances, the appropriate sanctioning is to consist of a penalty or an administrative fine.⁹⁷³ Although not apparent from the statute act, appointments are not made public. Hence the customary term ‘silent trustee’.⁹⁷⁴

7.3.2.4 Prohibition of activities and transactions

The regulator may stop consenting to a financial company’s activities in another EU member state, where the financial company does not comply with an instruction made under article 1:75 Wft with respect to its conduct of business or its financial position. The home country regulator informs the host country regulator in the relevant EU member country of its decision. From the moment of this information the addressed financial company is prohibited to continue its activities in the other EU member state.⁹⁷⁵

The regulator may give an instruction to follow a specified line of conduct, aimed at terminating the violation of legal provisions from another EU member state.⁹⁷⁶ Where this instruction is not satisfactorily complied with, the regulator may decide that the addressed financial company may no longer enter into agreements in the other member state – hence ‘a prohibition to transact’.⁹⁷⁷

⁹⁷¹ Article 1:76 para 5 Wft.

⁹⁷² *Kamerstukken II*, 2005-2006, 29 708, nr 19, p 410.

⁹⁷³ *Kamerstukken II*, 2005-2006, 29 708, nr 19, p 411 *in fine*.

⁹⁷⁴ Busch 2010, p 879.

⁹⁷⁵ Article 1:76 para 1 Wft.

⁹⁷⁶ An abbreviated rendition from article 1:59 para 1 Wft.

⁹⁷⁷ Article 1:59 para 2 Wft.

7.3.2.5 The charge under penalty

Article 1:79 Wft mentions the charge under penalty from (generic) administrative law.⁹⁷⁸ The regulator may impose a charge under penalty where there are breaches of provisions derived from⁹⁷⁹ or indicated within the provision, among which is the duty to co-operate which flows from article 5:20 Awb. The charge under fine comes into view where the bank breaches Wft-obligations owed to its clients. Article 5:31d Awb defines the charge under penalty as a sanction imposing an obligation to repair the offence, failing which the penalty will be levied. The measures to be taken under the charge, must be described with adequate possibility of definition.⁹⁸⁰

The regulator publishes a charge under penalty, unless doing so possibly conflicts with the objectives of the regulator's supervision on Wft compliance.⁹⁸¹ Comparable to the legal presumption that administrative fines will be published, publication is hence portrayed as the rule, as opposed to a matter of discretion.

7.3.2.6 The administrative fine

Article 1:80 Wft provides for the administrative fine,⁹⁸² which the regulator may impose where there are breaches of provisions derived from⁹⁸³ or indicated within the provision, among which is the duty to co-operate which flows from article 5:20 Awb. The category of provisions capable of being sanctioned with an administrative fine encompasses all such as are capable of being sanctioned by a charge under penalty. The regulators thus, where they weigh imposing a charge under penalty, always have the choice. In this context, it is relevant to realise that the charge under penalty is

⁹⁷⁸ Article 1:79 para 2 Wft refers to a ministerial regulation. So far as I can see, there is no ministerial regulation specifically derived from article 1:79 Wft itself. This is the more striking as Doets and Tillema write that, article 1:79 para 2 provides for equivalent applicability of certain provisions from Awb – see Busch 2010, p 882.

⁹⁷⁹ The first category of such relevant provisions are listed in an annex to article 1:79 Wft. See article 1:79 para 1 (a) Wft.

⁹⁸⁰ This follows from article 5:32a para 1 Awb.

⁹⁸¹ Article 1:99 Wft.

⁹⁸² The administrative fine is generically addressed in articles 5:40 Awb *et seq.*

⁹⁸³ Similar to how this works in article 1:79 Wft, the first category of such provisions is listed in an annex to article 1:80 Wft; see article 1:80 para 1 (a) Wft. And, as is described in the body of my text, it encompasses all provisions capable of being sanctioned by a charge under penalty.

portrayed as having a corrective as opposed to a punitive character.⁹⁸⁴ Clearly, where the administrative fine is concerned, this is different; it is a punitive sanction. Given this punitive character, the safeguards from article 6 ECHR and article 14 ICCPR must be warranted.⁹⁸⁵ The upshot of this is that the addressee must be given genuine recourse to a defence against the regulator's finding that there are breaches of Wft.⁹⁸⁶

Within the context of the punitive character of administrative fines, falls the *una via* principle, addressed under article 5:44 Awb; the regulator does not impose an administrative fine where, on the grounds of his identical action, the addressee is the object of criminal law prosecution where prosecution has reached formality.⁹⁸⁷ Where the action to be sanctioned by administrative fine also constitutes an offence under common criminal law, the regulator submits it to the public prosecutor, unless it has been agreed with the prosecuting service that this may be renounced. Where the action has had to be submitted to the public prosecutor, the regulator may only impose a fine where the public prosecutor has informed the regulator he will renounce from prosecution, or where the regulator has not got a reaction from the public prosecutor within thirteen weeks. This latter provision is reflected in the common criminal law; where, for the identical facts, an administrative fine has been imposed, this has similar effect as the notification by the public prosecutor that he will not proceed with the prosecution.⁹⁸⁸

On the possible amount of administrative fines, the law contains the maximum nominal amount of € 4 million, capable of being doubled in case of repeated offences.⁹⁸⁹ Where the actual benefit enjoyed by the perpetrator exceeds the threshold

⁹⁸⁴ See Busch 2010, p 882, where Doets and Tillema remark, wholly appropriately in my experience, that the addressees of a charge under penalty experience such sanction as punitive.

⁹⁸⁵ Eg the right to remain silent, cf article 29 Criminal Code. The 'translation' into generic administrative law is constituted by article 5:10a Awb.

⁹⁸⁶ Outside the confines of my thesis is that this may an area fraught with difficulty. There is (administrative) case law on admitting proof which would have constituted wrongfully obtained proof under common criminal law. See CBp 12 juni 2007, JOR 2007, 186, my source is Busch 2010, p 884, footnote 65.

⁹⁸⁷ In fact, the law provides that either formal proceedings before a criminal court must have commenced, or a punitive resolution must have been issued.

⁹⁸⁸ Article 243 in connection with article 245 Code of Criminal Procedure.

⁹⁸⁹ Article 1:81 Wft.

of €2 million, the regulator may impose a fine of double the amount of such benefit.⁹⁹⁰

The law provides that the regulator publishes its decision to impose an administrative fine.⁹⁹¹ Only where publishing the decision possibly conflicts with the objectives of the regulator's supervision on Wft compliance, will the regulator refrain from doing so.⁹⁹² Whereas publication of decisions to impose administrative fines is thus capable of being characterised as the rule, the lawmaker surmised that in practice the opt-out on the grounds of possible conflict with regulatory objectives, would be frequently invoked indeed.⁹⁹³

7.3.2.7 Revocation of the licence

Where I discussed the appointment of trustees, I indicated that the upshot of such appointment is prevention that ultimate consequences of breaches of Wft materialise. From the *travaux préparatoires*, I referred to the lawmaker's comment that the trustee is to be put into a position where it is, as yet, not opportune to terminate the activities, to revoke the licence or to request the emergency procedure.⁹⁹⁴ This appropriately serves to illustrate that the revocation of the licence is a measure of last resort. The law enables the regulator to amend, partially or whole revoke, or to limit the licence.⁹⁹⁵

7.3.3 Sanctioning through common criminal law⁹⁹⁶

The provisions from Wft possibly causing criminal liability are listed under article 1 (2) and (3) Wed. For completeness' sake, I also mention that Wed lists provisions from the Money laundering prevention Act,⁹⁹⁷ and the Sanctions Act 1977.⁹⁹⁸ Where

⁹⁹⁰ Article 1:81 para 3 Wft.

⁹⁹¹ Article 1:97 Wft.

⁹⁹² Article 1:97 para 3 Wft.

⁹⁹³ See *Kamerstukken II*, 2005-2006, 29 708, p 421.

⁹⁹⁴ *Kamerstukken II*, 2005-2006, 29 708, nr 19, p 410.

⁹⁹⁵ Article 1:104 Wft.

⁹⁹⁶ In addressing sanctioning through criminal law, I shall leave measures such as confiscation (article 36e Criminal Code), and the condition of compensation of damages ((article 74 para 2 (e) Criminal Code)) for what they are.

⁹⁹⁷ Article 1 (2) Wed. The Act concerned is Wwft.

Wed provides that the criminalisation encompasses (derived) regulation (the extensive body of implementing regulations), this brings criminalisation over a considerable range of subject matters.⁹⁹⁹ Doorenbos is outspoken on the matter; the list of legal provisions which have been subsumed under Wed is (much) too extensive.¹⁰⁰⁰

The range of common criminal sanctions encompasses:

1. Temporary measures;
2. Prison sentences and detainment;
3. Involuntary community service;
4. Monetary fines
5. Deprivation from professions or occupations;
6. Suspension in whole or in part of the business; or
7. Publication of the court sentence.

As to 1 Temporary measures

With certain similarities to the administrative instrument of the instruction, Wed enables the public prosecutor and the courts to order certain preliminary measures.¹⁰⁰¹ Such measures may consist of the order to abstain from specified actions.¹⁰⁰²

As to 2 Prison sentences and detainment

Prison sentences for any of the relevant crimes run to a maximum of two years.¹⁰⁰³

As to 3 Involuntary community service

The courts may punish by imposing community service, a sanction unbeknownst to administrative law.

⁹⁹⁸ Article 1 (1) Wed.

⁹⁹⁹ As at the date I write this, the government lists no less than 52 regulations, policy rules, arrangements, corrective regulations, temporary arrangements, implementation regulations, exemption regulations, exemption arrangements, amending arrangements, and amending regulations as being based on Wft. In 2007, Eisma noted that the regulations derived from Wft at that time covered 835 pages of text, see Busch 2007, p 23.

¹⁰⁰⁰ Busch 2010, p 925.

¹⁰⁰¹ Articles 28 and 29 Wed.

¹⁰⁰² Article 28 para 1 (a) and article 29 para 1 (d) Wed.

¹⁰⁰³ Article 6 para 1 (2) Wed.

As to 4 Monetary fines

I noted earlier¹⁰⁰⁴ that, in stark contrast to the maximum amounts of fines under administrative law, monetary fines are capable of being imposed to a maximum of € 760,000 for legal persons, and € 76,000 for natural persons.¹⁰⁰⁵

As to 5 Deprivation from professions or occupations

Wed enables the deprivation through a court sentence from such rights as defined under the Criminal Code, which includes professions and occupations.¹⁰⁰⁶ The maximum duration of such deprivation is, where a prison sentence was pronounced, for a period exceeding the prison sentence of up to five years.¹⁰⁰⁷ Hence, where the maximum deprivation will be seven years. In all other cases, the maximum duration is five years.¹⁰⁰⁸

As to 6 Suspension in whole or in part of the business

At first glance, this is a draconic sanction indeed, especially where I recall that this ancillary sanction may be imposed for any punishable action.¹⁰⁰⁹ The maximum term is one year, which is mild when compared to the possibility under administrative law to revoke the licence altogether.

As to 7 Publication of the court sentence

Where Wed defines this as an ancillary sanction,¹⁰¹⁰ it is clear that under criminal law, publishing is classified as punitive. This is in contrast to administrative law, where making measures public is portrayed as serving the interest that the public is forewarned.¹⁰¹¹

¹⁰⁰⁴ *Supra* pp 241 and 242.

¹⁰⁰⁵ Article 23 para 4 Criminal Code – the amount representing the sixth category; for natural persons the maximum of € 76,000 is the amount from the fifth category.

¹⁰⁰⁶ Article 7 (a) Wed which refers to article 28 Criminal Code.

¹⁰⁰⁷ Article 31 Criminal Code.

¹⁰⁰⁸ Article 31 Criminal Code.

¹⁰⁰⁹ Article 7 (c) Wed.

¹⁰¹⁰ Article 7 (g) Wed.

7.4 Concluding notes

This chapter addressed possible sanctions of compliance breaches from an external perspective; sanctions at the behest of parties outside the bank. Sanctions are an indispensable aspect of compliance, because it may be asked what the particular consequences are when compliance rules are breached.

I started by looking at private law sanctioning. Private law actions against banks have taken a high flight with the development of case law addressing banks' special duty of care. The case law on banks' duty of care hinges upon the doctrine of relativity. I mentioned that where the claim is founded on a Wft-norm reflecting duty of care, it is derived from the *travaux préparatoires* that relativity is almost a given. With that, I explored whether third parties stand a chance successfully to claim against the bank on the basis that the bank acted in breach of its own, internal, compliance rules. I concluded that where a bank's internal compliance rules may be taken to protect the interests of the injured party, this should be possible. And, in view of this, I submit that there is no reason to distinguish between external and internal compliance rules. I would anticipate, at this point to an analogy to cases concerning a director's duty properly to fulfil his task. Where a director acts in breach of internal guidelines applicable to the managing board, this triggers a ready presumption of impropriety.¹⁰¹²

I broached whether the reply that third parties may claim against the bank for breaching (its own) compliance rules varies depending on compliance being a subcategory of corporate governance. Where the bank's liability is one concerning the bank as a whole, it is, thereby, irrelevant which company organ caused the compliance breach. To the internal perspective, however, the reply to whether and how the compliance breach may be sanctioned, is safely with the domain of corporate

¹⁰¹¹ In *Kamerstukken II*, 2005-2006, 29 708, nr 19, p 302, the lawmaker states *expressis verbis* that the premonition (constituted by publication) required by the regulator, and which is opportune in financial markets law, does not have a punitive nature.

¹⁰¹² *Supra*, on p 220 I addressed *Staleman/Van de Ven*, laying down that 'guidelines applicable to the managing board' are a circumstance relevant to be included in considering whether the director has acted improperly.

governance – the sanctioning being a matter for the bank’s corporate governance mechanisms.¹⁰¹³

I then addressed sanctioning under public law, pointing out that to the lawmaker’s eyes, administrative law sanctioning ought to take precedence over criminal law enforcement. Moreover, possible administrative fines are a multiple of those arising from criminal law.

¹⁰¹³ Terminology borrowed from Davies 2008, p 511.

8 Chapter 8 – The proof of the pudding; Fortis and a view from experts

8.1 Introduction

In this chapter I first draw upon *VEB/Fortis (OK)* and *Kortekaas/Lippens*.¹⁰¹⁴ I do so with the objective of establishing whether the upshot of my thesis lends itself to relevance in practice. In brutal terms; why bother to yield clarity, as a matter of law, on compliance as a directors' duty and, thereby, pertaining to governing the company? As I have hereuntofore not dedicated detailed attention to the Dutch enquiry proceedings involving the Enterprise Division, I shall first address certain specifics of those proceedings meriting attention having regard to the significance of *VEB/Fortis (OK)* within the context of my thesis (section 8.2). Although meanwhile the Supreme Court has ruled in *VEB/Fortis* on 6 December 2013, there is no reason for me to address the Supreme Court's ruling in any detail – at the hands of the latter, the appeal lodged against *VEB/Fortis (OK)* fails categorically on all counts. In my view, the Supreme Court, in doing away with the appeal, cannot be accused of mincing its words.¹⁰¹⁵

In what follows I take a combined look at *VEB/Fortis (OK)* and *Kortekaas/Lippens*. From the discussion, I will home in on whether we may infer from *VEB/Fortis (OK)* that compliance breaches yield 'mismanagement'¹⁰¹⁶ (section 8.3). I will then proceed to formulate 'lessons learnt'; do these cases put me in good stead to formulate my proposal? With equal care for actual relevance, this precise same question is the basis for my discussions with professionals from the field. And that brings me to the second panel of this chapter; a meeting with experts from the field (from section 8.5).

8.2 The enquiry proceedings from article 2:344 et seq BW

¹⁰¹⁴ Whereas both cases have been appealed against, the Supreme Court ruled *VEB/Fortis* on 6 December 2013. At the time of closing this manuscript I was unaware of the outcome of the appeal in *Kortekaas/Lippens*.

¹⁰¹⁵ I will not dedicate any attention either to the pleasurable conclusion by A-g Timmerman of 12 July 2013, see *ECLI:NL:PHR:2013:172*.

¹⁰¹⁶ The particular term from article 2:355 para 1 BW. I shall explain this later.

Looking at *VEB/Fortis (OK)* may not be done without a succinct word on the remit of the judicial procedure concerning an investigation into the policy and the conduct of business in a company; the so-called enquiry from article 2:345 para 1 BW. The Enterprise Division gives leave to an application for an enquiry where there are founded reasons to doubt proper policy or proper conduct of the business.¹⁰¹⁷ The ensuing enquiry may then result in the finding that there has been ‘mismanagement’.¹⁰¹⁸ Earlier,¹⁰¹⁹ I pointed out that terminologically the Dutch word for mismanagement (‘wanbeleid’) is the antonym of *beleid*, which connotes policy rather than management. I also noted earlier¹⁰²⁰ that the authoritative case-law on the matter of mismanagement has it that mismanagement occurs where ‘elementary principles of responsible entrepreneurship’ are breached. A ubiquitous theme in Dutch case-law and literature is whether mismanagement is tantamount to the improper fulfilment of a director’s task, the latter being the criterion for director’s liability vis-à-vis the company.¹⁰²¹ Why such theme? Were the Enterprise Division’s conclusion that there has been mismanagement binding¹⁰²² in other law suits than the enquiry,¹⁰²³ there would not be any rationale to have the high threshold from *Willemsen/NOM*. Thus, as discussed in the literature, enquiries are broached with the intention to have the Enterprise Division find that there has been mismanagement, in order then to instigate a liability suit. In its *Laurus* order the Supreme Court formulated an ‘explanation’ to its dictum from *OGEM II*, which reiterates that albeit that the determination of mismanagement by the Enterprise Division is binding for those implicated in the enquiry, this does not imply personal liability of the individual members of the legal person’s organs. The Supreme Court has this followed by ruling that the facts as they have been established by the Enterprise Division are not thereby established beforehand in a subsequent liability suit, not even subject to counter-proof. But the Supreme Court sees fit to add that the Enterprise Division’s judgment

¹⁰¹⁷ Article 2:350 para 1 BW.

¹⁰¹⁸ Thus that the Enterprise Division understands the findings as they appear from the report issued by the person(s) it has appointed to conduct the enquiry, to manifest mismanagement - conditional upon a request for certain measures; see article 2:355 para 1 BW.

¹⁰¹⁹ *Supra*, p 136, footnote 498.

¹⁰²⁰ *Loc cit* where I refer to the norm from *OGEM II*.

¹⁰²¹ *Sc* the norm from article 2:9 para 1 BW.

¹⁰²² Save, of course, annulment by the supreme court.

¹⁰²³ Such inference had been capable of being derived from *OGEM II*, dictum at 5, providing that the determination that there has been mismanagement is binding, also in other legal proceedings, unto those having appeared in the enquiry, but that this does not mean that it has thereby been determined

that there has been mismanagement may in circumstances indeed carry evidentiary significance at the liability suit, such that the court, also in consideration of the contents of the report of the investigation and the debate thereupon at the second phase of the enquiry proceedings,¹⁰²⁴ *prima facie* considers as proven that the defendant in the liability suit has fulfilled his task improperly.¹⁰²⁵ The literature points to the absurdity of this ruling. In his NJ comment to it, Van Solinge puts his finger on it by noticing that a director may contest the facts in a subsequent liability suit, but were he to succeed in producing evidence to the contrary, the determination of mismanagement is, as it is binding, thereby not dispelled.¹⁰²⁶

Within the context of my thesis, drawing attention to such distinctions between mismanagement on one hand and improper fulfilment of a director's task on the other is relevant for my purposes for a number of reasons. I have sought to put emphasis on potential liability for banks', their organs and, importantly, individual directors as a consequence of compliance lapses. In my opinion, where clarity is shed that, as a matter of Dutch company law, (internal) compliance breaches may lead to liability, realisation thereof is conducive to banks steering clear from relegating compliance to a mere operational management issue.¹⁰²⁷ Where banks fail to perceive compliance as an integral part of their businesses and their business processes, and (thus) allocate compliance matters to (subordinate) organisational units within the bank, this likely leads to abdication of ownership. I recall at this place that I have undertaken to look at liability as a manifestation of external sanctioning, especially under common private law, and liability as a manifestation of internal sanctioning – the latter taken to refer to liability arising from actions instigated by the bank itself.¹⁰²⁸ Hence, were the criteria for the classification of mismanagement without any significance for

whether and in so far such mismanagement may be attributed to each individual defendant and which defendant may held liable therefor. *Cf* also Asser – Maeijer/Van Solinge/Nieuwe Weme 2009, 442.

¹⁰²⁴ The 'second phase' of the enquiry proceedings, which is not a term from Boek 2 BW, refers to (the) proceedings subsequent to the report issued by the person(s) the Enterprise Division has appointed to conduct the enquiry, which second phase of the proceedings at all times requires a request from certain parties and the determination of a view on the findings from the report by the Enterprise Division. See articles 2:354 and 2:355 BW.

¹⁰²⁵ Almost verbatim from *Laurus*, dictum at 3.8.

¹⁰²⁶ See *Laurus*, commentary Van Solinge at 6. *Cf* Asser – Maeijer/Van Solinge/Nieuwe Weme 2009, 443 *in fine*: '[. . .] we find it somewhat absurd that the mismanagement classification is binding at the liability suit, but not the facts upon which that classification is based.'

¹⁰²⁷ *Supra* p 11.

¹⁰²⁸ Which internal perspective includes the shareholders on the basis of their voluntary engagement with the company (devolving from the Supreme Court's approach in *Willemsen/NOM*).

potential liability, the enquiry proceedings in *VEB/Fortis (OK)* should not find any place in my thesis. It is already apparent, however, from my notes above on enquiry proceedings, that these criteria do carry relevance. This notwithstanding, or perhaps even in spite of, the absurdity (rightly) bemoaned in the literature.

