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Buysse Code II: A New Version of the Corporate Governance Code for Unlisted Companies

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A new version of the Corporate Governance Code applicable to unlisted companies (i.e., companies other than those listed on a regulated market) has been available since 23 June 2009. The first version of the so-called Buysse Code was issued in 2005 and met with limited success. However, given the current financial and economic crisis, it is expected that businesses will want to pay more attention to corporate governance and to the Buysse Code II's recommendations.

It should be noted that the Buysse Code II contains only non-binding recommendations as the existing rules in this area were thought to be sufficiently stringent for business owners. However, the recommendations in the Buysse Code II are much more detailed than those formulated in the 2005 version. The new elements of the 2009 code are summarised below.

Corporate social responsibility

Particular emphasis is placed on corporate social responsibility, and this theme is approached in a more structured manner than in the past.

In order to create long-term, sustainable value in the interest of all stakeholders, it is important to take into account everyone who participates in a company's activities, *i.e.,* (i) personnel and others, (ii) bankers and lenders, (iii) suppliers, (iv) clients, (v) competitors, (vi) external advisors, (vii) various public authorities, and (viii) any other outside contributors (*e.g.,* professional associations, unions, interest groups and research centres).

It is thus of the essence to identify all parties involved and define their interests, needs and expectations as well as the impact and interaction of the company's activities on each one. Subsequently, the company can determine the strategies and actions to develop taking this information into account.

Establishment of an advisory committee

In newly incorporated and smaller companies, the Buysse Code II recommends the establishment of an advisory committee or council to provide advice in certain areas. No decision-making authority is granted to the advisory committee which, as its name indicates, only advises the company's management and formulates various opinions and recommendations.

It is recommended that the advisory committee be composed of at least four members, with an equal number of internal and external members. The external members should include at least two independent external advisors.

The advisory committee should meet at least four times per year at sufficiently regular intervals to guarantee its continuity and the engagement of its advisors. The advisory committee should preferably be established for a two-year period and conduct an annual self-evaluation.

Identification of risks and risk management

Each company should internally identify, evaluate, manage and monitor its risks. The board of directors is responsible for determining the company's risk management policy, while management is in charge of managing the risks. The board should ensure that management puts in place a system of internal controls to correctly identify and manage risks.

In companies of a certain size or complexity, it may be advisable to establish an internal audit service, and it is recommended to regularly evaluate the need for such a service. The company's external auditor plays a key role in ensuring good corporate governance and, of course, should be independent. The auditor's relationship with the board of directors is also important, and the board is responsible for ensuring that the company's annual accounts are prepared on time.

Active board of directors

The Buysse Code II introduces no new provisions with respect to the role, duties and composition of the board of directors.

It is recommended that the board meet at least four times per year at regular intervals and that a special annual meeting be held to discuss solely the company's long-term perspectives. The board and its members should conduct periodic self-evaluations, and if it is found that the board's composition and/or functioning, or the contribution of individual directors, is not sufficient to allow the company to realise its goals in the most efficient way possible, the chairperson should take the necessary measures to rectify the situation.

The Buysse Code II states that it is possible and even advisable, depending on the size and specific characteristics of each company, for the board of directors to establish advisory committees subject to its authority, such as a finance and audit committee, a nomination committee, a remuneration committee and a strategic committee. The 2009 code introduces new provisions with respect to the operating rules and potential duties of these various committees.

Effective senior management

The Buysse Code II makes a clear distinction between non-executive directors and senior management, defined as executive directors and members of the top management.

Senior management implements the decisions of the board of directors. The code specifies that the managing director plays a key role in unlisted companies.

The Buysse Code II is not clear on the procedure to appoint the managing director. It however recommends that the board of director's nomination be approved by the general meeting.

Remuneration of directors and senior management

The Buysse Code II states that the remuneration of directors must be sufficient to attract, retain and motivate directors that meet the profile defined by the board of directors. It is recommended that, in general, non executive directors receive fixed remuneration linked to their attendance of board meetings. Stock options and other forms of variable or long-term remuneration are not indicated for non executive directors.

The Buysse Code II introduces a new criterion to be taken into account when determining the remuneration of senior management, stating that it should be adequate, linked both to the performance of the company and the individual's performance. Salary and variable remuneration should conform to the market practices and form a basis for attracting the best-skilled people.

Variable remuneration should correspond to services actually rendered which add value to the company. In any case, the system of remuneration should not result in the company taking unnecessary or too great risks. Moreover, remuneration should be approved by the company's management organs.

Engaged shareholders

The Buysse Code II provides that shareholders should not only be involved (the word used in the 2005 code) but also engaged. This is part of the current trend to strengthen not only the rights but also the obligations of shareholders to actively participate in corporate life and general meetings.

The code requests that shareholders respect the powers and authority of the board of directors and management, observe agreements such as shareholders agreements and family charters, train the next generation of shareholders, and have a clear vision of their long-term objectives.

Conclusion

The Buysse Code differs from its counterpart for listed companies due to the different ownership structures of listed and unlisted companies.

The ownership of an unlisted company can, as is often the case, be concentrated in the hands of one or several shareholders, who often belong to the same family. The Buysse Code II includes specific provisions on family governance, as did the 2005 version. Needless to say, an unlisted company can also have many unrelated shareholders. The Buysse Code II is intended to cover these various structures, and it is thus logical for its application to be characterised by a certain degree of flexibility.

Compared to listed companies, which are subject to the comply or explain principle, unlisted companies can decide for themselves the extent to which they wish to follow the recommendations of the Buysse Code II and the degree of transparency they wish to apply in this regard.

The Buysse Code II recommends that each company adopt a corporate governance statement to ensure the transparency and disclosure of its internal governance rules.

The Buysse Code II indirectly reinforces the criteria used to assess the liability of managers, and a judge asked to rule on the potential liability of the managers of a company, *e.g.,* in the event the company is experiencing financial difficulties, might be tempted to verify if the recommendations of the Buysse Code II have been taken into account. Companies should thus not underestimate or merely put aside without further consideration the principles recommended in the code. Forewarned is forearmed.

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