The Corporate Governance Review

Fifth Edition

Editor
Willem J L Calkoen

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EDITOR'S PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this fifth edition, we can see that corporate governance is becoming a more vital and all-encompassing topic with each year that passes. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, most of us work for them. Most corporations aim to add value to society and they very often do. Some, however, are exploiting, polluting, poisoning and impoverishing us. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards and vital staff members. Do they show commitment to all stakeholders and to long-term shareholders only, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in 'better corporate governance': parliaments, governments, the European Commission, the US Securities and Exchange Commission (SEC), the Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports, the media, supervising national banks, shareholder activists and other stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working diligently, many with even more diligence. Nevertheless, there have been failures in some sectors, so trust has to be regained. How can directors do all their increasingly complex work and communicate with all the parties mentioned above?

What should executive directors know? What should outside directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperial CEOs? Can lead or senior directors create sufficient balance? Should most outside directors understand the business? How much time should they spend on the function? How independent must they be? What about diversity? Should their pay be lower? What are the stewardship responsibilities of shareholders?

Governments, the European Commission and the SEC are all pressing for more formal inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, wise boards have 'selected engagements' with stewardship shareholders to create trust. What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better 'tone from the top'? Should they put big signs on their buildings emphasising integrity, stewardship and respect?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code and many countries produced national versions along the lines of the Cadbury 'comply or explain' model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs gradually amassed too much power or companies have not developed new strategies and have fallen into bad results – and sometimes even failure. More are failing in the financial crisis than in other times, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists. The European Commission is developing a regulation for this area as well.

This all implies that executive and non-executive directors should work harder and more as a team on policy, strategy and entrepreneurship. It remains a fact that more money is lost through lax directorship than through mistakes. On the other hand, corporate risk management is an essential part of directors' responsibilities, and sets the tone from the top.

Each country has its own measures; however, the chapters of this book also show a convergence. The concept underlying the book is of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, where a quick 'first look' at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that *The Corporate Governance Review* will be seen, in time, as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project. I hope that this book will give the reader food for thought; you always learn about your own law by reading about the laws of others. Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
March 2015

Chapter 2

BELGIUM

Elke Janssens and Virginie Ciers[1]

I OVERVIEW OF GOVERNANCE REGIME

Belgian corporate governance practices for listed companies have been partially codified in the Belgian Company Code (BCC). The BCC contains mandatory provisions on, for example, the establishment of an audit committee and a remuneration committee, requirements with respect to the determination and disclosure of executive remuneration, requirements for independent directors, and the issuance of a corporate governance statement. Compliance with these mandatory provisions is ensured, for the most part, by the listed company's auditor and the Financial Services and Markets Authority (FSMA).

In addition, other financial and *ad hoc* disclosure requirements for listed companies are laid down in the Royal Decree of 14 November 2007 on the obligations of issuers whose financial instruments are admitted for trading on a regulated market. Listed companies must also disclose the transparency notices they receive from their shareholders pursuant to the Act of 2 May 2007 and the Royal Decree of 14 February 2008.

The other main source of guidance with respect to corporate governance for Belgian listed companies is the Corporate Governance Code 2009 (the 2009 Code),[2] published on 12 March 2009 and also known as the Daems Code. The 2009 Code is an initiative of the non-governmental Corporate Governance Committee, composed of representatives from bodies such as the FSMA (formerly the CBFA), the Federation of Belgian Enterprises, Euronext Brussels, the Belgian Institute of Chartered Accountants and the Central Economic Council. The 2009 Code replaced the Corporate Governance Code 2004 (the Lippens Code). The FSMA monitors compliance by listed companies with the 'comply-or-explain' principle applicable to the 2009 Code. The 2009 Code

1 Elke Janssens is a partner and Virginie Ciers is a senior associate at NautaDutilh in Brussels.

2 See www.corporategovernancecommittee.be.

is intended to apply to Belgian companies whose securities are listed on a regulated market.[3]

In 2010, the 2009 Code was named the mandatorily applicable corporate governance code for certain listed Belgian companies, more specifically those whose shares are listed on a regulated market (in Belgium or another Member State of the European Economic Area (EEA)) or whose shares are traded on a multilateral trading facility (MTF) (i.e., in Belgium, mainly the Vrije Markt/Marché Libre and Alternext),[4] provided they have other securities listed on a regulated market (e.g., in Belgium, Euronext Brussels or the market for derivatives of Euronext Brussels). The BCC obliges such companies to adhere to the provisions of the 2009 Code or to explain in their corporate governance statement, which forms part of the annual report, why they have not done so, assuming of course that the provisions in question are not of mandatory application. This means that listed companies that fail to explain why they have not abided by certain provisions of the 2009 Code will be deemed to be in violation of Belgian law. In other words, listed companies are not required by law to comply with the 2009 Code, but they are required to explain why they have not done so. In addition, compliance is highly recommended since it gives credibility and authority to listed companies. Non-compliance can indeed adversely affect public opinion about a company.

The Belgian corporate governance rules have thus evolved over the past few years from soft law (the Lippens Code and the 2009 Code) to hard law (the BCC), and the process is ongoing. European legislation is often the driving force behind Belgian legislative proposals.