In fact, the matter of potential liability of the bank,¹⁰²⁹ its organs and/or individuals plays a prominent role within and adjacent to *VEB/Fortis (OK)*. There are three aspects.

1. First, apparently applicants had made it clear that they wished to use the proceedings as a step-up for liability proceedings;
2. Second, the Enterprise Division itself devotes multiple considerations to the matter of liability; and
3. Third, the District Court of Utrecht had actually sat over the closely connected liability lawsuit in *Kortekaas/Lippens*, addressed earlier.¹⁰³⁰

As to 1 Intended use by applicants as a prelude to liability suits

The Enterprise Division acknowledges that VEB's and Stichting Investor Claims against Fortis's aim to get mismanagement determined, is, in part, motivated by their intention (possibly) to take up liability claims.¹⁰³¹

As to 2 The Enterprise Division's consideration of possible liability

The Enterprise Division itself remarks that whereas it is not engaged to judge whether the actions or omissions by Fortis lead to private law liability, this does not preclude that private law norms may have either a direct or indirect role in the judgment whether Fortis had breached elementary principles of responsible

¹⁰²⁹ Evidently, in enquiry proceedings, the matter of responsibility of a bank as such (which implicates the legal person owning the company conducting the bank's business) is not at issue, simply because where there is mismanagement, by its very nature this involves actions by its organs or individual directors. This point also appears to be made by Raaijmakers, see Raaijmakers 2012, p 749.

¹⁰³⁰ *Supra* p 226.

¹⁰³¹ *VEB/Fortis (OK)* at 4.2. The Enterprise Division makes the explicit observation that, as VEB and others strive to obtain openness, this (*ie* their wish to follow suit with liability claims) is of no consequence. It is not entirely clear to me what the Enterprise Division has in mind in saying this; surely it can't be the intention to have this carry any relevance for the meaning of the classification of mismanagement, although this consideration is added where the Enterprise Division generally explains the criteria for mismanagement. Another possible interpretation could be that the Enterprise Division seeks to express it is loath to entertain enquiry proceedings where the applicants have no apparent purpose(s) other than precluding to claiming liability.

entrepreneurship.^{1032 1033} And I would draw attention to the Enterprise Division's consideration that it had not been requested to establish who is responsible for the alleged mismanagement.¹⁰³⁴ In view thereof, the Enterprise Division points out that it shall refer to Fortis without distinguishing any individuals or organs. Where the actions, omissions or knowledge of any such individuals or organs is attributable to Fortis, there is, in the eyes of the Enterprise Division, no need to distinguish.¹⁰³⁵ All in all, the Enterprise Division's *overall* determination that there has been mismanagement is an amalgam of such a wide variety of facts, findings, opinions and standards, that it is almost a matter of pick-and-mix for (possible) liability suits. To boot, the Enterprise Division indicates that on some specific counts, a separate and individual classification of mismanagement is warranted, but on (a greater number of) other counts, the classification of mismanagement is warranted on the basis that the actions or omissions those counts concern are intimately connected as much as they are all about (the) communication with parties concerned in Fortis's organisation and/or with the investor community and/or the financial markets.¹⁰³⁶

As to 3 *Kortekaas/Lippens*

De Jong surmises¹⁰³⁷ that the Utrecht district court's judgment in *Kortekaas/Lippens* is the first to establish a listed company director's private law liability vis-à-vis

¹⁰³² *Ibid.* The Enterprise Division repeats this tenet that breaches of Wft may either directly or indirectly have a role in the determination that there has been mismanagement at 4.10.

¹⁰³³ Raaijmakers notes that for listed public limited companies which are also subject to securities law obligations (eg disclosure obligations), this approach by the Enterprise Division causes unbridled judicial discretion to judge actions and norms of a disparate character without being tied to concrete claims and submissions from the parties involved in the legal proceedings. Raaijmakers 2012, p 748. Raaijmakers adds that the lawmaker does not show an intention to yield clarity in the maze of Wft, Boek 2 BW, governance rules, enquiry proceedings, directors' liability and (state) regulation. See Raaijmakers 2012, p 751. And to this, I would add that such maze may well lead to differences in interpretation of the law. A striking illustration is the Enterprise Division's consideration at 6.74: 'The fact that the AFM is not of the opinion that Fortis had had to disclose already at 21 May 2008, does not alter the Enterprise Division's view, if only because the standards wielded by the AFM are not the (exact) same as the standards that are determinant for the answer to the question whether there has been mismanagement. The Enterprise Division is (therefore) not bound by the opinion from the AFM.' I would note that the Enterprise Division's choice to add, albeit within parentheses, 'therefore' is tenuous at best.

¹⁰³⁴ Surely this reflects article 2:354 BW, which accommodates that the report of the investigation shows that a director or another employee of the legal person is responsible for the incorrect policy or unsatisfactory course of business.

¹⁰³⁵ *VEB/Fortis (OK)* at 4.12.

¹⁰³⁶ *VEB/Fortis (OK)* at 6.129.

¹⁰³⁷ De Jong, in my view with good cause, correctly voices reservations. The more prominent being that this judgment is indicative of an erosion of the high threshold for director's liability from *Willemsen/NOM (supra p 210)*, and he aptly reflects this by writing that the court pays lip service to the case law on this aspect, see De Jong 2012, p 272. Unsurprisingly, Raaijmakers is more critical as

investors for breaching Wft provisions.¹⁰³⁸ On the facts, the court heavily weighs on the report from the person(s) the Enterprise Division had appointed to conduct the *VEB/Fortis (OK)* enquiry.¹⁰³⁹ Otherwise, claimants do not appear to have sought to have these proceedings depend in any way upon the enquiry (proceedings) and, obviously, as the ruling from the Enterprise Division postdates the district court's judgment, the determination of mismanagement can not possibly have had any bearing on the judgment.¹⁰⁴⁰

My analysis of *VEB/Fortis (OK)* will be done with the specific aim of establishing whether my findings in this thesis may be put to proper use such that they could possibly yield added insights facilitating the establishment of compliance lapses. This must be seen in close connection with the matter as to whether (current) common company law is adequately equipped to promote the desired behaviours where compliance is concerned. Hence, the core theme in my analysis of *VEB/Fortis (OK)* must be the question whether my findings may bring concrete improvement to a judicial evaluation.

I shall perform this analysis by a deliberate selection from the facts, bearing in mind that many of them may not be looked at in isolation. As said, the Enterprise Division indicated that the determination of mismanagement for the greater number of counts depended on the way they were connected combined with their hinging on communication.

much as outspoken; he infers from *Kortekaas/Lippens* that in this manner the function of director of listed companies risks becoming a matter for dare-devils. See Raaijmakers 2012, p 751.

¹⁰³⁸ De Jong 2012, p 270.

¹⁰³⁹ With just under 50 direct references to the report within the judgment.

¹⁰⁴⁰ And, anyway, failing any of the claims directly referring to any procedural outcomes elsewhere, the court had no such liberty – doing so would constitute trespassing the confines of the legal contention, *cf* article 24 Rv. This is in (marked?) contrast to enquiry proceedings, where the Enterprise Division, however much based upon the report by the investigators, sets out to determine whether there has been mismanagement, an altogether open-ended notion. Whereas Raaijmakers is anxious that the Enterprise Division has unbridled discretion and is not tied to concrete claims and submissions from litigant parties, the Enterprise Division appears to exercise restraint in this particular case, as it only judges the factual circumstances distilled from the investigators' report by the applicants. See *VEB/Fortis (OK)* at 5.1 read in combination with 5.2.

In our current environment there is heightened focus on the behaviour of boards of financial institutions.¹⁰⁴¹ *VEB/Fortis (OK)* yields very interesting material indeed on behaviour and culture.¹⁰⁴²

Quoting from the investigators' report,¹⁰⁴³ the Enterprise Division includes:¹⁰⁴⁴

Mittler¹⁰⁴⁵ has, *amongst others*, when heard to give his version, mentioned that the legal department served, together with other duties, to advise the Fortis board members on such matters and that, as a rule, those board members could then rely upon the advice rendered. Investigators point in this respect to several situations inside Fortis in which opinions from Fortis-lawyers particularly relevant to the matter to hand were deviated from (Annexes B-47, B-48, B-49, B-61 and B-62) [. . .]'

I would admonish to this that the words from the investigators make it clear that Mittler's view on the legal department's role was neither incidental nor unique. Also, even if there isn't anything other than the number of annexes mentioned,¹⁰⁴⁶ the investigators have seen five instances where legal opinions were deviated from.

The Enterprise Division, whilst formulating an assumption that certain officials had insufficient knowledge and understanding of duties to disclose, then attaches weight to its inference that those officials didn't demonstrate due awareness of such deficiencies. The Enterprise Division distils this inference from such officials'

¹⁰⁴¹ Thus, DNB professes to have made behaviour and culture spearheads of their regulation. See, *eg*, *Leading by example* 2013, p 2.

¹⁰⁴² On culture in the proper sense, I cannot resist the temptation to mention that the investigators describe that several interviewed persons had stated on as well as off the record that the relations between the Belgians and the Dutch in the ExCo were capable of being classified as dramatic. The investigators then add that this impression is substantially less held among the Belgian membership of same ExCo, which investigators, equally on the basis of interviews, attribute to courteousness as much as to influence. See Report from the investigators at 144. On influence, the report from the investigators describes that the 'bankers' held sway over the ExCo and, also, that the bank had a predominantly Belgian character. The committee of directors ('directoire') from the bank, presided over by (the Belgian) Dierckx, was an important source of power within Fortis. Report from the investigators 142.

¹⁰⁴³ Report from the investigators at 380.

¹⁰⁴⁴ The quote is at *VEB/Fortis (OK)* 6.130. I added the emphasis and the listing of the annexes (which I took from the published excerpts of the investigators' report).

¹⁰⁴⁵ Sc Gilbert Mittler, CFO, who did not sit on the (one-tier) board.

¹⁰⁴⁶ Unfortunately the Enterprise Division has not published these Annexes.

refusals to act upon opinions rendered by internal (hierarchically subordinate) specialists.¹⁰⁴⁷

The Enterprise Division refers to correspondence between Mittler and Quaetaert.¹⁰⁴⁸ Mittler had sent an e-mail to Quaetaert in which he stated that he needed ‘the support and pro-active thinking’ from the legal function and that he would appreciate not to be given a statement that his desired outcome could not be attained. In her reply Quaetaert, with apparent insouciance to the coercive¹⁰⁴⁹ nature of Mittler’s exhortations to be ‘cooperative’, makes it clear she ‘is not able to help’. Notably, her reply e-mail contains the following phrasing:¹⁰⁵⁰

From a legal and compliance point of view, you cannot wait [. . .] to announce a deal which is virtually being made these days , and of which the main terms and conditions have been known for a few weeks now.

Consciously and artificially waiting [. . .] is misleading the public/the market and not disclosing price sensitive information, which is known by tens of persons within Fortis and within AA [. . .].

I dare to draw your attention to the responsibility you and the Board would incur in this respect.

I know this mail will upset you because it does not help you solving a problem. Sorry for this, but I consider it as my duty, as General Counsel, to warn you of the risks you may seem ready to take.’

The Enterprise Division couples its finding that Fortis seriously fails, to Fortis putting aside the internal specialist’s opinion and deliberately opting not to disclose the price-sensitive information.¹⁰⁵¹

¹⁰⁴⁷ *VEB/Fortis (OK)* at 6.130.

¹⁰⁴⁸ *Sc* Jeannine Quaetaert, General Counsel and Chief legal officer, like Mittler not a boardmember.

¹⁰⁴⁹ With like cause I could have uses ‘condescending’ or ‘patronising’.

¹⁰⁵⁰ *VEB/Fortis (OK)* at 6.75.

¹⁰⁵¹ *Ibid* at 6.76.

The Enterprise Division refers to an exchange between Dierckx¹⁰⁵² and Kloosterman,¹⁰⁵³ culminating in the latter writing an e-mail with the unveiled threat that Dierckx's persisting to refuse to issue a press-release on Ping An withdrawing from the intended joint-venture comprising the asset management division, would constitute a criminal offence.¹⁰⁵⁴

I have already mentioned that the Enterprise Division appears to attach great importance to aspects it seeks to consolidate under the term communication policy. On the greater number of counts the Enterprise Division does not find that they, each taken in isolation, classify as mismanagement, but that, as they are closely connected and hinge upon communication policy, together they amount to mismanagement. And it is precisely here that the Enterprise Division sees fit to add an extensive consideration addressing behavioural aspects rather than the actors' specific actions or attributes. The Enterprise Division does not so much reproach certain officials for lacking adequate knowledge, but, rather, it turns to the accompanying 'behavioural' elements. Thus, it is not so much the lack of knowledge on disclosure obligations which it reproaches them for, but it is their accompanying understanding as much as their apparent demonstration of lack of awareness, which is also distilled from the deliberateness with which opinions from internal specialists are set aside.¹⁰⁵⁵

8.3 Do compliance breaches yield mismanagement?

To what degree of particularity does *VEB/Fortis (OK)* address matters pertaining to the domain of 'compliance'¹⁰⁵⁶ in the sense given to it in my thesis? The Enterprise

¹⁰⁵² *Sc* Filip Dierckx. The facts on Kloosterman's mail occurred on 30 September 2008. It is interesting to note that only on 26 September 2008 Dierckx had been elevated to interim CEO. Prior to that Dierckx had been CEO of Fortis bank and CEO Fortis merchant banking. In both capacities Dierckx had not been a member of the board and was a fellow ExCo member with Kloosterman. Elsewhere in the report by the investigators, it appears that the Belgians from the ExCo had more influence and that the bank (committee of directors – 'directoire') was relatively more influential than other group units or entities. Although these observations might be taken to add no more than *couleur locale*, I believe they are indicative (and no more than that) of the relationship between Dierckx and Kloosterman.

¹⁰⁵³ *Sc* Lex Kloosterman, member of the Fortis ExCo (*ie* not a boardmember) and responsible for strategy, private banking and asset management.

¹⁰⁵⁴ *VEB/Fortis (OK)* at 6.78.

¹⁰⁵⁵ See *VEB/Fortis (OK)* at 6.130.

¹⁰⁵⁶ Quaetaert herself must have found that the matter of postponing to disclose the much lower consideration (the extra setback of yet another € 0.8 billion) on the sale of certain HBU units to Deutsche Bank, concerned 'compliance', as she writes in her e-mail to Mittler: 'from a legal and

Division had been requested by applicants to determine that there had been mismanagement, which request had been founded on a list of factual circumstances distilled (by the applicants) as a selection from the findings and conclusions from the report by the investigators.¹⁰⁵⁷ The Enterprise Division in turn addresses each of the listed circumstances on the basis of the findings pertaining to such categories by the investigators, with inclusion in each instance of the distinct submissions from the parties. A number of the factual circumstances (*eg* those pertaining to the decision to join the consortium bid, not walking away from the consortium upon serious doubts as to the capability to finance the deal, or prioritisation of the solvency planning) will hardly be capable of being related to breaches of regulatory duties. I would, on those grounds, dismiss them as being potentially relevant to *specific* matters in the domain of compliance. The greater number of (the remaining) factual circumstances may, however, be tied to either duties to disclose price-sensitive information or to (the prohibition of) market-manipulation. Thus, they could all well be construed as pertaining to possible breaches of Wft provisions. However, it should be recalled here that enquiry proceedings serve, upon an application of certain parties, to determine whether there has been mismanagement, and not whether any particular regulatory provisions have been breached.

The Enterprise Division addresses this by observing:¹⁰⁵⁸

The Enterprise Division is not engaged to judge whether Fortis' actions or omissions result in liability under private or criminal law or – at administrative law – to the determination that the Act on financial supervision (Wft) has been breached. This means for instance that the replies to the question as to whether inside Fortis information as meant in article 5:53 para 1 Wft, price-sensitive information, were known and whether, in view of article 5:25i para 2 Wft, Fortis should have made such information generally available, may, it is true, play a role, but they are neither (always) of determining importance, nor do they (always) have to be determining. This, however, does not prevent the private, criminal and administrative law norms from playing a – either or not

compliance point of view'. I applaud such terminology as I believe it is often artificial and unhelpful to distinguish between legal on one hand and compliance on the other.

¹⁰⁵⁷ Thus, applicants had not sought to use all criticisms capable of being distilled from the investigators' report and the Enterprise Division mentions it will only use circumstances reflected in those criticisms where that would be necessary for the due consideration of the itemised complaints. See *VEB/Fortis (OK)* at 5.2.

indirect – role at the judgment whether Fortis has acted in breach of the aforementioned principles [the elementary principles of responsible entrepreneurship, AJK] and whether, on that ground, there has been mismanagement.

Thus, it seems to me we may derive from the ruling that the Enterprise Division itself points out that breaching compliance obligations may, indeed, lead to a determination that there has been mismanagement.¹⁰⁵⁹ And, as I indicated earlier, the Enterprise Division's determination that there has been mismanagement, may carry substantial relevance to the matter as to whether directors may be personally liable. To this, I would add that in my thesis I have sought to distinguish between compliance breaches resulting from breaches of the law and compliance breaches resulting from breaches of internal (voluntary) norms. The latter concerns the (bank's) internal perspective. Does *VEB/Fortis (OK)* portend something on this internal perspective? I cast the relevance thereof to this thesis with the research question whether there is a possibility that breaches of internal rules on compliance may expose the bank or any of its organs to responsibility and liability as a matter of corporate governance. I would add here that what this way of formulating does is that it seeks to establish the connection (if there were any) between the spheres of banking regulation on one hand and general company law on the other.¹⁰⁶⁰ On this matter, Raaijmakers makes some comments which I find particularly worthy of note:¹⁰⁶¹

¹⁰⁵⁸ *Ibid* at 4.2.

¹⁰⁵⁹ And I have also broached that this approach leaves Raaijmakers somewhat exasperated. In my earlier footnote 1033 I quoted him as having written, *ia*, that this causes unbridled judicial discretion to judge actions and norms of a disparate character without being tied to concrete claims and submissions from the litigant parties. I referred to Raaijmakers 2012, p 748.

¹⁰⁶⁰ At the risk of belabouring the point, I would also recall that the lawmaker had mentioned that the rules defined in the Wft (notably article 3:17 Wft) on the controlled conduct of the business find their consequences in common company law. See *supra* pp 218 and 227 with references to *Sib* 2006, 519, p 76.

¹⁰⁶¹ Raaijmakers 2012, p 751. I ought to mention that Raaijmakers' comments here concern *Kortekaas/Lippens*. At this particular juncture Raaijmakers infers from *Kortekaas/Lippens* that the Utrecht District Court appears to condone breaching the internal duty of care which obliges the managing board to obtain advice from internal specialists in order to promote the company's interest. Thus, in his view, the managing board may breach article 2:9 BW in order to act in the company's interest. I am not quite capable of following his reasoning. Meanwhile I would note that in *Kortekaas/Lippens* an interesting aspect is liability of the legal person (involving the legal person's organs collectively) vis-à-vis individual managing board members' personal and *direct* liability arising from such obligations as article 5:58 para 1 (d) Wft. The Utrecht District Court addresses this *ia* at 4.49 where it states that the threshold of personal serious reproachfulness (*cf Willemsen/NOM*) does not apply where the defendant had made certain statements himself, as the legal norm from article 5:58 Wft as was is not only directed to the issuing institution itself.

That care [the board's care to analyse and weigh relevant information on whether and when information is price-sensitive, AJK] obliges the board to obtain advice from its internal specialists [. . .]. Also the fulfilment of the duties incumbent on the company to disclose pertains to the tasks of the board which must, in doing so, comply with those internal rules in order for the board to acquit itself of its instruction to manage (article 2:9 BW).

8.4 Lessons-learnt from *VEB/Fortis (OK)*

Precisely on the matter of the internal relations the ruling in *VEB/Fortis (OK)* yields particular lessons for the future; lessons capable of readily being brought in connection with my thesis. In keeping with the title of this chapter; can one have one's cake and eat it? If there were one lesson, it is one concerning 'awareness'. Here, I find the case about the most striking illustration of the relevance of my main points. The Fortis culture had all the apparent signs of one where a circle of senior managers (not necessarily all members of the board) felt that on matters depending on technical knowledge, they could afford relying on advice provided by third parties, including internal subordinate officers or departments.¹⁰⁶² I would note that I indicated that relegating compliance to a mere organisational issue, risks abdication of ownership.¹⁰⁶³ From the Fortis investigation arises exactly such a picture; a situation in which a circle of senior managers had indeed succumbed to abdicating from their own responsibility and, moreover, had made it a habit of looking at their internal specialists as the proverbial order-takers.¹⁰⁶⁴

From the investigators' report we glean that General Counsel Jeannine Quaetaert had made repetitive attempts to put the specific matter of the obligation to disclose price-

¹⁰⁶² See *supra* p 259, where I point to the Enterprise Division's quote at *VEB/Fortis (OK)* at 6.130, from the investigators' report on Mittler, *amongst others*, when heard to give his version, mentioning that the legal department served, together with other duties, to advise the Fortis board members on such matters and that, as a rule, those board members could then rely upon the advice rendered. I also illustrated that it would appear from the report that there have been multiple instances where opinions from the legal department were ignored or at least were not acted upon.

¹⁰⁶³ *Cf supra* p 255.

¹⁰⁶⁴ Or errand-boys (even though Jeannine Quaetaert isn't a boy). From a cultural perspective I would add that Belgian societal relations tend to be more hierarchical than Dutch. See, *eg* Hampden-Turner and Trompenaars 2000, p 16, indicating that Belgium is less universalist than The Netherlands, and, hence, less inclined to 'count every vote'.

sensitive information to the attention of the boards of Fortis and of Fortis Bank.¹⁰⁶⁵ She had done so by addressing it at her annual presentations to these boards and by sending e-mails. Interestingly, Quaetaert had mooted to the investigators that the sensitivity within the ExCo and the board to promptly sharing price-sensitive information was not 100 per cent.¹⁰⁶⁶ The upshot from the case suggests that Quaetaert's approach didn't suffice. Perhaps I ought to phrase this differently, as it might now appear that I lay blame with Quaetaert. Again, the facts in this case point to a cultural issue; executives demonstrated a downright cavalier approach to matters regulatory. Although suggesting they could rely on advice, where any advice given didn't readily accommodate the desired outcome, executives saw free to neglect it. I should make it clear, therefore, that the blame entirely resides with the executives at issue and it is this point I wish to address by making suggestions towards creating clarity on ownership of compliance. And so it may be asked what should or could be done instead. The first observation I will make is that the simple fact that there have and will be law suits, corroborates my point that Dutch common company law is adequately equipped to promote the desired conduct of the relevant actors. There may be frustration that these legal proceedings are, by nature, 'after-the-event'. But the case law thereby developed will yield important instruction and it helps to fill in the law. It is tempting indeed to suggest that general counsels, compliance heads and, where so desired, outside advisors, attract bank boards' attention to such case law. This may help, considerably, to increase the 'sensitivity' which Quaetaert found painfully lacking. As will be seen later, I believe there is yet one better way to bring about such 'sensitisation'; having the Dutch corporate governance code shed unequivocal clarity on compliance pertaining to directors' duties, and, hence, firmly within their obligation properly to fulfil their task.

This brings the lessons learnt from *VEB/Fortis (OK)* to my home plate; *VEB/Fortis (OK)* is a proverbial wake-up call for the consequences of relegating compliance to a matter for specialists organised within a department. A bank's management can't have its cake and eat it; it can ill afford being in a senior position and at the same time not be responsible for compliance.

¹⁰⁶⁵ Whereby 'Fortis' collectively refers to FORTIS N.V. as well as FORTIS S.A./N.V, the organs of which two distinct companies constituted a personal union.

¹⁰⁶⁶ Report at 357.

8.5 Proof of the pudding – a view from ‘experts’

8.5.1 Setting of the experts’ meeting

On Friday 27 September 2013, I met with experts to discuss my conclusions and my recommendations. The meeting took place at the Head Office of ABN AMRO Bank.

Present at the meeting were:

- Mrs Gwendolyn van Tunen, Chief Compliance Officer, ABN AMRO Bank;
- Mrs Ingrid Kromheer, directeur Compliance, veiligheidszaken en operationeel risicomanagement SNS REAAL; and
- Mrs Danielle Balen, Compliance manager ABN AMRO. Mrs Balen’s portfolio contains corporate governance, culture, ethics and behaviour.

In order to prepare for this meeting I had distributed the latest version¹⁰⁶⁷ of chapter 9 containing the conclusions and recommendations from my thesis. The meeting took place on the basis of PowerPoint presentations summarising my conclusions and recommendations towards limited changes to the Dutch corporate governance code.

8.5.2 Compliance is conduct of business

The meeting expressed firm appreciation for the contention that compliance classifies as pertaining to the category conduct of business. Practice doesn’t sufficiently recognise this. The meeting felt that explicitly positioning compliance as an element of conduct of business, supports creating increased awareness of the importance of compliance. Equally, the meeting expressed appreciation for classifying compliance as being an integral part of the business of the bank. In this regard, the meeting expressed it to be culturally beneficial to shift away from classifying compliance within the category of risk management. It was stressed that although risk management methods may be deployed towards assessing the effectiveness of compliance controls and towards following up on identified deficiencies, assimilating compliance to risk management contributes to delegation and setting compliance

¹⁰⁶⁷ Sc the version as at 11 September 2013.

apart as an organisational matter. Likewise, the meeting rendered support for the position that compliance may not form the subject of setting an appetite for risk. The meeting expressed that the norm must be that banks comply with regulation. The term ‘zero-tolerance’ was expressed. At this point there was some discussion on possible instances of conflicting norms, where it lies with the managing board to come to a resolution taking the company’s interest as its point of orientation.

8.5.3 Dutch financial markets law confuses compliance for an organisational matter

In the particular context of mistaking compliance for an organisational matter, it was conceded that Dutch financial markets regulation contributes to this fallacy; the focus in the Regulation on prudential rules Wft on the department performing a compliance function. It was, however, added that the lawmaker’s inclusion of societal aspects (the reference to duties imposed by rules of unwritten law pertaining to proper social conduct) of integrity in *eg* articles 3:10 and 3:17 Wft, is helpful indeed in creating awareness within the organisations.

8.5.4 Recent case law from the Enterprise Division

On the discussion of recent cases before the Enterprise Division, the meeting expressed that it may well be that these illustrate a tendency to delegate, but at the same time, it was felt that the degree to which directors are inundated by a wide array of complex issues must not be underestimated. It was therefore felt that it isn’t overly surprising that directors seek reliance on expert opinions obtained from inside advisors, such as general counsels and heads of compliance.

8.5.5 ‘Independence’ of the compliance function

There was discussion on dual reporting lines and ‘independence’ of the compliance function. The meeting agreed that ‘independence’ may never imply that the compliance function may operate outside or distinct from the responsibility of the managing board (or the executive directors). Neither may it mean that a reporting line to a supervisory board member (or non-executive director) presumes that the person reported to may issue ‘instructions’. However, the meeting expressed that the value of

having access to the supervisory board (or to non-executive directors) lies in having the opportunity to ‘escalate’.

8.5.6 Does the instruction that compliance is a director’s duty help?

I invited the meeting to be outspoken on whether there exists a need to increase sensitivity to and awareness of compliance, and on the way this is best achieved. The meeting expressed that there remains scope for improvement, but reiterated that complexity is added to this by the wide variety of other issues clamouring the managing board’s attention. In this regard, the meeting found that recent case materials from the Enterprise Division are particularly valuable. It may therefore be helpful to package relevant findings facilitating ready understanding of their impact. In doing so, the approach may be a *lessons-learnt* presentation. Thus, in this particular context, the meeting agreed that Dutch company law is adequately equipped to foster the desired behaviour of the principal actors involved. However, finding means to express compliance pertaining to directors’ duties and, thereby, potentially triggering liability without adding substantive provisions to the Dutch companies act, was endorsed. As said before, the meeting concurred with my view that Dutch financial markets law, as it stands, tends to cloud the issue.

8.5.7 Suggested additions to the Dutch corporate governance code

The centre piece of the meeting was formed by my recommendations to make additions to the Dutch corporate governance code. It transpired that, whereas there is general appreciation for the suggested additions (especially the explicit alert to possible liability), the use of the noun ‘compliance’ is cause for confusion. The current text of Principle II.1, 2nd paragraph of the Dutch corporate governance code formulates a responsibility for *complying with all relevant primary and secondary legislation*.

The version for Principle II, 2nd paragraph of the Dutch corporate governance code, I proposed to the meeting¹⁰⁶⁸ is the following:

The managing board is responsible for managing the risks associated with the company activities and for financing the company. Compliance is the managing board's responsibility. Compliance pertains to the directors' obligation properly to fulfil their task. The managing board reports on each of these categories to the supervisory board and the audit committee, with which it discusses the internal risk management and control systems, as well as compliance.

The meeting held that my suggested substitution: '[C]ompliance is the responsibility of the managing board', does not make it clear that this encompasses 'all relevant primary and secondary legislation'. Moreover, and more importantly for my purposes, my substitution does not yield automatic understanding that the noun compliance refers to broader obligations than those resulting from (the existing category of) 'relevant primary and secondary legislation'. The meeting supported the importance of 'compliance' covering a broader array of obligations than those flowing from the law. The meeting expressed a preference for more active terminology; 'the managing board has the responsibility to comply.'

8.5.8 Is compliance more than law and regulation?

This took the discussion to the implications of 'extending' compliance, and possible liability, to internal, self-imposed, compliance regulation. Although it was granted that where the bank adopts voluntary rules, this is a matter of setting strategy, it raised the interesting point whether banks showing a greater ambition in setting such norms, actually expose themselves and their directors to heightened risk of liability. Thus, as was argued, raising the likelihood of liability, may temper a bank's level of ambition.

8.5.9 The need for more detailed guidance on compliance

¹⁰⁶⁸ This was the version contained in my draft as at 11 September 2013.

There was general support for stopping short of defining more granular guidance on compliance, either in the Dutch corporate governance code, or anywhere else. The meeting expressed its concern that yet adding further guidance leads to ticking-the-box compliance, which is tantamount to form over substance. Indeed, further detail almost necessarily triggers delegation to siloed departments.

8.5.10 No additions to the Banking Code

There was agreement on the deliberate choice not to add provisions to the Banking Code. Whereas it was discussed that the current Banking Code does not contain any substantial reference to compliance, it was felt that adding new areas to it at this stage risks further duplicity, due to overlap with the existing provisions from the Dutch corporate governance code. The latter Code already addresses compliance with law and regulation.

9 Chapter 9 – Conclusion and recommendations

9.1 Introduction

In this thesis I narrowed the perimeter to compliance at banks – more than anything because of the topicality of banking regulation; the causes of the persistent credit/financial/economic/sovereign debt crises are widely ascribed to banks.¹⁰⁶⁹ Thus, in any case in corporate governance terms, banks may increasingly be made out to be in a category of their own.¹⁰⁷⁰

I framed the starting point for my quest in this thesis thus:

Does the law shed adequate clarity on whether the ownership of compliance lies with the managing board, such that common company law promotes the desired conduct of the relevant actors? Is it thereby sufficiently clear that compliance is within the category of corporate governance?

To this, I have had to admonish why this matters. Banks are confronted with a slew of incrementally complex regulation. Their need to digest and accommodate such regulation will almost necessarily push them into a reactive mode. They will likely (have to) approach this in a process orientated manner,¹⁰⁷¹ risking bias to technical detail and a focus on compliance with the detailed rules. Precisely in view of the rules being laid down in regulation, banks will orientate themselves on the rule book to inform them on the meaning of compliance. Failing the rule book to instruct them on

¹⁰⁶⁹ Eijsbouts *et al* 2010, p 3, matter-of-factly note that financial institutions' practices have given rise to the most serious global economic crisis since the 'Great Depression' during the thirties of the previous century.

¹⁰⁷⁰ As a poignant signal – *de lege ferenda* – towards possibly singling out banks' corporate governance from general corporate governance, one may think of the suggestion by the (UK) Treasury to impose particular duties on bank directors, over and above the regime for directors' duties from sections 170 through 177 CA. See HM Treasury, Sanctions for the directors of failed banks, July 2012, paras 3.21 through 3.24.

¹⁰⁷¹ In this thesis, I moreover conclude that the way Dutch financial markets law addresses compliance, adds weight to the risk that compliance is (mis)taken to be process orientated; where regulation explicitly refers to compliance, this is to designate the department performing the compliance function.

compliance being a matter of corporate governance and thereby pertaining to directors' duties, banks will not readily construe such relation.¹⁰⁷²

So, banks not relating compliance to corporate governance will make them deal with it reactively, process orientated and mechanically; bank boards, not being duly sensitised on their ownership of compliance will feel inclined to delegate it to 'order-taking' departments performing a compliance function.¹⁰⁷³ Whereas delegation triggers loss of attention and risks shirking, my thesis establishes that compliance failures may actually lead to liability under general company law.

On compliance, I concluded that financial markets law does not provide a clear indication as to its meaning and scope. Where the statute law mentions compliance, this concerns the label for a department 'performing the compliance function in an independent and efficient manner'. At law, the compliance function is made out to be 'checking' the adherence to rules. In this manner, compliance is singled out as if it were a special aspect or a special branch of a bank's functioning. And this is an artificial notion of compliance. It is artificial, as I will moot below, because it overly detaches compliance from the (conduct of the) business.

Having come to my conclusions, I sought to establish the degree to which these appear practicable. This was done through a combined look at recent case law from the Enterprise Division laying bare an apparent lack of sensitivity to the relevance of certain obligations flowing from the law, seen by senior management as unnecessarily technical (and burdensome). The 'lesson-learnt' I derived from such case law is that where matters capable of being ascribed to 'compliance' are delegated, such delegation triggers abdication of responsibility.¹⁰⁷⁴ By way of a reality-check I conducted a meeting with experts from the field. In due appreciation thereof, I made a minor addition to my proposal for an amendment to the Dutch corporate governance code.

¹⁰⁷² They will, hence, not automatically take corporate governance for a *totum pro parte* for compliance.

¹⁰⁷³ A department as meant in article 21 Regulation prudential rules Wft.

¹⁰⁷⁴ See *supra* para 8.4.

This chapter serves to dovetail my conclusions in order to moot the reply to my primary research question (section 9.2). I then follow up with practical consequences (section 9.3); where I propose shifting the emphasis to compliance as an integral and inclusive part of the business (section 9.3.1). Within the section on practical consequences, I shall have to conduct a reality check, confronting the findings from my thesis with the actual state of how banks organise compliance (section 9.3.2). Hence, I shall address whether the upshot from my thesis were that I promote abolishing (existing) compliance departments (subsection 9.3.1.3). ‘Independence’ being contradictory to the desired inclusiveness leads me to reiterating that I am neither in favour of creating dual reporting lines for the compliance function to both the managing and supervisory boards, nor of giving the compliance function a power of veto (Section 9.3.5). There ought to be clarity as a matter of law that compliance pertains to the director’s duties. This is a matter for the common company law. I corroborate this with a suggestion to make limited additions to the Dutch corporate governance code (section 9.4 and subsection 9.4.1). I next get to financial markets law, picking up from chapter 3, where I left off by anticipating a suggested rewording for article 3:10 Wft promoting a more inclusive expression of the key regulatory objectives (Section 9.5).

9.2 Reply to my primary research question

As a matter of Dutch company law there appears to be an ‘axiomatic’ presumption that law and regulation are to be complied with. I expressed this earlier in this thesis as law compliance not being an option; there is no liberty to choose to operate outside the law. Whereas we learnt from *Schwandt/BPF* that acting in breach of provisions from the articles of association purporting to protect the company yields a ready presumption of improper fulfilment of a director’s duty, this should, thereby, apply *a fortiori* to acting in breach of the law.¹⁰⁷⁵ In addition, where the statute act addresses managing the company, this is done by using open-ended terms. Compliance is readily presumed as being ‘an aspect’ of running the company.¹⁰⁷⁶ All of this goes to

¹⁰⁷⁵ Cf Kortmann 2013 at 2, who phrases this as it being ill-conceivable that the position were different where breaches of the law are concerned.

¹⁰⁷⁶ Cf Assink 2010, at 16, where he lists overseeing compliance with law and regulation by the company as an aspect of the company running an enterprise.

explain why Dutch law is not outspoken on compliance as a directors' duty. Neither, I would add, is Dutch *law* clear on compliance pertaining to corporate governance.¹⁰⁷⁷ I ascribe this to the way Dutch law approaches corporate governance; possibly leading to a narrow view that corporate governance concerns the division of powers among companies' organs and that it thereby addresses the (system of) relationships between those organs. I moot that corporate governance is about the work of the governing bodies and it thereby – as a matter of substance – includes their duties. Corporate governance substantively encompasses the duties of the governing bodies, with a focus on setting the direction. This aspect of setting the direction presumes that directors promote the success of the company, manifestly by setting values for the company.¹⁰⁷⁸ Consequently, the law may readily acknowledge that compliance pertains to corporate governance.

I would emphasise that this is a matter of common company law, and it should not be a reason to add yet further detail to financial markets law. The lawmaker pointing out that the consequence of breaching the duty originating from article 3:17 Wft is a matter for the common company law, renders firm support to this view; in its explanatory memorandum to the Regulation prudential rules Wft, the lawmaker states:¹⁰⁷⁹

‘A controlled conduct of the business is primarily the financial company's own responsibility and it is in this company's own interest. This is why the rules contained in this regulation are predominantly “principle based”. According to company law (article 9 of Book 2 BW) the managing board is obliged properly to fulfil its task. The managing board must therefore, by virtue of the Civil Code, take care that the rules on the conduct of the business are being complied with.’

Thus, it is to be left to common company law to address the internal consequences of breaching banks' duty to conduct their business with integrity. Consequently, where banks breach internal compliance regulations, such as policies, standards, procedures or measures, which have been designed under the internal rules of the allocation of

¹⁰⁷⁷ Whereas principle II.1 para 2 of the Dutch corporate governance code – not to be mistaken for ‘law’ – explicitly provides that compliance with relevant law and regulation is a managing board responsibility.

¹⁰⁷⁸ Cf the UK Corporate Governance Code.

competence, this yields a ready presumption of improper fulfilment of the directors' duty and it thereby becomes sanctionable under article 2:9 BW. A director who has failed to take compliance measures may have acted in breach of article 2:9 BW.¹⁰⁸⁰

9.3 Practical consequences

9.3.1 Compliance as an integral part of the business

Bank directors' acknowledging compliance as part of their duties, corroborates their (awareness of) responsibility for compliance. It will readily make them focus on integrating the substantive consequences of law and internal rules alike into the conduct of business. Compliance thereby takes its proper place as *an integral and inclusive part* of the business. This approach will prevent a tendency to spend undue effort and capacity towards classifying (banking) regulation as either falling within or outside a category (artificially) labeled as 'compliance' which will then lead to the bank's governing bodies abdicating from their ownership of such subject matters.

Rather, banks' governing bodies will assume their responsibility of considering the regulatory environment as an important aspect in weighing up considerations leading to setting strategy. This is the bridge to banks' CSR; setting the strategy forcibly integrates taking a deliberate stance on a bank's place in society. Banks may derive any commitments beyond mandatory law from CSR, so long as they take care in establishing that such commitments are in fact conducive to their purpose.¹⁰⁸¹

Precisely in view of this, banks do well not to make an artificial and counter-productive distinction between regulatory (or law) compliance and CSR or sustainability.¹⁰⁸² This may for instance be a consequence of creating organisational units assuming the responsibility for (such) distinctly classified areas. Where a bank

¹⁰⁷⁹ *Stb* 2006, 519, p 76. *Cf* Strik 2009, p 216.

¹⁰⁸⁰ A view also phrased in Kersten en Diekman 2014, pp 253 and 265.

¹⁰⁸¹ *Cf* the phrasing in best practice provision II.1.2 (d) of the Dutch corporate governance code: 'corporate social responsibility issues *relevant to the enterprise*.' [emph. from me, AJK].

¹⁰⁸² It may be argued on good authority, for example, that CSR is a domain of compliance; the (Australian and New Zealand) 3806 Standard for Compliance ('AS/NZS3806') states that a compliance programme enables an organisation to demonstrate its commitment to standards of good corporate governance, ethics and community expectations.

has a distinct CSR unit, what department should take responsibility for preventing corruption?¹⁰⁸³

Without undue focus on organisational aspects and terminology, banks should ensure dedicating the appropriate resources to understanding the law. Lest there should remain any doubt about this, this is a technical matter for specialists. All too often the importance of ‘front-load’ technical and specialist knowledge where compliance is concerned is given short shrift. The ‘business’ in a bank will not be (overly) bothered were this relegated to a distinct function. Where technical issues are left to ‘compliance departments’, the degree to which these departments may dedicate their undivided attention to them suffers from the pressure they are under in attending to other re-active ‘compliance activities’.¹⁰⁸⁴ Banks must ensure that the required technical knowledge is capable of being actively deployed throughout their organisations, especially where knowledge is prerequisite to conducting the business (properly). In fact, where technical knowledge on banking regulation is a prerequisite to conducting a bank’s business, this is the most appropriate illustration that compliance is *an integral part* of the business. On such matters, it is incorrect and misleading to distinguish compliance from the conduct of business. I use the term misleading on purpose; classifying certain aspects of business transactions as pertaining to compliance creates false security. It would be inefficient to accommodate such knowledge in siloed departments of the bank. The complexity of banking regulation increases. This lays claims on capacity.

9.3.1.1 Organisation – the reality of existing compliance departments

¹⁰⁸³ Given that anti-corruption is *generally recognised* as a CSR topic – see, eg, Eijsbouts *et al*, p 23, and Lambooj 2010, p 206.

¹⁰⁸⁴ Compliance ‘departments’ are being hijacked to process administrative requirements such as the receiving-end of client due diligence processes (with accompanying responsibility for deficient know-your-client records), and a panoply of ‘monitoring’ duties. Combined with this, compliance departments are made responsible for managing repair programmes for all matter of backlogs and deficiencies as ‘identified’ by various other ‘departments’, notably ‘operational risk’ and ‘internal audit’ functions. Within compliance functions itself, this is corroborated by ‘cultural’ influences. The more senior staff in compliance departments have an affinity with ‘risk management’, the more the compliance department itself will be process-driven. The end-result may lead to compliance as a ‘ticking-the box’ exercise, an approach feared by Tjong Tjin Tai. See *supra* p 63. I should note that

Hence, I contend that compliance ought not overly to be mistaken for an organisational matter. The matter to hand conveniently serves as a reality check; all banks have compliance departments.¹⁰⁸⁵ Do I stand to be accused of being in denial of reality? Or do I, by submitting that compliance is an integral part of the business, thereby promote abolishment of the compliance function, for instance by striking it from the Regulation prudential rules Wft? In doing so, am I suggesting that banks should dismantle their existing compliance departments? And, closely connected to organisational ramifications; what about the division of responsibilities between various support units? The Basel Committee on Banking Supervision concedes there is no necessity that (all) ‘compliance responsibilities’ are carried out by a ‘compliance department’ or ‘compliance unit’.¹⁰⁸⁶ Phrased differently, I shall have to come up with a clear indication as to what the consequences of my reply to the primary research question are. A natural sequel to formulating such consequences is the matter of how it may be established whether any actions taken in observance of my recommendations work.

In order to formulate my replies to these practical questions, it will be helpful to refer to such responsibilities as are typically dubbed ‘compliance responsibilities’. This is an area which may benefit from using the designation of various (such) compliance responsibilities within Compliance and the compliance function in banks 2005,¹⁰⁸⁷ which categorises the following responsibilities:¹⁰⁸⁸

1. Advice;
2. Guidance and education (to which I add: awareness creation);
3. Identification, measurement and assessment of compliance risk;

Tjong Tjin Tai’s assertion is made in the context of a Wft-centred approach to compliance with duty of care as opposed to a BW-approach to it. In my view there is a common denominator.

¹⁰⁸⁵ Whereas in other sectors or industries this applies to a lesser extent; however it is not uncommon that companies allocate the responsibility for compliance issues to other support units, most often the legal function.

¹⁰⁸⁶ Compliance and the compliance function in banks 2005, para 35. ‘Compliance responsibilities’ refers to the activities the paper identifies as typically pertaining to those of a template compliance function.

¹⁰⁸⁷ My first inclination was to look closer to home; Dutch financial markets law. Article 21 Regulation prudential rules contains but a small category of responsibilities. Whereas articles 10 through 16 of the same Regulation span a much wider category, starting with the duty systematically to analyse integrity risks, whilst pertaining to the domain of ‘integrity’, the Regulation does not presume these tasks will be performed by a compliance department.

¹⁰⁸⁸ Compliance and the compliance function in banks 2005, paras 35 through 43.

4. Monitoring, testing and reporting; and
5. Statutory responsibilities and liaison.

I will first look at each of these responsibilities in turn (section 9.3.1.2), then to formulate my replies to the questions, with recommendations on how to make my suggestions practicable (section 9.3.4).

9.3.1.2 Compliance function's responsibilities according to Basel

As to 1 Advice

On this, Compliance and the compliance function in banks 2005 is very matter-of-fact; it is to the compliance function to advise senior management on 'compliance laws, rules and standards', whereby this aspect also covers keeping senior management informed on developments. The terms 'compliance laws, rules and standards' are open-ended. In addition, providing that *the compliance function* advises on (various) *compliance aspects* is circular. Likely, senior management seeks the advice from the compliance function as much as it may (wish to) be advised by a wide array of other parties with equal or even greater claim to knowledge on any given particular issue. Obviously, where *regulation* is concerned, senior management may solicit the advice from specialist lawyers. Where CSR-norms (comprising anti-corruption)¹⁰⁸⁹ are concerned, it will take advice from CSR-specialists. In practice, therefore, the (erroneous) suggestion there might or should be a clear definition of the category of 'compliance laws, rules and standards' will lead to organisation turf battles and lack of focus.

This is capable of being illustrated by many examples. For instance one may look at preventing the bank from being misused for money laundering. 'Anti-money laundering' is readily associated with compliance'.¹⁰⁹⁰ Probably all anti-money

¹⁰⁸⁹ See *supra* p 52, where I mention that there is general acceptance that anti-corruption is within the class of CSR-norms.

¹⁰⁹⁰ Equally accepted terminology, with an arguably wider remit, has it that this concerns 'customer due diligence'. See *eg* Customer due diligence for banks 2001. Within Customer due diligence for

laundering compliance programmes start at a ‘client acceptance policy’.¹⁰⁹¹ If there were one core area where a bank’s *business* must claim ownership, it is (setting the policy on) what clients it will do business with. Thus, although it is conceivable that the compliance function advises senior management on *regulatory* matters concerning client acceptance (as much as senior management will seek the advice from specialist lawyers), and although it is conceivable that senior management will ask the compliance function’s support in designing its client acceptance policy (as much as senior management will invite internal auditors to advise on whether such client acceptance policy is fit-for-purpose and effective), an (implied) understanding that anti-money laundering is within the remit of the compliance function ought not to lead to the conclusion that the compliance function *sets* the client acceptance policy. Rather, on anti-money laundering, the (UK) Joint Money Laundering Steering Group (‘JMLSG’) poignantly reminds us: ‘[S]enior management must be fully engaged in the decision making processes, and must take ownership of the risk-based approach, since they will be held accountable if the approach is inadequate.’¹⁰⁹²

I wish to take this particular example, looked at in isolation, one step further. A client acceptance policy relies on the degree to which the business itself is convinced of the substantive importance of taking a considered view on any given client’s (or client segment’s) repute. Only those in the business with proven knowledge of and affinity with that business’s particular target client segment are capable of taking such decisions. Of course, a business will benefit from taking advice on how to design a client acceptance policy. But in the end, it must be the business which assumes ownership. I am therefore in favour of organising the required knowledge and skills closely to the business and closely to the business’s senior management. The greater the distance in organisational and physical terms alike between, say, the compliance function and the business, the greater the chance that relevant compliance aspects will be lost sight of. To a considerable extent, this has to do with creating acceptability of and natural authority for advice rendered. Senior management will be naturally more inclined to act upon the advice of a party whose knowledge it accepts as it

banks 2001, para 19 designates a customer acceptance policy as a key element of preventing the bank from being used by criminal elements.

¹⁰⁹¹ Cf article 14 Regulation prudential rules Wft which requires the institution to have procedures and measures on customer acceptance.

¹⁰⁹² JMLSG Guidance 2011, para 1.4.

demonstrably absorbs and reflects insights with particular significance to the business to hand. The upshot of this is to do with the single most important success factor to advice; the advisor's natural authority.

As to 2 Guidance and education

Compliance and the compliance function in banks 2005 divides this compliance responsibility between educational activities, and issuing written guidance on the appropriate implementation of compliance laws, the latter for example through policies and procedures.¹⁰⁹³ Where these subjects are concerned, I would add creation of awareness as an important aspect. Clearly, 'education' is a specialism best entrusted to those versed in pedagogics. I do not see any reason that any of these responsibilities could not be successfully performed by a compliance function. But along identical lines as expounded above on advice, I believe this may only work properly where they are performed in a manner truly worthy of gaining acceptance from the target audience. And, similarly as with any support function rendering advice, this hinges upon natural authority.

As a matter of reality I acknowledge there are many areas where a bank will simply be forced to conduct educational activities and to record them. Obviously there will be a tendency to organise such activities with a great ambition for efficiency. Thus, banks will naturally seek means to providing e-based learning modules and the like, through which they may automate registration of participation and end-test results. In like vein, where a bank will wish to make sure certain key communications have reached all relevant staff, electronic media solutions do have their role to fulfil. I am not categorically negating or downplaying the potential for quality in e-based learning. Where it is essential, however, that education in the widest sense of the term, thus also encompassing the creation of awareness, leads to the acquisition of *new* skills or to a change in *habitus*, it will only succeed where the education garners acceptance. And this requires that the subject matter of the education strikes a chord with the recipient. Hence, there must be tangible affinity with the target audience. Typically, this requires specialisation. An important element of this is that any target

¹⁰⁹³ Para 36.

audience will only truly be prepared to accept ‘education’, if it feels respected. Such respect may be attained where any audience, no matter its average education level, is not underestimated. Another way of saying this is that education must be made interesting. Thorough knowledge of and affinity with the given business and compliance aspects particular to that business are critical success factors. The aspect of specialisation presumes there is clear understanding of two distinct matters:

1. The place where, within a business line, there exists a (genuine) need for education; and
2. What the content of the education should be.

Thus, where a bank is organised along multiple ‘business lines’, I promote organising compliance training within the business lines, as their own clear responsibility. In due recognition of the potential for capacity problems, I should add that it is possible to achieve educational objectives through different approaches, whereby one could think of engaging outside providers.¹⁰⁹⁴ With the latter, clearly such outside providers should be ‘up to the job’ in that they possess adequate knowledge of and affinity with their target environment’s business and culture.¹⁰⁹⁵

As to 3 Identification, measurement and assessment of compliance risk

On the responsibility *to identify* compliance risks,¹⁰⁹⁶ Compliance and the compliance function in banks 2005 indicates that this must be done pro-actively. According to the paper, identified risks should be documented and assessed. Such risks should concern those “associated with the bank’s business activities, including the development of new products and business practices, the proposed establishment of new types of business or customer relationships or material changes in the nature of such relationships.”

Thus, Compliance and the compliance function in banks 2005 departs from classifying compliance as a risk, which, in turn implies that, at least where executing such responsibility as identifying compliance risks is concerned, performing a

¹⁰⁹⁴ Which may include bank colleagues from other organisational units than a particular business line or environment.

¹⁰⁹⁵ This normally leads to ‘up-front’ cost.

compliance function is tantamount to exercising a risk management function. Whereas I must hope it is clear at this stage in my thesis that I find that compliance and risk are distinct, I shall leave this issue aside. I expand on the particular matter of identifying activities susceptible to breaching compliance norms particular to the business in which they are performed. Understanding the (nature of the) activities in any of a bank's businesses, requires intimate specialist knowledge of such business.

With due appreciation of the anecdotal nature of one singular case, I believe this is well capable of illustration by the events surrounding a 'coordinated settlement' involving Rabobank ('Rabo') of 29 October 2013 in view of Rabo through the acts of certain traders and managers located throughout the world, engaging in manipulative acts that undermined the integrity of LIBOR and Euribor.¹⁰⁹⁷ For the purposes of my thesis, the heart of the matter lies in the reproach to Rabo for its failure to identify the process for submitting LIBOR and Euribor contributions, as one specifically classifying as a risk or, otherwise, as an area of attention for the compliance function. DNB concludes that whilst Rabo senior and executive management had been aware that it acted as a contributor bank to various LIBOR and Euribor currency panels, they had, at least not until the end of 2010, not acknowledged it as susceptible to risk.¹⁰⁹⁸ Whereas DNB finds that Rabo's compliance function has acted inadequately, it ascribes the responsibility for identifying the risks associated with the process for submitting LIBOR and Euribor contributions, to the operational risk management function.¹⁰⁹⁹

The reason I find the Rabo LIBOR and Euribor matter particularly apt as a case in point, is that it lays bare the practicality and reality of pro-actively identifying what activities are being undertaken throughout a bank's various businesses, and then to adduce an adequate analysis of the degree to which (any) such activities are susceptible to norm breaches. Sequentially, the first step consists of assessing how a bank may organise awareness and noticeability of its activities. In this Rabo instance, it appears that during a considerable time the activity consisting of making the

¹⁰⁹⁶ Para 37.

¹⁰⁹⁷ See, *eg*, CFTC Order 29 October 2013 in the matter of Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A., CFTC Docket No. 14-02, and see letter DNB to Rabo of same date.

¹⁰⁹⁸ DNB letter to Rabo of 29 October 2013, section 4.2, pp 11 and 12.

¹⁰⁹⁹ *Ibid*, para 4.9, p 18.

LIBOR and Euribor contributions had simply not been recognised as susceptible to risk. DNB writes that from the nineties¹¹⁰⁰ Rabo had acceded to various LIBOR-panels for a number of currencies, and that it had been a Euribor-contributor from 4 January 1999. I have already noted above that DNB finds that until the end of 2010, Rabo had not classified the contribution processes as susceptible to risk. From the DNB report on its findings, this is, strikingly, capable of being taken one considerable step further; during the period 2006 through 2010 the LIBOR and Euribor contribution processes had not altogether been *acknowledged* in the risk (self) assessments conducted within the relevant businesses, whereby DNB jointly lists Global Financial Markets, Client Trading and Money Markets, and Liquidity and Finance.¹¹⁰¹ In other words, the business itself had not earmarked the activity consisting of making these contributions as one worthy of additional safeguards.

In logical order, the next step would then be to assess the norms particularly significant to any such activities. DNB presumes a business to be aware of susceptibility to risk where such business is or could be aware of certain documents. Thus, DNB writes that to Rabo there were known as well as recognisable serious signals that there were risks to the LIBOR and Euribor submission processes;¹¹⁰² these serious signals being made up by a variety of documents ranging from newspaper articles, a 2008 BIS report and, particularly relevant to LIBOR, publications from the British Bankers' Association.¹¹⁰³ Whereas DNB matter-of-factly considers that Rabo (without any further description as to *where* within its organisation) had either received such documents or could have been aware of them,¹¹⁰⁴ it subsequently chides the compliance department for not possessing adequate knowledge of relevant regulation, including the various sources mentioned above.¹¹⁰⁵

¹¹⁰⁰ *Ibid.*, p 11.

¹¹⁰¹ Rabobank Nederland is the (customarily used) trade name for Coöperatieve Centrale Raiffeisen en Boerenleenbank B.A., a cooperative association under article 2:53 para 1 BW. Her membership is comprised of 136 'local Rabobanks', each in turn being cooperative associations. Rabobank Nederland operates 'Rabobank International' as its own captive banking business. Within Rabobank International there exists a *business line* 'Global Financial Markets', which is organised in turn along *divisions*. The *division* Client Trading and Money Markets operates several *departments*. The submissions for the LIBOR and Euribor contributions were accommodated within the Liquidity and Finance *department*.

¹¹⁰² DNB letter to Rabo of 29 October 2013, p 12.

¹¹⁰³ *Ibid.* – DNB lists documents containing the serious signals in para 2, pp 6 through 10.

¹¹⁰⁴ *Ibid.*, see *eg* pp 9 and 12.

¹¹⁰⁵ *Ibid.* p 17.

In order to be able to understand on what grounds DNB chides the compliance function, I must look more closely at its implied approach to organising the role and involvement of the compliance function. And this brings us back to ‘three lines of defence’, earlier discussed in this thesis.¹¹⁰⁶ DNB starts off on the premise that in relation to the LIBOR and Euribor submission process Rabo’s ‘three lines of defence-model’ had performed inadequately. From the detailed report it would seem that DNB accepts Rabo ‘operating’ such three lines of defence-model as a given. In any case DNB is not explicit on whether it finds that there is a (normative) expectation for a bank to operate the three lines of defence-model. Thus, upon the construction of DNB’s analysis, it gets to assess the role and the performance of both Rabo group functions compliance and internal audit, *because Rabo alleges* operating a three lines of defence-model.¹¹⁰⁷ As far I can see, however, DNB does not profess that, if a bank operated such three lines of defence-model, it ought to function in any particularly prescribed manner.

At the particular point of *identifying, measuring and assessing compliance risk*, it would appear that, on the matter of the LIBOR and Euribor contributions, DNB finds that Rabo ought to have conducted *ex ante* risk analyses, the responsibility for which it ascribes to the risk (self)assessment processes operated by the operational risk function (‘ORM’), and not to any ‘responsibilities’ lying with the compliance function. Thus DNB writes:¹¹⁰⁸

‘During the period 2006 up to and including 2010 the LIBOR and Euribor submission-process have incorrectly not been identified as a process carrying an increased or operational risk. It is a matter of the responsibilities of (operational) risk management to identify, measure and assess such risks to which a financial company is or may be exposed.’

¹¹⁰⁶ *Supra* section 3.10, p 101.

¹¹⁰⁷ DNB letter to Rabo of 29 October 2013, p 5: ‘[O]nderdeel van het onderzoek was ook het beoordelen van de rol en het functioneren van de groepsstaffuncties compliance en de interne accountantsdienst [. . .]. *Rabobank hanteert immers* het ‘three lines of defence’-model om mede te voldoen aan de wettelijke eisen m.b.t. integere en beheerste bedrijfsvoering.’ Emph. from me, AJK.

¹¹⁰⁸ *Ibid*, p 18.

To me, the upshot is that one may hardly presume a compliance function being capable of identifying such activities which are not being earmarked, listed, categorised or otherwise reported by the business itself. In my view, this is a reason to be perfectly clear on one particular point; it does not lie with a compliance function to make an inventory of the bank's businesses or activities. This ought to lie with the business itself. The next step – assessing the norms particularly significant to such activities – is one requiring specialisation as a condition prerequisite to any (remote) expectation that this may function successfully. Yet again, the Rabo case is a perfect illustration of this point. If we supposed, for the sake of argument, that the LIBOR and Euribor contributions had been brought to the attention of the compliance function, it is a stretch to presume the compliance function apprised of any such documents which DNB readily assimilates to 'known and recognisable serious signals' of the risks pertaining to the LIBOR and Euribor contributions. From a compliance function's perspective, the more so where it were a *group staff function* (as it apparently is at Rabo), it is not immediately evident it would take notice of them. None of the BBA documents DNB lists in its report,¹¹⁰⁹ is by its nature addressed to a compliance (function) audience. The only references the BBA documents make to (the term) *compliance* is where the paper setting out a proposed methodology for how enhanced LIBOR governance and scrutiny would operate in the future of 17 November 2008 and the Contributor Terms of Reference of 16 July 2009, mentions that the banks were required to have internal processes in place to audit their LIBOR submissions *as part of their annual compliance procedures*.¹¹¹⁰ Otherwise, all documents merely focus on procedural matters.

The point one only stands a reasonable chance of being able to identify where and how a certain activity is susceptible to breaching compliance norms, may easily be underscored by gleaning the JMLSG guidance for the UK financial sector on the particular matter of *prevention of money laundering*. The guidance is divided in three parts, whereby Part II provides guidance for specific industry sectors and Part III is intended to provide additional guidance on a number of specific areas of activity. If only looking at Part II, we find a categorisation into no less than 22 distinct areas of

¹¹⁰⁹ *Ibid.*, pp 8 and 9.

¹¹¹⁰ Emph from me, AJK. See the BBA's paper LIBOR Governance and Scrutiny 17 November 2008, para 2.12 on p 9 and the BBA's Terms of Reference para 10.

‘specific industry sectors’, to which Part III adds yet another five layers, by their nature possibly diagonally cutting through all previous guidance.¹¹¹¹ The upshot from the JMLSG guidance is perfectly clear; anti-money laundering measures depend to a considerable extent on the given specific activity and where one is not intimately familiar with the activity, it will be difficult to know where to look and what to look for. JMLSG Guidance 2011, provides:¹¹¹²

Senior management must be fully engaged in the decision making processes, and must take ownership of the risk-based approach, since they will be held accountable if the approach is inadequate. Senior management must be aware of the level of money laundering risk the firm is exposed to and take a view whether the firm is equipped to mitigate that risk effectively; this implies that decisions on entering or maintaining high-risk business relationships must be escalated to senior management. That said, provided the assessment of the risks has been approached in a considered way, the selection of risk mitigation procedures is appropriate, all the relevant decisions are properly recorded, and the firm’s procedures are followed and applied effectively, the risk of censure should be small.

As to 4 Monitoring, testing and reporting

Compliance and the compliance function in banks envisages that it is the compliance function which ‘monitors and tests compliance’, to be effectuated through what it terms ‘sufficient and representative compliance testing.’¹¹¹³ Looked at it this way, this may be tantamount to *checking* the adherence to legal and internal rules having been drafted by the financial company or branch itself; *ie* the requirement from article 21 para 1 Regulation prudential rules Wft.

Without the pretense of completeness, there are several areas where there exist ‘monitoring’ requirements. One may think, for instance, of measures in order to check adherence to an ‘insider policy’ as required in article 5:65 Wft. The AFM Policy Statement on the template for such insider policy¹¹¹⁴ designates the person

¹¹¹¹ Addressing, for instance, jurisdictional perspectives.

¹¹¹² Para 1.4.

¹¹¹³ Compliance and the compliance function in banks 2005, paras 40 and 41.

¹¹¹⁴ Beleidsregel Wft 06-04 van de AFM van 12 december 2006.

meant in article 5:60 para 4 Wft as ‘the compliance officer’.¹¹¹⁵ In practice, checking adherence to such internal policies will consist of the compliance department checking transaction statements from safe-custody accounts. Another altogether different area often denominated under monitoring is the duty to report *unusual transactions* from article 16 para 1 Wwft. This, often (erroneously) seen in combination with a bank’s compliance measures in respect of the duty continuously to check the business relationship and the transactions conducted throughout the duration of such business relationship,¹¹¹⁶ causes banks to have their compliance function operate software supported so-called ‘transaction monitoring’ programmes. In practice, specifically designated units within compliance scrutinise exception reports being generated by the transaction monitoring programme. Also, where banks’ measures to comply with the Sanctions Act 1977 are concerned, the Arrangement on the Supervision (of the) Sanctions Act 1977,¹¹¹⁷ practically leads to ‘monitoring’ measures, to be accommodated by their compliance functions. The explanatory note to this Arrangement uses the term ‘monitoring’ throughout – thereby meaning that banks must be in a position to check the identities of parties connected to transactions, as and when¹¹¹⁸ such transactions occur.¹¹¹⁹

It was especially in view of the terminological confusion as a consequence of the proliferation throughout banking regulation of terms such as ‘monitoring’, that the Wolfsberg Group of Banks issued its *statement* on AML screening, monitoring and searching in September 2003, followed by its AML screening, monitoring and searching *paper* in 2009. By these papers, benefiting from its truly insightful perspective on feasibility and practicability within large globally operating banks, the Wolfsberg Group endeavours to influence the regulatory debate through admonishing best-practice. From the Group’s definition of the term monitoring, whilst noting that monitoring occurs ‘after the event’,¹¹²⁰ it is nonetheless clear that the process of monitoring comprises *all transactions*. Even *one single transaction* may need to

¹¹¹⁵ *Ibid*, article 1 (d).

¹¹¹⁶ Article 3 para 2 (d) Wwft.

¹¹¹⁷ Regeling van de Autoriteit Financiële Markten en De Nederlandsche Bank NV van 28 september 2005, houdende regels met betrekking tot het financieel verkeer (Regeling toezicht Sanctiewet 1977).

¹¹¹⁸ The Wolfsberg Group would call this: ‘screening’, since it presumes a ‘real-time’ approach; see Wolfsberg Statement on AML Screening, Monitoring and Searching (2009), section 2.

¹¹¹⁹ Regeling toezicht Sanctiewet 1977, explanatory note, para 4.3.

¹¹²⁰ Wolfsberg Statement on AML Screening, Monitoring and Searching (2009), section 2.

come up for review. And, as I wrote before, whereas in practice compliance departments or units assume the responsibility for monitoring described in each of the above examples, they assume a panoply of monitoring duties alongside processing administrative processes in areas ranging from managing insider lists,¹¹²¹ conducting (aspects of) client due diligence processes,¹¹²² through managing the process of keeping so-called sanctions lists up-to-date.¹¹²³

Importantly, the Basel paper's *monitoring, testing and reporting* responsibility is to be distinguished from any such activities. The Basel paper's responsibility concerns checking adherence to ('compliance') norms – whereby others are performing the duties subject to such norms. In any of the monitoring and administrative activities described above, however, it is the compliance function *itself* performing duties. Above all else, I need to be realistic; where law requires a compliance department to perform certain duties, this must be unconditionally accommodated. I believe, however, that outside such cases where there exist statutory obligations, banks should exercise the utmost restraint in allocating such duties to the compliance function.

First, where the compliance function fulfils monitoring duties, it thereby assumes responsibility for them. Where the compliance function's activities are organised separate from a business (line), this means that the business thereby abdicates from its responsibility. Of course, where the compliance function is integrated in the business (line), this problem does not arise. In such case, 'compliance' is nothing other than a denominator for certain (procedural) activities, but this does not deflect from compliance being *an integrated part* of the business. Second, performing monitoring duties lies outside the specialist competence of the compliance function. It thereby leads to distraction and loss of focus. In practice, the degree to which compliance functions are bogged down with administrative and monitoring duties deflects from their capacity to add value by advising on regulation. Finally, closely related to the previous point, we should not lose sight of the fact that checking whether procedures

¹¹²¹ Cf article 5:59 para 1 Wft.

¹¹²² Cf article 3 para 1 Wwft.

¹¹²³ Eg making sure that the electronic-Combined Targeted Financial Sanctions' List ('e-CTFSL') of the European Commission is fed into a bank's relationship data bases so as to enable screening against lists of known or suspected terrorists. See Regeling toezicht Sanctiewet 1977, explanatory note para 4.2.

and measures are fit-for-purpose and effective is the core competence of (internal) audit.

Hence, if compliance functions were to assume a role in checking adherence to norms, this may have to include the compliance function advising on the substantive content on the norm itself. If, from such analysis, it appeared that the norm leaves scope for interpretation, this would then require the business to take an informed *business decision* on how the organisation wishes to implement it. The compliance function may consequently consult executive management on designing policy reflecting the business decision. The compliance function may then consult executive management on procedures and measures in order to effectuate the policy. It is at such point that internal audit may also be engaged as it pertains to its competence to assess (operational) effectiveness.

As to 5 Statutory responsibilities and liaison

Compliance and the compliance function in banks 2005, where ‘statutory responsibilities’ are concerned, simply mentions that the compliance function may have specific statutory responsibilities, and it thereby gives the example of the role of *anti-money laundering reporting officer* as, *eg*, the MLRO known under the English regulatory regime.¹¹²⁴ Obviously, where (Dutch financial markets) law defines the role of the ‘department performing the compliance function’,¹¹²⁵ any tasks explicitly attributed to it must thereby be assumed by the compliance function. To use modernist language, this is non-negotiable. In my view, it is undesirable however that financial markets law should add specific and further ranging responsibilities to the compliance function. Generally, I believe it is altogether undesirable and counter-productive that financial markets law expands, however much I must accept this as a fact. Specifically where it concerns compliance, although prescription by law of organisational issues may promote the certainty of law, it raises the degree to which

¹¹²⁴ For the English situation, a difference applies between law and regulation. Whereas, as an obligation at law ((Money Laundering Regulation 20(2)(d)), all firms must appoint a so-called nominated officer, under SYSC 6.3.9 a firm must appoint a natural person as its MLRO. The MLRO assumes personal responsibility and, hence, liability for discharging his duties – failure to do so constitutes conduct that does not comply with Statement of Principle 7 for Approved Persons. See, *eg*, JMLSG Part I, para 3.8. Under Dutch Regulation there is no equivalent for the MLRO.

¹¹²⁵ As it does in article 21 Regulation prudential rules Wft.

business may mistakenly take compliance for an organisational matter, as opposed to an integral and indivisible part of its responsibilities.

Basel and the compliance function in banks 2005 moots that the compliance function may liaise with ‘relevant external bodies’, and it lists regulators, standard setters and external experts as instances of the compliance function’s likely counterparts. Where the bank is represented to any such outside parties that have power to influence the decisions or the behaviour of the bank, the bank’s representatives must muster knowledge and seniority to warrant ‘equality of arms’. This is clearly a critical factor in each of the examples from the Basel paper, and more than anywhere it applies to the bank’s representations to its competent regulators. With this, I would add that the moment any exchanges with third parties may have strategic implications – *eg* negotiating with the regulator on ramifications to strategy in response to measures to be taken against the bank¹¹²⁶ – it must, once again, be ensured that *ownership* is taken where it naturally belongs; *strategy* being a matter for the managing board.¹¹²⁷ The appropriate actors must take a direct involvement in the process since if it were otherwise there is a risk any required changes will lack organisational acceptability. Where strategic changes (forcibly) made as a consequence of representations to regulators lack the active involvement of the managing board, it is improbable they will meet with the acceptance of the business. I believe all this serves to illustrate the strategic importance of regulatory relations altogether. Thus, as in the Rabo LIBOR case, a bank may engage in discussions with the regulator on industry sectors in which it will be active. Equally likely a bank may engage in discussions on the geographical spread of its business, for instance as to whether it envisages accommodating ‘US persons’ as clients.¹¹²⁸

¹¹²⁶ For instance, as part of the measures Rabo has undertaken in the coordinated settlement of 29 October 2013, it will conduct a strategic reorientation of high risk activities of its business line Global Financial Markets. See DNB letter to Rabo of 29 October 2013, p 3.

¹¹²⁷ See *supra* p 107

¹¹²⁸ Where US persons are account holders or receive payments from foreign banks this may trigger applicability of US law. For instance under the (US) Foreign Account Tax Compliance Act (‘FATCA’), ‘foreign financial institutions’, including banks with no activities in the US, must report to the (US) Inland Revenue Service, the identities, balances and transactions of all ‘US persons’ holding accounts with them. Where domestic law prohibits disclosing the required information, the foreign financial institution must either make its US person client waive his right to protection under the law governing the bank, or it must close out the business relationship. See J P van Schoonhoven, ‘Privacy versus FATCA: twee regimes op één kussen?’, *TvCO* 2013/3, pp 287 through 294. The fact that accommodating US clients may have (even) more than ‘strategic’ implications may be illustrated with the settlement between the US (Government), the (US) Internal Revenue Service and UBS AG of 19

Where the nature of an involvement as ‘liaison’ to, say, regulators, is no other or more than ‘secretarial’, which does not preclude there are important requirements on professionalism or administration, there is no particular reason to involve the compliance function. With this, we are back to (mere) organisation. Given the increasing complexity of record-keeping issues, such liaison task is perhaps best allocated to a bank’s record-keeping specialists.

9.3.1.3 Replies to practical questions from subsection 9.3.1.1

The start of subsection 9.3.1.1, contained the following questions:

1. Am I in denial of reality – do I seek to negate the existence of compliance functions;
2. Do I promote the abolishment of the compliance function;
3. Should banks dismantle their (existing) compliance departments;
4. What about the division of responsibilities between certain support units (‘turf battles’);
5. What are the consequences of my reply to the primary research question in this thesis; and
6. How may it be established that my recommendations work.

I shall now reply to each of these questions in turn.

As to 1 Do I seek to negate the existence of compliance functions?

Whereas I do not deliberately pay short shrift to the reality and existence of compliance functions, I wrote this thesis primarily from the point of view of the law, and I sought faithfully to account for the compliance function’s overly prominent position in Dutch financial markets law. I equally faithfully conceded that where the law contains requirements on the organisation of the compliance function, fulfilment of such requirements is non-negotiable (this rhymes with my tenet that compliance

with the law is non-negotiable altogether). My thesis does not profess to reflect the practicality of existing compliance departments and their functioning. I have, however, started out on a hypothetical view; whereas the law does not shed adequate clarity on ownership of compliance lying with the managing board, banks will persist in confusing compliance for an organisation matter. And I have then sought to illustrate this by gleaning recent case law. It may now be asked whether my appraisal that there exists a lack of appreciation of ownership of compliance was also, if only in part, meant as a reflection on the quality or the performance of existing compliance functions. I hope the reader of my thesis will appreciate that it was not. Instead, I contend that the cause for such lack of appreciation lies with the law).

As to 2 Should the compliance function be abolished?

In my view, Dutch financial markets law contributes to compliance mistakenly being assimilated to a department (performing ‘the compliance function’).¹¹²⁹ Does this imply that I submit striking the compliance function from the statute act? I would recall that what we have in the law is for the greater part the result of the transposition of EU law into Dutch law. Thus, article 21 Regulation prudential rules Wft forms the result of adaptation into Dutch law of the MiFID implementing Directive.¹¹³⁰ It is altogether unrealistic to propose going against the tide of EU legislation. We ought to acknowledge that MiFID II¹¹³¹ is in the making, which will doubtless see the enactment of yet further detailed implementing directives. I therefore stop short of recommending to strike the compliance function from the law. I would, however, stress that I don’t readily accept advantages from increasing volume and/or detail of banking regulation. And, in any case, it must be prevented that any future regulation will allocate (organisation) *responsibility* for compliance to the compliance function.

As to 3 Should banks dismantle their (existing) compliance departments?

¹¹²⁹ Cf article 21 para 1 Regulation prudential rules Wft.

¹¹³⁰ See *supra* p 47.

¹¹³¹ See *supra* p 58.

I hope to have succeeded in illustrating above that in many instances compliance is an integral part of the business. This applies most prominently in any areas where technical knowledge on banking regulation is a prerequisite to conducting the business. Where this is the case, such specialist knowledge must be organised in such a manner that it can seamlessly and unconditionally be deployed by the relevant business. To me, this implies that delivery and availability of such specialist knowledge are (again: in organisation terms) 'owned' by the business. In addition, any processes which are a condition for the performance of a business's activities, must be 'owned' by the business which depends on them. This may be illustrated by looking at the procedural requirements under a customer due diligence programme. Were the business whose clients are involved not in command of such process, the business itself could be brought to a grinding halt outside that business's own doing.

'Translating' relevant specialist knowledge on regulation to a business may only succeed if there is intimate knowledge of and affinity with that business. This is an important argument in favour of organising this in close proximity to 'internal business clients'. This may well be accommodated by a compliance function, so long as the compliance function assures adequate capacity towards attaining the necessary knowledge and affinity. Only in this way the compliance function will be capable of meriting natural authority from its 'internal business clients'. Where natural authority lacks, implementation problems will undoubtedly follow.

A next aspect is where a compliance function checks a business's adherence to rules. As I have illustrated above, this is to be distinguished from the compliance function itself *performing duties*. Examples of the latter are a compliance function's engagement in screening, monitoring and searching. On screening, monitoring and searching, I stress that where the law requires that the compliance function performs such tasks, this must be obeyed. Otherwise, *ie* outside the category of legally prescribed duties of the compliance function, engagement of the compliance function in screening, monitoring or searching activities necessary for the actual *performance of business processes*, is to be avoided. The obvious reason for this has to do with capacity. The more a compliance function is enmeshed in procedural duties, the more it will be inclined to become reactive and process-driven. All this tends to have an influence on a function's habitus and culture. A function with a heavy procedural

workload, will focus first and foremost on ‘getting the job done’ instead of adding value on substance. The substance of the compliance function consists of facilitating a bank in understanding and absorbing the letter and spirit of banking regulation. This requires specialist knowledge of relevant banking regulation, the bank’s business and its activities to which such regulation applies. An equally important reason to minimise the involvement of an independently organised compliance function in *performing business processes* is the matter of responsibility. Where any business’s processes depend on any function for which it is not responsible, there will be finger-pointing the moment something goes wrong.

I must now address the compliance function checking a business’s adherence to rules. As with the above, where the law prescribes that the compliance function’s duty is to check adherence to the rules, this legal requirement must be obeyed. An involvement of the compliance function in checking adherence to rules may put it in a fraught position where the compliance function is actively engaged in designing a business’s rules or in translating rules into standards and procedures. Where a compliance function actively engages as a consultant and advisor to a business, it should not at the same time be called upon to be that business’s judge. This may be one reason to devise a clear cut between compliance advisory and compliance checking, as I will suggest below.

In order for it to be adequately equipped *to check adherence to rules*, the compliance function must take care in designing and, in so far as necessary, adjusting its skillset. This may well mean that the compliance function must orientate itself upon (internal) auditing skills. Typically, (banking) regulation specialists will not be experienced in assessing whether control measures are fit-for-purpose and effective – this being the core competence of (internal) auditors. And it is precisely here that a bank must steer a clear course on managing its compliance function and the deployment of its resources. The more a compliance function has the duty to check adherence to rules, the more such compliance function will need to possess the skillset of (internal) auditors. And where the number of (internal) auditors relative to the specialists on relevant banking regulation housed in a compliance function increases, this will have a thorough impact on the habitus and culture of the compliance function. In my view, a compliance function drawing heavily on auditing skills will evolve to a ‘risk

management' function. This is, by no means, intrinsically bad. However, where this happens, the bank must carefully consider how and where it wishes to organise the specialist knowledge on banking regulation in order to counsel the business on the actual performance of its core activities. As anticipated upon above, one way of accommodating all required skills, may be to make a cut between compliance advisory (which would go equally well under other appropriate banners, *eg* regulatory relations and strategy – which could go well under or alongside the legal department) and compliance checking (again: other banners may be equally appropriate – this could go under the internal audit department).

Thus, should banks dismantle their existing compliance departments? No, if only because banks must comply with the law. But, banks must carefully consider how they facilitate their businesses in understanding and absorbing relevant banking regulation. In any case, where specialist regulatory knowledge is a condition precedent to conducting the business, this knowledge ought to be 'owned' by the business.

As to 4 Division of responsibilities ('turf battles')

From the above, it will be clear that there are evident overlaps with such (support) functions as legal and internal audit. In so far as the compliance function acts as a sounding board to the bank's senior management on issues regarding business ethics, there may be an overlap with any other advisory or support functions, *eg* a distinct sustainability department. In addition, where the compliance function's role consists of awareness creation and training, there may well be an overlap with human resource departments. Where the compliance function checks adherence to rules it may overlap with operational risk functions and with internal audit.

Much of this is simply a fact of life. It does not need to be problematic, so long as it does not lead to turf battles. In reality, however, turf battles arise and they cause wasting corporate resources and the festering of bureaucracy. Simple examples of this are where a legal function will claim 'owning' everything regulatory and thereby asserts an entitlement to advising the bank on the translation of relevant regulation to the business by exclusion of the compliance function. I should be the first to admit

that I have no magic solution to this issue. But I would say that all of this should be the best reminder to a bank that compliance is not a matter for organisation. Banks should avoid getting bogged down in terminological discussions. They should perceive compliance as a state of mind; the business must integrate all required knowledge and skills upon which the performance of its activities depends. This will be fostered by, if there was a requirement to do so, or if it was otherwise seen as indispensable to accommodate such knowledge and skills in a compliance function, organising this function as close to the business as possible.

May legal and compliance functions be combined? I believe they may. Yet again, where the bank opts for this approach, it must assure that any such (statutory) duties of the compliance function requiring it to draw upon an altogether distinct skillset, may be adequately performed. In other words, the professionalism of the compliance function should not suffer from an internal cultural bias to regulatory skills.

Above, I suggested that all tasks consisting of checking a business's adherence to rules, where the law would not have it otherwise, may be assumed under a bank's internal audit function. Outside this particular area of checking a business's adherence to law, combining the compliance and internal audit functions is a non-starter. This would trigger the reproach of amalgamating functions which are incompatible. There is, naturally, a requirement for the compliance function to be covered under the bank's internal audit plan.¹¹³² This implies that whereas as a statutory duty, the internal audit encompasses assessing whether *the rules* of the bank are fit-for-purpose and effective,¹¹³³ equally the compliance function itself should be the subject of an audit review.¹¹³⁴ I would add to this that the involvement of internal audit with the specialist area of banking regulation is fraught with tension. More often than not, rules are open to interpretation. The compliance function and the internal audit function's views on rules may well differ. Where such differences of interpretation arise, it may be difficult to assess whether the compliance function's view is faulty, in that the compliance function has transgressed the boundaries of its professional discretion. An evident example of this is where rules, rather than

¹¹³² The audit or 'control' plan as meant in article 17a (a) Regulation prudential rules Wft.

¹¹³³ Cf article 17a (a) Regulation prudential rules Wft.

¹¹³⁴ Cf Compliance and the compliance function in banks 2005, para 44.

imposing strict liability, confer obligations of a due diligence nature. It may then be a matter open for discussion whether the way the compliance function suggests attaining adequate comfort that the fulfilment of the obligation passes muster, may expose the bank to a liability for breaching the (underlying) norm.¹¹³⁵ As a rule-of-thumb, with due appreciation for how difficult this may be, matters hinging upon the interpretation of regulation should lie within the discretion of the compliance function, to be respected in principle by internal audit.

Somewhat beside the issue as to the borderlines between the various support functions, there is the matter of whether what I am suggesting for the compliance function applies with equal justification to any support functions other than compliance. If within a business process (especially where a process culminates in transactions) a step needs to be performed in order that the process may be completed, such function typically processing that step ought to be organised so that the performance of its duties will occur seamlessly and unconditionally. Thus, the delivery and availability of the capacity required to complete any business process, needs to be 'owned' by the relevant business as a whole. Duties which do not form an integral part of any of the bank's business processes, may be organised outside the responsibility, and hence, ownership, of the business. In like fashion, where a duty is not a procedural prerequisite to performing a transaction, but consists of checking whether any steps within a business process (which may have culminated in a transaction) have correctly been performed, it may be organised and, hence, owned, outside the business.

There is no uniform answer to the question whether any other support functions should be organised similarly to the compliance function. The upshot from my thesis is that 'the compliance function' may mean many things. In most instances – for the greater part of the responsibilities usually ascribed to the compliance function – I argue that compliance should be seen as an integral part of the business. Where support functions other than compliance, perform duties inextricably connected to a

¹¹³⁵ One may think of the duty to identify clients and to verify their identity from article 3 para 2 (a) Wwft, to be read in conjunction with article 1 para 1 (d) Wwft. It may be questioned whether establishing (D: vaststellen) that a client is who he alleges to be, imposes a strict liability.

business process, the same applies; such support functions ought not to be organised outside the relevant business.

As to 5 Consequences of my reply to the primary research question

Whereas I conclude that Dutch law is not outspoken on compliance pertaining to the directors' duties and the ancillary exposure to liability, I submit that clarity on the matter yields the instruction as a matter of law forming the catalyst to directors assuming the required ownership. Directors will be exhorted actively to seek the initiative in setting the course on regulatory issues as they will find it a matter for themselves rather than one for a compliance function or any other support function. Compliance thereby becomes part of those issues on which the managing board sets the agenda and steers its own, deliberate course. Directors will be dissuaded from shirking their responsibility. Later in this chapter, I corroborate this essential aspect by recommending to add explicit best practice to the Dutch corporate governance code providing that *no board member will be exempt from the duty to ensure that the managing board is in a position to guide and monitor the business on compliance.*¹¹³⁶ All in all, an increased sensitivity to compliance will no doubt result in the managing board more actively soliciting the advice from either senior compliance or legal managers on the ramifications of regulatory matters on the conduct of the bank's business.

As to 6 How may it be established that my suggestions work?

Later in this chapter I recommend (only) limited additions to the Dutch corporate governance code (*infra* section 9.4.1). I would remind that presently where the Dutch corporate governance code already addresses law compliance, there does exist a somewhat obliquely phrased auxiliary prescription for the managing board to report on this aspect to the supervisory board and the audit committee. As will be seen below at section 9.4.1, my recommendation – where it specifically concerns 'compliance' – seeks to make the managing board's responsibilities to report as well as to table it at the discussion agenda with the supervisory board and audit committee

¹¹³⁶ *Infra* section 9.4.1.

alike, explicit and, thereby, unequivocal. I should think that under my recommendation any fog surrounding the degree to which there were any such managing board duties to render an account concerning compliance, are lifted. And, on the matter of replying to my question – how may it be established that my suggestions work – I would then point to this being (and hopefully more so: becoming) truly a matter of governance. Audit committees and supervisory boards alike have their own responsibilities which I must assume they will (actively) take. They are the first parties to assert the managing board reports on compliance and concurrently brings it up for discussion. Where this doesn't occur, these parties have their own vested interests in seeking the initiative. From a practical perspective, I would note that the fulfilment of either of these duties will benefit from the due realisation by all parties engaged in this process that regulatory, and hence, compliance aspects, may carry strategic importance. Thus, in line with this, it is a good idea for each of these parties consistently to warrant, or, as the case may be, demand, that any discussions on strategic issues, address the immediately adjacent compliance ramifications.

Without any necessity (and wish on my part) for further amendments or additions to any regulatory source, as the company must make disclosure on adherence to such principles and best practice provisions from the Dutch corporate governance code that are addressing the company's managing or supervisory boards,¹¹³⁷ this would – were the Dutch corporate governance code to yield in adaptation to my recommendations – now encompass the managing board's performance on 'compliance'.

9.3.2 'Independence' contradicts inclusion

At this place I recall that the Regulation prudential rules Wft requires that the compliance department performs its function in an independent manner. I mooted earlier¹¹³⁸ that, whereas (this requirement of) independence probably doesn't mean anything other than 'independent from line management', this should not be (mis)taken to require or to construe a degree of independence from the managing

¹¹³⁷ Cf article 3 para 1 Regulation of 10 December 2009 containing additional prescriptions on the content of the annual report, *Stb* 2009, 545.

board. Precisely in view of the above – compliance being an integral and inclusive part of the business – it will not do to set it apart from it. Compliance is (as a matter of corporate governance) a directors’ duty. The managing board may only assume this duty if it has autonomous power to instruct the compliance function. I am therefore not in favour of formalising reporting lines of the compliance function to the supervisory board – a ‘reporting line’ presumes that the party receiving the reports becomes a principal and, hence, assumes a power to issue instructions to the reporter. To this, I also noted that where the supervisory board were to use a power to make instructions to the compliance function, such instructions constitute acts of management. The supervisory board is estopped from exerting supervision over the managing board in regard to the compliance function’s actions on the instructions from the supervisory board. This is not to say that the supervisory board may not receive information from the compliance function, possibly through direct (personal) contact with compliance staff. But any such information and contacts are under the responsibility of the managing board.¹¹³⁹

In similar vein, I addressed a suggestion for the compliance function to be given a power of veto for certain transactions.¹¹⁴⁰ Giving the compliance function such power will muddy the principle that the business is responsible for compliance. Again, compliance is an integral part of the business; the business may not (be given a chance to) exonerate itself by pointing to the compliance function’s approval. In addition, if the compliance function had a power of veto, it would thereby assume a (derived/residual) responsibility. This would naturally cause it to be unstinting in vetoing transactions.

9.4 Compliance as a director’s duty in the Dutch corporate governance code

Does practice stand to benefit from added regulation addressing the substantive message from this thesis? It should be obvious from the above that I feel reluctance in

¹¹³⁸ *Supra*, section 2.2.1.1.

¹¹³⁹ *Supra*, p 40.

¹¹⁴⁰ I recall that such suggestion is an analogy to a recommendation on the position of the Chief Risk Officer in the Walker Report 2009. See *supra* p 41.

mooting this. Beyond any other consideration, this is to do with subsidiarity. I recall, however, that in my opinion banks will naturally orientate themselves on the law to inform them on the meaning of compliance. This is only natural in view of the increasing volume and complexity of banking regulation. Banks will likely struggle to absorb the spate of regulation of which they are on the receiving end. Thus, I argued, the law failing to yield pertinent guidance on the matter risks banks not readily relating compliance to corporate governance. And my analysis shows that where banks orientate themselves on Dutch financial markets law, compliance may well suffer from being mistaken for a department or associated to a (mere) risk.

Lest there be a misunderstanding, I find that Dutch common company law is adequately equipped to promote the desired conduct of the relevant actors and to discipline such actors were there a need to do so.¹¹⁴¹ There is no necessity to add (yet) further provisions to Boek 2 BW. It may next be broached whether we should turn to the Banking Code.

The Banking Code provides in Principle 3.2.1 that the managing board takes into account such applicable legislation, regulation and codes as are applicable to the bank. Principle 3.2.3 provides that in performing their duties the managing board takes due account of applicable legislation, regulation, codes and regulations. The Banking Code makes multiple references to duty of care and couples this to the code's core idea that the customer's interest must prevail; 'customer first'.¹¹⁴² Thus – as we glean from Principles 3.2.1 and 3.2.2, read in conjunction with the template for the declaration on moral and ethical conduct – the Code's apparent view is that exercising duty of care is done through (the process of) weighing the interests of all parties concerned in (the organisation of) the bank,¹¹⁴³ such that the customer's interest prevails.¹¹⁴⁴

¹¹⁴¹ See for a similar opinion Willems; Dutch company law is sufficiently equipped to discipline the actors; I glean his view indirectly from Schild 2013, p 341.

¹¹⁴² See the Code's own explanation to principle 3.2.2; the requirement to treat the customer with care and to ground this duty of care vis-à-vis the customer within the bank's culture, is done in response to the Maas Commission's chosen point of departure that the customer's interest ought to carry more weight than was the case at the time of writing the report Restoring Confidence.

¹¹⁴³ Principle 3.2.1 non-exhaustively lists customers, shareholders and employees.

¹¹⁴⁴ See *supra* p 150, where I broach that this approach confuses director's duties on one hand and the conduct of business on the other.

It seems to me that beyond these subjects, the Banking Code does not include allusions to areas capable of being subsumed under compliance. It may then be asked whether the Banking Code should provide for guidance on compliance, which guidance would help to promote the perspective that compliance forms an integral part of corporate governance. In my view, such provisions should not be formulated within the Banking Code, but, rather, in the Dutch corporate governance code. The reason such guidance ought to be in the Dutch corporate governance code, is one of substance. In its current form the Dutch corporate governance code already addresses compliance – it would be counter-productive to add yet further provisions on substantively similar matters to the Banking Code. In fact, one of the possible criticisms against the Banking Code as it stands is that it contains overlapping provisions, irrespective of whether such provisions overlap with the law or with the Dutch corporate governance code. So, staying away from the Banking Code serves to avoid duplicity. As the Dutch corporate governance code addresses corporate governance, in substance it addresses directors' duties. Of course, by its very nature, the Dutch corporate governance code allows for a tailor-made approach. The ever increasing expectations on the substantive quality of explanations provided for non-observance, will likely prove onerous where yet another subject area is added to the Dutch corporate governance code. Nonetheless, its mechanics, geared as they are to the formulation of best practice, lend themselves appreciably better for these purposes, than those of the Banking Code. The latter, however much (seemingly) couched in comply or explain terms, does not distinguish between principles and best practice provisions and is (terminologically at any rate) far more prescriptive and coercive.¹¹⁴⁵

There are evident drawbacks to adding provisions to the Dutch corporate governance code. The main is that, strictly speaking, hardly any banks operating from the Netherlands, fall under its remit. I find this is outweighed by the previously noted¹¹⁴⁶ circumstance that the (legal) debate on corporate governance in the Netherlands is mainly informed by the Dutch corporate governance code and that the Dutch banking

¹¹⁴⁵ Banking Code Principle 1 provides that, whereas the comply or explain principle applies, the default position is that banks comply. Intriguingly, the unofficial English translation from the draftsmen itself provides: "[T]he Banking Code uses the 'comply or explain' principle, which means that banks shall apply the principles of the Banking Code.' All this, as I argued *supra* on p 156, should not deflect from the non-binding character of the Banking Code as a matter of law.

community itself presumes as an automatism that Dutch banks voluntarily conform to it. Another important drawback I believe, is that adding to the Dutch corporate governance code leads to yet further prescription and this to a category of addressee companies much wider than banks. This is outweighed, however, by ensuring that the additions fit in to the already existing mould. I recall that the Code already provides that the managing board is responsible for complying with all relevant primary and secondary legislation, as I would recall that the Code also provides that the board reports on this aspect to the supervisory board and the audit committee.¹¹⁴⁷

9.4.1 Recommended additions to Dutch corporate governance code

In what follows, I use my own formulations for the English text version of the Code, causing slight variation from the English text version published by the Monitoring Committee Corporate Governance Code itself.

From Principle II.1 para 2, I propose to strike out: ‘for compliance with all relevant law and regulation’. In the footsteps of the, thus purged, first full sentence, I propose adding one (mere) sentence:

Compliance with law – which presumes compliance with self-imposed standards and procedures – is the responsibility of the managing board. Compliance pertains to the directors’ obligation properly to fulfil their task.

Along this line I suggest rephrasing the last full sentence of Principle II para 2, so as to integrate compliance as a specific item for reporting purposes;

The managing board reports on each of these items to the supervisory board and the audit committee, with which it discusses the internal risk management and control systems, as well as compliance.

Thus, read in its entirety, in my proposal Principle II.1 para 2 will read:

¹¹⁴⁶ See *supra* p 123.

¹¹⁴⁷ Principle II.1 para 2 *in fine*.

The managing board is responsible for managing the risks associated with the company activities and for financing the company. Compliance with law – which presumes compliance with self-imposed standards and procedures – is the managing board’s responsibility. Compliance pertains to the directors’ obligation properly to fulfil their task. The managing board reports on each of these categories to the supervisory board and the audit committee, with which it discusses the internal risk management and control systems, as well as compliance.¹¹⁴⁸

And, to this, I propose inserting a new best practice provision II.1.4:¹¹⁴⁹

Compliance may be delegated if the managing board ensures it is in a position to guide and monitor the business on compliance. No board member is exempt from this duty. Where delegation occurs, directors take care there are in place adequate controls which will throw up problems in the delegated areas whilst there is still time to do something about them.

I am readily aware that it may be asked how a corporate governance code which I argued earlier should not mistakenly be clad with (too much) relevance at law¹¹⁵⁰ should provide on directors’ liability, the latter being the preserve of the law. But I feel confident in mooted my proposal, as the Dutch corporate governance code otherwise does not shy away from addressing the extent as well as the fulfilment of the managing board’s tasks. The preamble to the Code itself provides that, notably its best practice provisions, create a certain frame of behavioural norms. And, albeit that a corporate governance code should not (profess to) encroach on the law, for it to be true to its name, by rights it should address the managing board’s duties. This is precisely what corporate governance means.¹¹⁵¹

9.5 Recommendation to reword article 3:10 Wft

¹¹⁴⁸ In addition to an earlier version I added words to give explain compliance. This is in due recognition of certain views expressed at my meeting with experts on 27 September 2013. See *supra* para 8.5.7.

¹¹⁴⁹ Whereby, it goes without saying, existing best practice provisions II.1.4 through II.1.11 will be renumbered as II.1.5 through II.1.12.

¹¹⁵⁰ As I argued earlier, see *supra*, p 130, with reference to Assink who questions the Supreme Court’s preparedness to assume that the corporate governance code ‘fills in’ Dutch company law.

As it stands, financial markets law is overly proliferated as much as it is complex. The degree to which resort is had to secondary legislation is worrying, especially where such secondary legislation demonstrates an apparent ambition to address (unnecessary) detail. I am therefore loath to adding yet further complexity to financial markets law, in the conviction that this will not yield greater achievement of its regulatory objectives. But it is on precisely this aspect – the regulatory framework corroborating its (stated) objectives – that I would make a recommendation. I anticipated on this recommendation in chapter 2. Wft is not outspoken on market confidence and the reduction of financial crime as points of departure for regulation. I draw on FSMA, as it stood at the time I wrote this,¹¹⁵² for a recommendation to arrive at greater clarity.

I propose rewording article 3:10 Wft so as to express the prominence of market confidence and prevention of financial crime as (key) legislative objectives, but, at the same time, so that these two objectives are subsumed under ‘integrity’.¹¹⁵³

It is my proposal to amend article 3:10 para 1 Wft to read:

‘A payment institution, clearing institution, entity for risk acceptance, credit institution, funded pension institution or insurer with seat in the Netherlands must conduct its business with integrity, serving the primary legislative objectives of market confidence, the protection of consumers and the reduction of financial crime.’

My suggestion triggers the issue as to the ramifications for the analogous provisions in Part 4 Wft; articles 4:11 and 4:14 Wft. As described, article 4:14 Wft substitutes *orderly and transparent market processes* for solidness, and it may now be asked whether such aspects are readily subsumed under ‘integrity’. It may be clear that I am not in favour of the situation that almost entire provisions in Part 4 Wft, are a

¹¹⁵¹ See my argument on the inclusive meaning of corporate governance, esp. *supra* p 134.

¹¹⁵² FSMA as it was in force through March 2013. I derive my proposal from section 2, para 2 FSMA (old), which expresses the general duties of ‘the [single] Authority’ and postulates ‘market confidence’ as the first regulatory objective. Under the Financial Services Act 2012, the restatement of the three (new) regulators’ duties is different, and ‘market confidence’ is no longer made explicit.

¹¹⁵³ The substitutions having come into the Financial Services Act 2012, which came into effect on 1 April 2013, added a new section 1D, introducing ‘the integrity objective’ as an operational objective for the newly created Financial Conduct Authority (‘FCA’). The integrity objective comprises the prevention of financial crime objective.

repetition of provisions from Part 3 Wft. We have already faced up to the situation that this is a consequence of the Dutch distinction between prudential and behavioural supervision and, for the present purposes, this is water under the bridge. I do not see any convincing reason why we wouldn't subsume the entire category of orderly and transparent market processes under integrity. The consequence of this proposal would lead to amending article 4:11 Wft such that it would read:

‘An asset manager, investment institution, investment company, custodian or custodian of pension funds must conduct its business with integrity, serving the objectives of market confidence, the protection of consumers and the reduction of financial crime.’

Under my proposal, all elements referring to orderly and transparent market processes may be struck from article 4:14 Wft, leading, in my view, to similar advantages as those described above for Part 3 Wft.

9.6 In conclusion

In order to get it right in compliance for banks, the way forward lies in greater reliance on common company law. It is common company law we should look to to promote the relevant actors' desired behaviour. Compliance with *the law* is non-negotiable. The rule from *Schwandt/BPF* is that acting in breach of provisions from the articles of association seeking to protect the company, constitutes a ready presumption of improper fulfilment of directors' duties. My thesis strives to add to this that acting in breach of any internal compliance regulations, be they policies, standards, procedures or measures, equally yields a ready presumption of improper fulfilment of directors' duties. Notably, failing to take due care enabling them always to be in a position to guide and monitor the management, may expose directors to liability for improper fulfilment of their duties. So, directors' duties on compliance go beyond their own actions. In my view, the greater, more prominent area constituted by compliance pertains to the domain of directors' duties actively to promote the success of the company. This puts compliance in the domain of *business decisions*.

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HR 21 januari 1955, NJ 1959, 43, m nt H E Bröring (*Forumbank*)

Howard Smith Ltd v Ampol Pteroleum Ltd, [1974] A.C. 821

Hyatt/Dirksz

HR 14 september 2007, NJ 2008, 334, m nt E Verhulp (*Hyatt/Dirksz*)

Van de Klundert/Rabo

HR 26 juni 1998, NJ 1998, 660, m nt C J van Zeben (*Van de Klundert/Rabo*)

Kortekaas/Lippens

Rb Utrecht 15 februari 2012, LJN BV3753, RF 2012/32 (*Kortekaas/Lippens*), m nt B J de Jong in OR 2012/6, pp 267 – 272.

Van Lanschot/Bink

HR 1 juni 1990, *NJ* 1991, 759, m nt C J H Brunner (*Van Lanschot/Bink*)

Laurus

HR 8 april 2005, *NJ* 2006, 443, m nt G van Solinge (*Laurus*)

Laurus Enterprise Division

OK 16 October 2003, *JOR* 2003/85, m nt Van den Ingh (*Laurus Enterprise Division*)

Lindenbaum/Cohen

HR 31 January 1919, *NJ* 1919, 161, *W* 10365, with commentary Molengraaff (*Lindenbaum/Cohen*)

Levob/Bolle

HR 5 juni 2009, *NJ* 2012, 183, m nt J B M Vranken (*Levob/Bolle*)

De Marchant et d'Ansembourg

HR 25 mei 1928, *NJ* 1928, p 1688, m nt E M Meijers (*De Marchant et d'Ansembourg*)

MeesPierson/Ten Bos

HR 9 January 1998, *NJ* 1999, 285, m nt W M Kleijn (*MeesPierson/Ten Bos*)

Van der Moolen

OK 15 februari 2013, *JOR* 2013, 102 m nt D A M H W Strik (*Van der Moolen*)

OGEM II

HR 10 January 1990, *NJ* 1990, 466, m nt Maeijer (*OGEM II*)

Ontvanger/Roelofsen

HR 8 december 2006, *NJ* 2006, 659 (*Ontvanger/Roelofsen*)

Rabo/Everaars

HR 23 mei 1997, *NJ* 1998, 192, m nt C J van Zeben (*Rabo/Everaars*)

Safe Haven

HR 23 december 2005, *NJ* 2006, 289, m nt M R Mok (*Safe Haven*)

Schwandt/BPF

HR 29 november 2002, *NJ* 2003, 455 (*Schwandt/BPF*)

Shaw & Sons (Salford) Ltd v Shaw, [1935] 2 K.B. 113, CA*Staleman/Van de Ven*

HR 10 januari 1997, *NJ* 1997, 360, m nt Maeijer (*Staleman/Van de Ven*)

Van de Steeg/Rabobank

HR 8 februari 2013, *ECLI:NL:HR:2013:BY4600* (*Van de Steeg/Rabobank*)

Stichting/Plazacasa

HR 26 februari 2010, *NJ* 2011, 473, m nt H J Snijders (*Stichting/Plazacasa*)

Stichting/World Online

HR 27 november 2009, *LJN*: BH2162, m nt H M Vletter-van Dort in *OR* 2010/2, pp 119-126 (*Stichting/World Online*)

Stichting Gedupeerden Spaarconstructie/Aegon Bank

HR 5 juni 2009, *NJ* 2012, 184, m nt J B M Vranken (*Stichting Stichting Gedupeerden Spaarconstructie/Aegon Bank*)

Stork

Hof Amsterdam (OK) 17 januari 2007, *JOR* 2007/42 (*Stork*)

De Treek/Dexia

HR 5 juni 2009, *NJ* 2012, 182, m nt J B M Vranken (*De Treek/Dexia*)

US Securities and Exchange Commission vs Siemens Aktiengesellschaft, civil case 1:08-cv-02167-RJL*VEB/Fortis*

HR 6 december 2013, *ECLI:NL:HR:2013:1586* (*VEB/FORTIS*)

VEB/Fortis (OK)

Hof Amsterdam (OK) 5 april 2012, *LJN*: BW0991, m nt S M Bartman in *OR* 2012, 71 (*VEB/Fortis (OK)*)

Versatel II

HR 14 september 2007, *NJ* 2007, 611, m nt Maeijer (note published under *NJ* 2007, 612) (*Versatel II*)

Vie d'Or

HR 13 oktober 2006, *NJ* 2008, 529, m nt C C van Dam (*Vie d'Or*)

Vodafone/ETC

HR 19 oktober 2007, *NJ* 2007, 565 (*Vodafone/ETC*)

Willemsen/NOM

HR 20 juni 2008, *NJ* 2009, 21, m nt J M M Maeijer en H J Snijders (*Willemsen/NOM*)

Van Zuylen/Rabo

HR 11 juli 2003, *NJ* 2005/103, m nt C E du Perron (*Van Zuylen/Rabo*)

HR 2 maart 1982, *NJ* 1982, 446, m nt A C 't Hart (Criminal case against Johannes Arie B)

OK 14 December 2005, *JOR* 2006, 7, with commentary Ingh

Hof Amsterdam 25 januari 2007, *NJ* 2007, 427 (artikel 7:907 BW declaration concerning the Duisenberg-arrangement)

CBp 12 juni 2007, *JOR* 2007, 186 (on admission of proof in administrative law)

Nederlandse samenvatting

Als compliance officer bij ABN AMRO opgedane ervaringen vormden de aanleiding voor mijn promotieonderzoek. Het gevolg van recente ontwikkelingen, gecombineerd met de grote en gestaag toenemende complexiteit van (toezicht)wet- en regelgeving, maken dat banken gedwongen zijn ‘compliance’ reactief op te vatten. Het is onvermijdelijk dat banken zich daarbij oriënteren op de wet. De vertaalslag van omvangrijke en gedetailleerde (toezicht)wet- en regelgeving naar de bedrijfsvoering wordt als een last ervaren. Dit leidt ertoe dat compliance wordt opgedragen aan uitvoerende ‘organisatieonderdelen’. Vooral daardoor wordt compliance machinaal en krampachtig.

In mijn beleving stellen banken compliance niet vanzelfsprekend gelijk met een bestuurderstaak. Evenmin zien banken compliance vanzelfsprekend als bestanddeel van corporate governance. De belangrijkste motivatie voor dit onderzoek is dat het recht geen of althans onvoldoende instructie bevat op het punt van ownership van compliance.

In dit proefschrift behandelt hoofdstuk 2 de juridische invulling van de term compliance. Hoofdstuk 3 behandelt compliance en risico, met inbegrip van de juridische benadering van risico en risicobeheersing. Hoofdstuk 4 adresseert corporate governance. In hoofdstuk 5 komt Corporate Social Responsibility (‘CSR’ – de Engelse kunstterm voor maatschappelijk verantwoord ondernemen) aan de orde. De hoofdstukken 6 en 7 gaan in op aansprakelijkheid en sanctionering voor compliance schendingen. De kernboodschap uit deze hoofdstukken is dat schending van interne compliance reglementen aansprakelijkheid jegens door die schending benadeelde derde partijen kan opleveren. Hoofdstuk 8 richt het zoeklicht op de praktijk. In een tweeluik wordt gekeken naar recente rechtspraak van de Ondernemingskamer en volgt een verslag van een bespreking met specialisten uit het veld. De bedoeling van hoofdstuk 8 is daarbij aan te orde te krijgen in hoeverre een duidelijker rechtsnorm dat compliance een bestuurderstaak is, het gewenst gedrag van de relevante actoren bevordert.

De met het proefschrift ondernomen zoektocht eindigt in hoofdstuk 9. De opmaat daarvan is de beantwoording van de onderzoeksvraag; het recht is onvoldoende uitgesproken over compliance als een bestuurderstaak. Dit draagt ertoe bij dat compliance wordt aangezien voor een organisatievraagstuk. Hoofdstuk 9 vervolgt met de confrontatie van de conclusie met de hedendaagse realiteit; betekent de beantwoording van de onderzoeksvraag dat compliance afdelingen dienen te worden afgeschaft?

Tot slot bevat hoofdstuk 9 tweeërlei aanbevelingen:

1. De Nederlandse corporate governance code dient uitdrukkelijk te bepalen dat compliance een bestuurderstaak is; en
2. Wft dient te bepalen dat markvertrouwen en het terugdringen van financiële misdrijven wetgevingsdoelen zijn.

Hoofdstuk 2 Compliance bij banken

Het centrale thema dat van hoofdstuk 2 is compliance in het recht. BprWft bepaalt dat (o.a.) kredietinstellingen dienen te beschikken over een organisatieonderdeel dat op een onafhankelijke en effectieve wijze een compliancefunctie uitoefent. BprWft bepaalt dat de taak van dat organisatieonderdeel is de naleving van wettelijke en door de financiële onderneming zelf opgestelde regels te controleren. Daarvan kan worden afgeleid dat compliance de naleving van wettelijke en vrijwillig gestelde regels betreft.

Betekent de BprWft-eis dat het organisatieonderdeel zijn taak op een onafhankelijke wijze uitoefent, dat de compliancefunctie op enigerlei wijze onafhankelijk is van het bestuur? Juridische analyse leidt niet tot beantwoording van deze vraag. Er zijn aanwijzingen dat het bestanddeel onafhankelijkheid doelt op onafhankelijkheid van het 'lijnmanagement'. Het is onwenselijk dat de compliancefunctie gehoor moet geven aan instructie van enig ander vennootschapsorgaan dan het bestuur. Het bestuur kan zijn verantwoordelijkheid voor het functioneren van de compliancefunctie niet nemen indien enig ander orgaan de compliancefunctie kan

instrueren. Waar de raad van commissarissen de compliancefunctie instrueert stelt hij ‘daden van bestuur’.¹¹⁵⁴

De verplichting een onafhankelijke compliancefunctie te hebben stamt in Nederland uit de Regeling Organisatie en Beheersing van 2001, waarin de compliancefunctie in rechtstreeks verband werd gezien met integriteit. Eind 2002 werd integriteit geëxpliciteerd als een onderwerp van toezicht,¹¹⁵⁵ en soms (zelfs) verheven tot een doel daarvan.¹¹⁵⁶

Ter inkleuring van de wettelijke betekenis van compliance (losgedacht van de ‘compliancefunctie’), volgt in hoofdstuk 2 een analyse van aspecten van de bedrijfsvoering die onder integriteit worden gecategoriseerd. Het startpunt is de term integriteitsrisico; gevaar voor aantasting van de reputatie of bestaande of toekomstige bedreiging van vermogen of resultaat van een financiële onderneming als gevolg van ontoereikende naleving van hetgeen bij of krachtens enig wettig voorschrift is voorgeschreven.¹¹⁵⁷ Deze wettelijke definitie opent de weg naar alle (mogelijke) wetgeving. Het heeft echter de voorkeur het bereik van compliance te betrekken op *de kernactiviteiten* van de financiële onderneming. Dit kan worden geschraagd met een materialiteitstoets; die regels waarvan schending vertrouwen in de financiële onderneming of de financiële markten schaadt, behoren tot het domein van compliance. Belangenverstrengeling als een aspect van integriteit, behoort tot de kern. Juist waar het privébelang van bij de organisatie van de bank betrokkenen (kan) botsen met het belang van de bank of van haar cliënten, kan opportunistisch gedrag het vooropstellen van het klantbelang verhinderen. Witwaspreventie behoort tot het domein van de integriteit van de financiële sector.

Hoofdstuk 2 vervolgt met de uit de MiFID voortgekomen zorgplicht. De zorgplicht als publiekrechtelijke norm komt tot uitdrukking in de artt 4:14 lid 2 (c), 4:25 lid 1 en 4:90 lid 1 Wft. Het betreft de plicht zich op eerlijke, billijke en professionele wijze in te zetten voor de cliëntbelangen. Ook waar een bank geen

¹¹⁵⁴ Vgl art 2:151 BW.

¹¹⁵⁵ Wet modernisering en harmonisatie financieel toezicht, *Kamerstukken II*, 28 373.

¹¹⁵⁶ Zie bijv. *Kamerstukken II*, 2004-2005, 29 708, nr 10, p 240.

¹¹⁵⁷ Art 1 BprWft.

bankbeleggingsonderneming is, dient zij zich aan de publiekrechtelijke zorgplicht te houden.¹¹⁵⁸

De behandeling van zorgplicht als publiekrechtelijke norm in hoofdstuk 2 wordt meteen gevolgd door die van de BW-norm van de bijzondere zorgplicht van banken. Zorgplicht manifesteert een ‘fundament’ van het Nederlands recht; de grondnorm van de maatschappelijke aanvaardbaarheid.¹¹⁵⁹ Staat het de Nederlandse burgerlijke rechter vrij hogere verplichtingen op te leggen dan die welke uit de MiFID zijn omgezet in het Nederlandse (publiek)recht? Busch is uitgesproken tegenstander van vrijheid van de burgerlijke rechter op dit punt. Hij wijst daarbij op het karakter van maximumharmonisatie en op de behoefte aan rechtszekerheid bij beleggingsondernemingen. Cherednychenko wijst op de discretionaire bevoegdheid van de burgerlijke rechter, welke hij ontleent aan de autonome karakters van de privaats- en publiekrechtelijke ordes; een waarlijk dubbel systeem (van rechtsordes).

Hebben banken een contractuele band met een cliënt, dan vloeit zorgplicht rechtstreeks voort uit de bewoordingen van de overeenkomst.¹¹⁶⁰ En kan de overeenkomst worden gekwalificeerd als overeenkomst van opdracht, dan is art 7:401 BW van toepassing; de bank moet de zorg van een goed opdrachtnemer in acht nemen. De analyse van de bijzondere zorgplicht van banken wordt vervolgens in hoofdstuk 2 ontleend aan de ontwikkeling daarvan in de civiele rechtspraak.¹¹⁶¹ In 1997 bezigde de Hoge Raad *bijzondere zorgplicht* voor het eerst – in het licht van de mogelijk zeer grote risico’s die de in opties beleggende cliënt kan lopen, is de bank als bij uitstek professioneel en deskundig, gehouden aan een bijzondere zorgplicht jegens particuliere, niet-professionele cliënten. In 1998 volgde dat de maatschappelijke rol van banken maakt dat de bijzondere zorgplicht ook geldt jegens partijen met wie de bank geen contractuele band heeft; derde partijen met wier belangen de bank op grond van hetgeen volgens ongeschreven recht in het

¹¹⁵⁸ De generieke toepasselijkheid van zorgplicht volgt, op overigens onrechtstreekse wijze, uit art 4:25 lid 1 Wft.

¹¹⁵⁹ Vgl Asser-Hartkamp/Sieburgh 2010, 43.

¹¹⁶⁰ Art 2 Algemene Bankvoorwaarden 2009.

¹¹⁶¹ Gevormd door *Van Lanschot/Bink, ABN AMRO/Hendriks, D/ING, Rabo/Everaars, MeesPierson/Ten Bos, Van de Klundert/Rabo, Van Zuylen/Rabo, Safe Haven, ABN AMRO/Van Velzen, De Treek/Dexia, Levob/Bolle, Stichting Gedupeerden Spaarconstructie/Aegon Bank, VEB/World Online, Fortis/Bourgonje, Van de Steeg/Rabobank, en A cs/NBG*. Niet alle genoemde casus komen binnen dit proefschrift aan de orde.

maatschappelijk verkeer betaamt, rekening moet houden. Waar zorgplicht aan de orde is in een contractuele relatie van de bank met een cliënt, komt hij voort uit de redelijkheid en billijkheid (voor zover hij overigens niet uitdrukkelijk in de overeenkomst is opgenomen). Waar de bijzondere zorgplicht jegens derden geldt, is hij maatschappelijk.

Zoals hierboven gereleveerd, zijn de wettelijke plichten van banken betreffende de bestrijding van (vormen van) financiële misdrijven van banken, een manifestatie van (de bescherming van de) integriteit van de financiële sector. Aldus heeft te gelden dat:

1. het een doelstelling van Nederlands financieel toezichtrecht is dat banken maatregelen nemen ter bestrijding van witwassen, terrorismefinanciering en overtredingen van sanctiemaatregelen; en
2. waar het daarbinnen te doen is om bescherming van de integriteit van de financiële sector, behoren deze onderwerpen tot het bereik van compliance.

Hoofdstuk 2 bevat een beknopte vergelijking met de wijze waarop het Engelse recht compliance benadert. FSA behandelt compliance naar analogie van risico.¹¹⁶² Waar het FCA Handbook compliance en de compliancefunctie behandelt, bevat het een *resultaatverbintenis*: ‘a firm must have adequate policies and procedures to ensure compliance [. . .] with its obligations under the regulatory system and for countering the risk that the firm will be used to further financial crime.’¹¹⁶³ Daarmee kan de Engelse situatie als strenger worden opgevat dan de Nederlandse, waar compliance in de sleutel van integere bedrijfsuitoefening wordt gevat. Tenslotte, in de vergelijking met het VK, bevat hoofdstuk 2 dat in het Engelse financieel toezichtrecht het terugdringen van financiële misdaad als doel is geëxpliciteerd.

Compliance wordt in de Nederlandse wetgeving veelvuldig in verband gebracht met integriteit. De reikwijdte van integriteit kan verwarring wekken en het is een gemiste kans dat wetsbepalingen omtrent integriteit negatieve formuleringen bevatten; integriteit betekent voorkomen dat bepaalde dingen gebeuren. De wet ontbeert een

¹¹⁶² In een ‘Dear CEO Letter’ van 2007 schreef FSA: ‘that exercising good compliance judgment can benefit by perceiving compliance as a risk management function.’

¹¹⁶³ FCA Handbook, Senior Management Arrangements, Systems and Controls 6.1.1.

duidelijke aanwijzing van de betekenis en reikwijdte van compliance. De wet, daarbij secundaire wetgeving inbegrepen, is onnodig uitgebreid en gedetailleerd.

Als vooruitblik bepleit hoofdstuk 2 vermindering van nog verdergaande opnemings in het financieel toezichtrecht van gedetailleerde verplichtingen. Ook wordt bepleit dat niet in verdergaande mate organisatorische eisen worden gesteld aan banken; daarentegen zou meer steun kunnen worden gezocht bij het algemeen ondernemingsrecht. Overigens geldt dat waar de kernactiviteiten van banken zijn onderworpen aan gedetailleerde wettelijke eisen, die eisen moeten worden opgevat als integraal onderdeel van de bedrijfsvoering. Geïnspireerd door het vergelijk met de Engelse wet, anticipeert hoofdstuk 2 op een aanbeveling het marktvertrouwen en het terugdringen van financiële misdaad als wetgevingsdoelstellingen op te nemen.

Hoofdstuk 3 Compliance en risico

Compliance wordt veelvuldig geassimileerd met risico. Is compliance een integraal onderdeel van risicobeheersing of risk management? Risico komt ter sprake in de finance literatuur. Hoewel het erop lijkt dat veelal een onderscheid wordt getroffen tussen de klassieke risicocategoriën bij banken, gevormd door krediet- en marktrisico enerzijds, en operationeel risico anderzijds,¹¹⁶⁴ wordt een veelheid van andere classificaties gebruikt en bestaat hierover geen eenstemmigheid. Operationeel risico kan worden opgevat als een restcategorie, waarbij aangetekend zij dat het wordt onderkend als een ‘fuzzy’ concept omdat het lastig blijkt een helder onderscheid te maken tussen operationeel risico en de ‘normale’ onzekerheden waaraan een organisatie in haar dagelijkse activiteiten blootstaat.

Onder (internationale) pogingen een normenkader te bieden voor beheers- en controlesystemen is het COSO raamwerk het meest bekende. Niettemin wordt in hoofdstuk 3 de waarschuwing van Bainbridge aan de rechter aangehaald terughoudend te zijn met het geven van opvattingen die kunnen worden aangezien als

¹¹⁶⁴ Operational Risk Management 1998, p 3: ‘[M]any banks have defined operational risk as any risk not categorised as market or credit risk.’

het maken van een routekaart voor de inrichting van risicobeheersing.¹¹⁶⁵ Specifiek t.a.v. compliance wordt gewezen op de ontwikkeling van raamwerken.¹¹⁶⁶

Na een summiere beschrijving van COSO en aantekening dat daarbij kritische kanttekeningen t.a.v. de effectiviteit (kunnen) worden gemaakt,¹¹⁶⁷ wordt vervolgd met ‘three lines of defence’. Three lines of defence duikt veelvuldig op als de mogelijke (nadere) praktische invulling van een beheers- en controlesysteem, al dan niet als uitwerking van COSO. Three lines of defence komt in door FSA meest geziene variant erop neer dat binnen het beheers-en controlesysteem rapportagelijnen en verantwoordelijkheden worden verdeeld, zodanig dat afstand (en daarmee een zekere mate van onafhankelijkheid) ontstaat tussen de bedrijfsvoering en de (ontwikkeling van) beheers- en controlemaatregelen. Diekman hanteert een inclusief en meer omvattend lines of defence model; wat hem betreft behoren interne toezichthouders (de raad van commissarissen) alsmede externe toezichthouders tot de lines of defence.¹¹⁶⁸

Vervolgens wordt gekeken naar risk management in het recht. Art 2:141 lid 2 BW heeft het over het beheers- en controlesysteem van de vennootschap. De Nota van wijziging Wft van maart 2005, bevat dat beheersen het gehele traject omvat van vaststellen, besturen, monitoren en bijsturen van doelstellingen en processen. Hoewel art 2:141 lid 2 BW bepaalt dat de raad van bestuur de raad van commissarissen ‘informeert’ over het beheers- en controlesysteem, doen zowel de Nederlandse corporate governance code als de Code Banken het erop lijken dat de raad van commissarissen goedkeuring dient te geven. Valt dit te rijmen met de door de wet bepaalde graag van autonomie van de raad van bestuur? In de beantwoording wordt erop gewezen dat ervoor moet worden gewaakt dat de raad van commissarissen een mate van discretie in acht neemt, al was het maar ter voorkoming dat hij (*ie* de raad van commissarissen) toezicht moet uitoefenen op zijn eigen handelingen.

¹¹⁶⁵ Bainbridge 2009, p 982.

¹¹⁶⁶ Onder exclusieve invloed van the (Australian and New Zealand) 3806 Standard for Compliance – ÁS/NZS3806, is het ISO MSS Proposal for Compliance programs 2010 ontwikkeld.

¹¹⁶⁷ Simkins & Ramirez schrijven: ‘the literature and evidence to date makes it clear that there is no single ERM implementation process that works for every board and for every company.’, Simkins & Ramirez 2008, p 586.

¹¹⁶⁸ Diekman 2011, pp 482 en 483.

Hoofdstuk 3 vervolgt met het onderscheid tussen het bepalen van de risk appetite (het *ex ante* perspectief) en het beheersen en controleren van (die) risico's (het *ex post* perspectief). Het *ex ante* perspectief behoort tot het domein van de *margin of appreciation* van het bestuur. In een analogie met het Engelse recht heet het daarbij dat deze categorie behoort tot de directors' duty to promote the success of the company.¹¹⁶⁹ Dit is een terrein waar geen (onnodige) beperkingen aan bestuurders worden opgelegd. Waar dit, aldus, bij de bestuurders ligt, zijn zij wat dit betreft verantwoordelijk jegens bij de organisatie van de bij de vennootschap betrokkenen als een zaak van de corporate governance mechanismen van de onderneming en, daarmee, (dus) niet als een zaak voor de rechter.¹¹⁷⁰ Betreft het daarentegen het *ex post* perspectief, dan voert de Engelse analogie naar the duty of care.¹¹⁷¹ Tot de duty of care behoort dat bestuurders zich in een positie plaatsen het management van de onderneming te sturen en te monitoren. Is er sprake van aanmerkelijke delegatie (bijv. op grond van de omvang van de onderneming) van uitvoerende management taken, dan betekent dit concreet dat bestuurders moeten verzekeren dat toereikende interne beheerssystemen werken, die tijdig problemen signaleren.¹¹⁷²

Hetgeen hier voorafgaat betreft nadrukkelijk *risk management*. Is eenzelfde onderscheid tussen de *ex ante* en *ex post* perspectieven hanteerbaar waar het compliance betreft? Met betrekking tot het *ex ante* perspectief is het dan de vraag in hoeverre aan bestuurders beleidsvrijheid toekomt t.a.v. naleving van regels. Bestaan die regels uit wetten, dan ligt het voor de hand dat geen enkele vrijheid bestaat te besluiten omtrent de mate waarin de onderneming beoogt daarnaar te handelen. Hier kan dus geen sprake zijn van het bepalen van een 'appetite for compliance.' Aldus is compliance geen voorwerp van de margin of discretion van het bestuur. Wat is de situatie m.b.t. door de bank zelf geformuleerd (compliance) beleid? In het *ex ante* perspectief bestaat er de volle vrijheid te beslissen omtrent de normen die een bank zichzelf wil opleggen. Het betreft dan niet een zaak van het bepalen van een appetite for risk, doch het bepalen van standaarden. Hierbij ware te denken aan kernwaarden, ethische of gedragscodes, integriteitscodes, business principles etc. Het is moeilijk

¹¹⁶⁹ Vgl Section 172(1) CA.

¹¹⁷⁰ Vrijwel woordelijk ontleend aan Davies 2008, p 511.

¹¹⁷¹ Section 174 CA.

¹¹⁷² Davies ontleent zijn frasering hier aan een Australische casus; *Daniels v Anderson*. Mijn vindplaats is Davies 2008, p 491.

voorstelbaar dat dergelijke reglementen¹¹⁷³ indruisen tegen hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt.

Hoofdstuk 4 Een ruime benadering van de juridische betekenis van corporate governance; een verkenning

Het accent van dit proefschrift ligt bij compliance als bestuurderstaak. Daarbij wordt verondersteld dat het recht hierover onvoldoende instructie biedt. Dit hoofdstuk 4 betoogt dat bestuurderstaken behoren tot de categorie corporate governance. Daarmee is gegeven dat, indien compliance een bestuurderstaak is, het behoort tot corporate governance. Zoals het Nederlands recht niet uitgesproken is over compliance als een bestuurderstaak, is het dat al evenmin over compliance als bestanddeel van corporate governance. In Nederland wordt corporate governance veelal opgevat als het stelsel van regels dat de verhoudingen reguleert tussen de organen van vennootschappen. Lambooy noemt dit het ‘rules of the game’ perspectief.¹¹⁷⁴ Ik betoog dat het in een moderne, *de lege ferenda*, opvatting over corporate governance past, daartoe ook de bestuurderstaken te rekenen. Tricker brengt de ontwikkeling van corporate governance (grootweg) in drie fasen onder. De eerste werd gevormd door ‘corporate governance compliance’, het dwingend(er) opleggen van inrichtingsverplichtingen in wetgeving en jurisprudentie. De tweede bestond uit de uitbreiding en oprekking van corporate governance tot de gebeden risicoanalyse en risicomanagement – deze beide aspecten zijn onderdeel geworden van het corporate governance *proces*. En de meest recent daaraan toegevoegde is CSR en duurzaamheid – welke beide aspecten volgens Tricker zijn toegevoegd aan de corporate governance portefeuille.¹¹⁷⁵

Waarom is het van belang duidelijk te hebben dat compliance een bestanddeel is van corporate governance? Dit draagt ertoe bij dat compliance niet wordt verward met, en beperkt tot, een kwestie die slechts behoort tot *de dagelijkse uitvoerende aspecten* van het besturen van de bank. Waar compliance tot de corporate governance behoort, is duidelijk dat het bestuur hierover aan de raad van commissarissen dient te

¹¹⁷³ Zoals bedoeld in artt 2:8 lid 2 en 2:15 lid 1 sub c BW. Het proefschrift gaat nader hierop in in hoofdstuk 6 waar wordt gekeken naar de wijze waarop de bank haar eigen rechtsorde inricht.

¹¹⁷⁴ Lambooy 2010, p 32.

rapporteren. In het bepalen van de strategie dient het compliance aspect (het reeds genoemde *ex ante* perspectief) nadrukkelijk te worden betrokken.

Hoofdstuk 5 CSR

De bijdrage van dit hoofdstuk aan de centrale thematiek bestaat eruit dat waar een belangrijk aandachtsgebied van compliance de vraag betreft aan welke normen banken zijn gebonden en wat de consequenties zijn van schending van die normen, juist dient te worden bepaald welke aard en herkomst die normen hebben. Hoofdstuk 5 gaat nader in op CSR. In de rechtspraak gaat het vanaf 1995 steeds weer over de maatschappelijke rol van banken.¹¹⁷⁶ Het rapport *Naar herstel van vertrouwen* uit 2009 is geheel gestoeld op de premisse dat het de maatschappelijke rol van banken is die hen onderscheidt van andere ondernemingen. Daarom is aan de orde of die maatschappelijke rol is te vereenzelvigen met de CSR van banken, en, zo ja, wat het rechtskarakter van die CSR-verplichtingen is. De ter beantwoording van deze vraag in dit proefschrift gekozen weg betoogt dat, waar *maatschappelijke aanvaardbaarheid* een grondnorm van het Nederlands recht is,¹¹⁷⁷ voor banken (met het oog op hun kernactiviteiten) relevante CSR-normen rechtens relevant zijn. Dat betekent dus ook dat niet *alle* normen die brede erkenning als CSR-normen vinden, daartoe behoren. Tevens wijst dit hoofdstuk erop dat waar banken in aan zichzelf op te leggen regels bepalen wie haar stakeholders zijn, daarmee is gegeven dat banken daarmee uitspreken welke maatschappelijke rol zij voor zichzelf weggelegd zien. Dergelijke, aan zichzelf opgelegde regels, worden rechtens relevant; binnen de eigen rechtsorde van de bank zijn zij bindend.

Met het hier gereleveerde is beantwoord dat de in het Nederlandse recht als fundament verankerde norm van de maatschappelijke aanvaardbaarheid in wezen dezelfde is als de voor banken (meest) relevante CSR-norm. Banken hebben een rechtsplicht rekening te houden met de belangen van door hun kernactiviteiten

¹¹⁷⁵ Tricker 2009, p 349.

¹¹⁷⁶ Ik heb het oog op *ABN AMRO/Hendriks*, en vervolgens werd in *MeesPierson/Ten Bos* de maatschappelijke component bevestigd als onderdeel van het argumentarium ter vestiging van aansprakelijkheid uit schending van de bijzondere zorgplicht van banken.

¹¹⁷⁷ Vgl Asser-Hartkamp/Sieburgh 2010, 43.

(mogelijk) geraakten. De meest karakteristieke norm die hier aan de orde is, is de bijzondere zorgplicht van banken.

Hoofdstuk 6 Bepaling van de interne rechtsorde en interne sanctionering

Hoofdstuk 6 bevat de stelling dat schending door de bank van interne compliance reglementen in beginsel een aanwijzing vormt voor onbehoorlijk bestuur. Ik richt mij in hoofdstuk 6 op de wijze waarop banken gestalte geven aan de bepaling van de eigen interne rechtsorde en vervolgens hoe schendingen daarvan leiden tot (interne) sanctionering.

Banken leggen compliance betreffende zaken neer in schriftelijk geformuleerd beleid. Dat beleid kan de vorm aannemen van gedragscodes.¹¹⁷⁸ Beleid wordt daarbij ook uitgewerkt in procedures en maatregelen.¹¹⁷⁹ Dergelijke interne regels hebben het rechtskarakter van reglementen.¹¹⁸⁰ Hoewel ondergeschikt aan wet respectievelijk statuten, blijven reglementen in het BW zonder begripsbepaling. Reglementen bepalen de eigen, interne orde van de rechtspersoon voor zover deze orde niet in de statuten is vervat. Reglementen zien met name op het functioneren van de vennootschap en haar organen.¹¹⁸¹ Waar het de vennootschap, die wezenlijk een deelrechtsorde¹¹⁸² is, (in hoge mate) vrij staat haar eigen juridische orde te bepalen, zijn haar reglementen die zij met inachtneming van de interne regels vaststelde, aldus bindend voor haarzelf en (al) degenen die bij haar organisatie zijn betrokken.

De vrijheid ter bepaling van de interne rechtsorde vindt haar begrenzing daar waar de consequenties van die orde in strijd zijn met de algemeen geaccepteerde fundamentele beginselen van onze maatschappij – welke beginselen hun weerslag vinden in het objectieve recht.

¹¹⁷⁸ Men denke hierbij aan de ‘gedragscode’ genoemd in best practice bepaling II.1.3 (b) van de Nederlandse corporate governance code, alwaar die code wordt gekwalificeerd als een instrument van het intern risicobeheersings- en controlesysteem.

¹¹⁷⁹ In bijv. art 10 lid 2 BprWft heet het dat het beleid zijn ‘neerslag’ vindt in procedures en maatregelen.

¹¹⁸⁰ Vgl art 2:8 lid 2 en 2:15 lid 1 (c) BW.

¹¹⁸¹ Asser – Van der Grinten/Maeijer 1997, 35.

¹¹⁸² Vgl Van Schilfgaarde 2009, p 18.

Het tweede en belangrijkste luik van hoofdstuk 6 betreft interne sanctionering. Met intern doel ik op aansprakelijkheid voor schendingen jegens de bank (georganiseerd als een vennootschap) met inbegrip van aansprakelijkheid jegens aandeelhouders. Bij wijze van vooropstelling haal ik aan uit de memorie van toelichting bij BprWft waar zij verduidelijkt dat de door de Wft geëiste beheerste bedrijfsvoering¹¹⁸³ in de eerste plaats de verantwoordelijkheid is van de financiële onderneming zelf en (aldus) haar eigen belang is. De memorie van toelichting doet dat meteen volgen door de vaststelling dat waar art 2:9 BW behoorlijke taakvervulling vereist, het aan het bestuur is zorg te dragen dat de regels met betrekking tot de bedrijfsvoering worden nageleefd.¹¹⁸⁴

Bij het leerstuk van onbehoorlijke taakvervulling naar algemeen ondernemingsrecht, staat de eis van ernstige verwijtbaarheid voorop. Die eis dient niet slechts het belang (van bescherming) van de falende bestuurder, doch juist ook dat van de vennootschap. *Willemsen/NOM* drukt uit dat de door de eis van ernstige verwijtbaarheid opgeworpen hoge drempel voorkomt dat bestuurders hun handelen in ongewenste mate door defensieve overwegingen laten leiden.

Schending van een statutaire bepaling door een bestuurder, waar de geschonden bepaling strekt ter bescherming van de vennootschap, levert *in beginsel* wanbestuur op.¹¹⁸⁵ In *Staleman/Van de Ven* bepaalt de Hoge Raad dat ter vaststelling van ernstig verwijt alle voor het geval relevante omstandigheden in aanmerking moeten worden genomen. Daarbij geeft hij een lijstje van categorieën van omstandigheden.¹¹⁸⁶ Eén der categorieën wordt gevormd door richtlijnen die voor de raad van bestuur van toepassing zijn.¹¹⁸⁷ In de context van mijn proefschrift ware daarbij juist ook te denken aan de hierboven genoemde reglementen. *Willemsen/NOM* betrof schending van een procedurele bepaling uit de statuten. Het is (vandaar) een kleine stap naar reglementen met een procedureel karakter, men denke aan een huishoudelijk

¹¹⁸³ Art 3:17 lid 1 Wft.

¹¹⁸⁴ *Stb* 2006, 519, p 76.

¹¹⁸⁵ Te destilleren uit *Willemsen/NOM*.

¹¹⁸⁶ R.o. 3.3.1.

¹¹⁸⁷ Vgl de in art 2:129 lid 4 BW gehanteerde bewoordingen; 'aanwijzingen van een orgaan van de vennootschap die de algemene lijnen van het te voeren beleid op nader in de statuten aangegeven terreinen betreffen.'

reglement voor de raad van bestuur. Ik ga ervan uit dat deze categorie van richtlijnen interne reglementen betreffende compliance omvat, ook waar dergelijke reglementen een (louter) procedureel karakter hebben. Aldus kom ik tot de stelling dat schending door de bank van interne compliance reglementen, in beginsel een aanwijzing vormt voor onbehoorlijk bestuur. Ik voeg daaraan toe dat dat niet anders is waar het wanbestuur wordt gevormd door nalaten te handelen.

Voor bestuurdersaansprakelijkheid jegens een aandeelhouder staat slechts de actie uit onrechtmatige daad open. Toch hanteert het recht dezelfde hoge drempel voor de verwijtbaarheid van de bestuurder. Ware dit anders – zou bij de actie die (noodzakelijkerwijs) stoelt op art 6:162 BW de onverzwaarde (en daarmee: lichtere) onrechtmatigheidstoets gelden – zou daarin, in de bewoordingen van Timmerman daarin een aansporing zijn gelegen voor aandeelhouders niet de weg te beproeven de vennootschap ertoe te brengen te ageren uit (interne) bestuurdersaansprakelijkheid. Deze convergentie kan worden geschraagd met de aantekening dat de aandeelhouder zich committeert aan de hogere maatstaf door zijn als aandeelhouder vrijwillig gekozen betrokkenheid bij de vennootschap.¹¹⁸⁸

Hoofdstuk 7 Externe sanctionering

Hoofdstuk 7 stelt aan de orde jegens welke partijen buiten de kring van haar organisatie, en aldus buiten de mechanismen van haar (eigen) corporate governance, aansprakelijkheid kan ontstaan voor compliance schendingen. Het hoofdstuk draagt bij tot de beantwoording van de hoofdvraag doordat het aangeeft op welke wijze het recht consequenties verbindt aan compliance schendingen. Wordt daarbij duidelijk welke actoren kunnen worden getroffen door sancties, dan is daarmee invulling gegeven aan de vraag omtrent de verantwoordelijkheid voor, en dus, de ownership van compliance. Waar externe sanctionering van compliance schendingen voor een belangrijk gedeelte gebeurt binnen de sfeer van het bestuursrecht, en voor een in belang (nog) minder groot gedeelte door het strafrecht, komen deze onderwerpen binnen dit hoofdstuk ter behandeling.

¹¹⁸⁸ *Willemsen/NOM*,

Een belangrijke verschijningsvorm van sanctionering door buiten de bij haar organisatie betrokkenen is de civiele aansprakelijkheid uit een actie wegens schending van de bijzondere zorgplicht van banken. De kring jegens wie aansprakelijkheid kan bestaan is breder dan degenen met wie een contractuele band bestaat. Kort gezegd komt het erop neer dat de door schending van een regel benadeelden aanspraak maken op vergoeding van door hen geleden schade indien de regel mede beoogt hun belang te beschermen. De wetgever heeft de vooropstelling uitgesproken dat de Wft-zorgplicht beoogt bescherming te bieden aan buiten de bank staande partijen. Ook schending van door de bank zelf geformuleerde (compliance) regels kunnen aansprakelijkheid opleveren. Cortenraad bestemt de brede categorie van ‘gedragscodes waarop zich bij wijze van zelfregulering oriënteren’ tot normen waaraan door schending benadeelden bescherming ontnemen.¹¹⁸⁹

Tenslotte zij opgemerkt dat hierboven aansprakelijkheid van de bank als zodanig aan de orde is. De vraag welke actor binnen de organisatie verantwoordelijk is voor de compliance schending is daarbij minder relevant. Het ligt minder voor de hand dat derde partijen binnen de bank werkzame actoren rechtstreeks aanspreken wegens compliance schendingen. Wil een dergelijke actie kansrijk zijn, dient te worden bewezen dat het handelen van de aangesprokene onrechtmatig *jegens* de benadeelde was.¹¹⁹⁰ Daarbij zal dan toch hebben te gelden dat het litigieuze handelen van de aangeprokene duidelijk op de persoon van de gelaedeerde moet kunnen worden betrokken.¹¹⁹¹

Hoofdstuk 8 De proef op de som; Fortis en een visie uit het veld

¹¹⁸⁹ Cortenraad 2012, p 709.

¹¹⁹⁰ In *Kortekaas/Lippens* spraken beleggers in aandelen Fortis N.V. en Fortis S.A. niet slechts de bank maar ook daarbinnen werkzame *senior managers* aan voor schendingen van het Wft-verbod van marktmanipulatie. In dit proefschrift wordt deze casus onder hoofdstuk 6 behandeld waar het het interne perspectief betreft. De keuze hiervoor is gelegen in de parallel met aandeelhouders.

¹¹⁹¹ Een recent en veelbesproken geval waarin een bestuurder rechtstreeks wordt aangesproken is *Costa Blanca*. Daarin was aan de orde dat de bestuurder in de eerste plaats als persoon jegens de benadeelden optrad en meer in afgeleide zin als bestuurder.

Dit hoofdstuk stelt zich ten doel te bepalen of het voor de praktijk zin heeft (meer) duidelijkheid te hebben t.a.v. de ownership van compliance. Daartoe wordt in het bijzonder gekeken naar de beschikking van de Ondernemingskamer in *VEB/Fortis (OK)*¹¹⁹² en wordt daarnaast verslag gedaan van een bespreking van de bevindingen in dit proefschrift met specialisten uit de praktijk. De bijdrage door dit hoofdstuk aan het proefschrift is de ondersteuning van de veronderstelling dat er onvoldoende besef lijkt te bestaan van ownership van compliance bij bestuurders (en andere *senior managers*) en dat het dat gebrek aan besef is dat veroorzaakt dat compliance te zeer wordt aangezien voor een organisatieprobleem. Het vormt daarmee de opstap naar de aanbeveling die in hoofdstuk 9 wordt gedaan verhoogde sensitivering voor compliance teweeg te brengen door aanvullingen op de Nederlandse corporate governance code.

Aan *VEB/Fortis (OK)* kan worden ontleend dat compliance schendingen¹¹⁹³ wanbeleid kunnen opleveren. De Ondernemingskamer oordeelt dat, hoewel zij niet is geroepen te oordelen over de vraag of enige wettelijke bepalingen zijn geschonden, normen uit het privaatrecht, strafrecht, of bestuursrecht, zelfs indirect tot het oordeel dat sprake is van wanbeleid kunnen bijdragen. Daaraan voeg ik in dit hoofdstuk toe dat schending van interne op het bestuur toepasselijke (compliance)regels wanbeleid kan opleveren.

Hoofdstuk 8 vervolgt met lessons-learned uit *VEB/Fortis (OK)*. Uit de beschikking ontstaat een beeld dat een kring van *senior managers* verantwoordelijkheid voor wat door hen kennelijk werd ervaren als lastige en technische aspecten van op de bank toepasselijke regelgeving, afschoof naar aan hen ondergeschikte interne adviseurs. Die adviseurs werden als boodschappenjongens gezien; men verwachtte uitvoering en flexibele medewerking – een kritische en waarschuwendende houding werd niet geaccepteerd. En terwijl men het wilde doen voorkomen dat de interne adviseurs er waren om bij technische kwesties advies te geven, werd advies in de wind geslagen indien het niet bijdroeg tot enige (tevooren) gewenste uitkomst.

¹¹⁹² Op 6 dec. 2013 beschikte de Hoge Raad in het beroep in cassatie tegen de beschikking van de Ondernemingskamer. Ik heb de beschikking van de Hoge Raad buiten beschouwing gelaten omdat het zonder omhaal van woorden door de Hoge Raad faalt op alle onderdelen.

VEB/Fortis (OK), ondersteund door *Kortekaas/Lippens*, versterkt mijn opvatting dat het Nederlandse ondernemingsrecht is geëquipeerd om het gewenst handelen van de relevante actoren te bevorderen. Natuurlijk kan het frustratie wekken dat het daarbij moet hebben van procedures achteraf. Het is echter deze en dergelijke jurisprudentie die kan worden ‘ingezet’ ter voorlichting en instructie. Dat kan vorm krijgen door behandeling van deze jurisprudentie met bestuurders en commissarissen. Hoofdstuk 8 preludeert op de aanbeveling in hoofdstuk 9 met de veronderstelling dat de combinatie hiervan met een aanvulling op de Nederlandse corporate governance code bijdraagt tot de vereiste gevoeligheid dat compliance een bestuurderstaak is.

Vervolgens verslaat hoofdstuk 8 een bespreking van de hoofdpunten eruit voor de praktijk met de (op het moment van de bespreking) compliance hoofden van ABN AMRO en SNS REAAL. In de bespreking werd ondersteuning uitgedrukt voor de benadrukking van compliance als een integraal onderdeel van de bedrijfsvoering. Afschilderen van compliance als behorend tot risk management doet daar mogelijk afbreuk aan. De praktijk heeft er behoefte aan dat compliance niet als een organisatievraagstuk wordt gezien.

Uit de bespreking volgde dat de sensitiviteit voor compliance als bestuurderstaak voordeel kan hebben bij opnemings van jurisprudentie in voorlichtingssessies. Tevens werd het voorstel verantwoordelijkheid, en, met name mogelijke aansprakelijkheid, meer uitgesproken op te nemen in de Nederlandse corporate governance code, positief ontvangen.

Hoofdstuk 9 Conclusies en aanbevelingen

In hoofdstuk 9 komt de hoofdvraag tot beantwoording.

Maakt het recht voldoende duidelijk dat de ownership van compliance berust bij het bestuur, zodanig dat het ondernemingsrecht het gewenst gedrag van de relevante actoren bevordert? Is daarbij voldoende duidelijk dat compliance bestanddeel is van corporate governance?

¹¹⁹³ Het betrof beweerdelijke Wft-schendingen (bestaande uit marktmisbruik).

Het Nederlandse recht is niet uitgesproken over compliance als een bestuurderstaak. Evenmin is het Nederlands recht duidelijk erover dat compliance tot corporate governance behoort. De Nederlandse corporate governance code – die men niet te gauw of met teveel enthousiasme moet aanzien voor ‘recht’ – bepaalt wel dat naleving van alle relevante wet- en regelgeving de verantwoordelijkheid is van het bestuur. Corporate governance omvat in materiële zin de taken van de bestuursorganen, waarbij het accent ligt op het bepalen van de richting. Bij het laatste geldt de vooronderstelling dat bestuurders het succes van de onderneming bevorderen, juist ook door het opleggen van kernwaarden aan de onderneming.

Invulling van en afdwinging van voldoening aan bestuurderstaken liggen bij het ondernemingsrecht. Waar het compliance schendingen betreft die met name (doch niet exclusief) bestaan uit schendingen van de verplichting tot een beheerste en integere bedrijfsvoering, is het aldus aan het ondernemingsrecht deze te sanctioneren. Schending van interne compliance reglementen wijst in beginsel op onbehoorlijk bestuur.

Hoofdstuk 9 formuleert daarop als praktisch gevolg dat compliance *een integraal onderdeel* van de bedrijfsvoering is. Zonder overmatige aandacht voor de organisatorische aspecten, moeten banken bewerkstelligen dat de juridisch technische kennis die een voorwaarde is voor de juiste bedrijfsvoering, beschikbaar is waar zij is benodigd.

Voorafgaand aan de aanbevelingen, bevat dit hoofdstuk een *reality check*. Kort gezegd komt deze erop neer te bezien of hetgeen in het proefschrift wordt geconcludeerd de realiteit van de wijze waarop banken compliance opvatten en organiseren, ontkent. Er wordt niet betoogd dat de compliance functies moeten worden gesloten. Doch wordt erop gewezen dat waar relevante specialistische kennis een vereiste vormt voor een juiste bedrijfsvoering, die kennis zodanig dient te worden aangeboden dat het bedrijfs onderdeel dat daarover dient te beschikken, daarvan in die zin ownership heeft dat het in staat is zonder hinder daarover te beschikken.

Hoofdstuk 9 mondt uit in tweeërlei aanbevelingen:

1. De Nederlandse corporate governance code dient uitdrukkelijk te bepalen dat compliance een bestuurderstaak is; en
2. De Wft dient te bepalen dat markvertrouwen en het terugdringen van financiële misdrijven wetgevingsdoelen zijn.

Ad 1 Aanvulling op de Nederlandse corporate governance code

De aanbeveling luidt uit principe II.1 2^e al. te schrappen: ‘voor de naleving van alle relevante wet en regelgeving’. De, aldus ingekorte volzin, wordt in de aanbeveling meteen gevolgd door een nieuwe zin:

Compliance met het recht – hetgeen compliance met zelf opgelegde standaarden en procedures veronderstelt – is de verantwoordelijkheid van het bestuur. Compliance behoort tot de plicht van bestuurders tot behoorlijke vervulling van hun taak.

Hiernaast wordt aanbevolen de laatste volzin van principe II 2^e al. te herformuleren, zodanig dat compliance een zelfstandig benoemd voorwerp van rapportage wordt;

Het bestuur rapporteert over ieder van deze aandachtsgebieden aan de raad van commissarissen en de auditcommissie, waarmee het de interne risicobeheersings- en controlesystemen alsmede compliance bespreekt.

Tenslotte, wat de Nederlandse corporate governance code betreft, luidt de aanbeveling een nieuwe best practice bepaling genummerd II.I.4 in te voegen:

Compliance mag worden gedelegeerd indien de raad van bestuur zeker stelt dat het in staat is de bedrijfsvoering ten aanzien van compliance te sturen en te monitoren. Geen bestuurslid is vrijgesteld van deze taak. Waar delegatie plaatsvindt dragen bestuurders zorg dat toereikende beheersmaatregelen werken die problemen binnen de gedelegeerde gebieden signaleren op een moment dat tijd resteert daaraan iets te doen.

Ad 2 Herformulering art 3:10 Wft

De aanbeveling tot herformulering van art 3:10 Wft luidt als volgt:

Een betaalinstelling, clearinginstelling, elektronische geldinstelling, entiteit voor risicoacceptatie, bank, premiepensioeninstelling, verzekeraar of wisselinstelling met zetel in Nederland moet haar bedrijf integer voeren, dienstig aan de primaire wetgevingsdoelstellingen van marktvertrouwen, de bescherming van consumenten en het terugdringen van de financiële misdaad.

Curriculum vitae

Armand Kersten werd geboren te Haarlem op 30 juni 1959. Hij behaalde aldaar het diploma Gymnasium-alpha aan het Lyceum Sancta Maria in 1978. Hij studeerde rechten aan de Universiteit Leiden waar hij in 1985 het doctoraal internationaal publiekrecht behaalde. Eén jaar voor zijn afstuderen maakte hij deel uit van het Nederlandse pleitteam dat deelnam aan de *Professor Telders International Law Moot Court Competition*. Het team won de landenprijs en Armand won de prijs voor de beste individuele pleiter. Meteen na zijn afstuderen werd hij advocaat bij Blackstone, Rueb & Van Boeschoten, waar hij tot 1989 in het Amsterdamse kantoor werkte. In 1989 ging hij voor ABN naar Curacao (Nederlandse Antillen) waar hij een bijna 20 jaar omspannende carrière bij wat later ABN AMRO werd, aanving. Bij ABN AMRO heeft hij nooit meer dan drie jaren eenzelfde functie gehad. Armand was werkzaam binnen international private banking toen deze vorm van dienstverlening werd geassocieerd met belastingvlucht. De wettelijke maatregelen ter bestrijding daarvan wekten zijn interesse. Als gevolg daarvan was vanaf 2000 ‘compliance’ de rode draad in zijn posities bij ABN AMRO. In 2009, bijna twee jaar na de overname, verliet hij de bank. Vanaf dat moment combineerde hij een part-time betrekking bij EY met het onderzoek dat uitmondde in dit proefschrift. Bij EY werkte hij als consultant bij de afdeling Fraud Investigation & Dispute Services en ondersteunde aldaar de preventieve compliance-praktijk. Na in 2013 als universitair docent onderwijs met onderzoek te hebben gecombineerd, begon hij in 2014 bij Horus Partners Wealth Management Group SA, een Geneefse beleggingsonderneming. Daarmee keerde hij terug naar een private banking omgeving. Armand is gehuwd en heeft twee dochters. Hij woont met zijn vrouw en nog één thuiswonend kind te Naarden.