One of the most important recent legislative actions in the area of corporate governance is the adoption of rules that oblige listed companies to ensure that at least one-third of the members of their board of directors is of a different gender than the other members.[5] This action is based on a January 2011 recommendation on gender diversity of the Corporate Governance Committee. Indeed, the means of increasing the number of women on management boards has been widely debated. The legislature finally decided to use hard law rather than soft law (such as a recommendation in the 2009 Code) to achieve this goal.

Specific, more stringent corporate governance rules are applicable to financial institutions.

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3 There is an inconsistency between the Dutch version of the 2009 Code, on the one hand, and the French and English versions, on the other; the latter only refer to 'companies whose shares are listed on a regulated market'.

4 Publieke Veilingen/Ventes Publiques, Trading Facility and Easynext, organised by Euronext Brussels, and MTS Belgium, MTS Denmark and MTS Finland, organised by MTS Associated Markets SA, are also MTFs but are rarely used.

5 Act of 28 July 2011 amending the Act of 21 March 1991 on the reform of certain economic public undertakings, the Company Code, and the Act of 19 April 2002 on the functioning and management of the National Lottery, in order to guarantee that women are represented on the boards of directors of public undertakings, listed companies and the National Lottery, published on 14 September 2011 in the *Belgian State Gazette*.

In addition to the 2009 Code, which is applicable to listed companies, the Buysse Code II contains corporate governance recommendations for unlisted companies. The Buysse Code II was published in 2009 to update the Buysse Code 2005; compliance with this code is voluntary in nature.

This chapter, however, focuses only on the corporate governance rules applicable to listed companies.

II CORPORATE LEADERSHIP

i Board structure and practices

In Belgium, listed companies usually take the form of a limited company (NV/SA).[6] Companies with other corporate forms can be listed if their shares are freely transferable.

The basic governance structure of an NV/SA is a one-tier model, whereby the board of directors holds all powers except those specifically reserved by law or the articles of association to the general meeting of shareholders. Limitations on the powers of the board of directors set out in the articles of association are not enforceable against third parties and have internal effect only. The board of directors should be composed of at least three directors (or two if there are only two shareholders in the company and the articles of association so provide).

The BCC allows the board of directors to delegate daily management of the company, and the external representation of the company in that respect, to another person, who may also be a director. Limitations on the powers of the daily manager, either set out in the articles of association or adopted by the board of directors, are not enforceable against third parties and have internal effect only. This person is generally known as the CEO, managing director or general manager. The board of directors still has authority to take decisions with respect to the delegated powers.

The BCC allows companies to adopt a two-tier governance model if their articles of association provide for this possibility. In this model, the board of directors delegates (some of) its powers to a management committee, except those reserved to it by law and general corporate policy. Limitations on the powers to be delegated can either be set out in the articles of association or adopted by the board of directors. Again, such limitations are not enforceable against third parties and have internal effect only. If the board of directors thus delegates all of its powers except those reserved to it by law and general policy, it becomes in fact a supervisory board and can no longer take management decisions. Very few listed companies have adopted a two-tier governance model.

The most common governance model in listed companies, and the basis for the 2009 Code, is the one-tier model, whereby the board of directors delegates daily management to the CEO, who is assisted by a number of executive managers (who may or may not be directors), for example, the chief operating officer, the chief financial officer or the chief legal officer. Together, they constitute the company's executive management. The powers of the executive managers, other than the CEO, to represent the company

6 Since most listed companies in Belgium take the form of an NV/SA, the governance structures of other corporate forms are not discussed in this chapter.

for the purposes of certain acts derive from a special authorisation granted by the board of directors or the CEO.

In addition to representation by the CEO (for matters of daily management) and other executive managers (within the limits of their specific powers), the company can also be represented externally by a majority of its directors, acting jointly, or by a person appointed to this end in the articles of association (often two directors acting jointly, the chair, the CEO, etc.). The company will be bound by any acts taken or obligations incurred by these individuals, even if the internal decision was not taken by the correct corporate organ (unless the counterparty acted in bad faith). Quantitative limitations (e.g., representation for transactions with a value of up to €100,000) on the external representation powers of the CEO or the persons appointed in the articles of association to represent the company are not enforceable against third parties and have internal effect only.

In the above model, the board of directors still has all powers to manage the company, but daily management is mostly handled by executive management. The board of directors, in actuality, mainly supervises the management of the company. The 2009 Code indicates that the board of directors is responsible for determining the company's values and strategy, its risk appetite and key policies. As a guideline, the board of directors should ensure that the necessary leadership and human and financial resources are available for the company to meet its objectives. In translating values and strategies into key policies, the board should pay attention to corporate social responsibility, gender diversity and diversity in general. In addition to general corporate policy, the board of directors should at least, in the context of its supervisory role:

a review the performance of executive management and the realisation of the company's strategy;

b monitor and review the effectiveness of the board's committees;

c take all necessary measures to ensure the integrity and timely disclosure of the company's financial statements and other material financial and non-financial information disclosed to shareholders and potential shareholders;

d approve the internal control and risk management mechanisms proposed by executive management;

e review the implementation of these mechanisms, taking into account the review made by the audit committee;

f supervise the performance of the statutory auditor;

g supervise the internal audit function, taking into account the review made by the audit committee; and

h describe the main features of the company's internal control and risk management systems (disclosed in the corporate governance statement).

The 2009 Code states that the board of directors should take decisions in close consultation with the CEO regarding the structure of executive management and should determine the powers and duties of the executive managers. A mention to this effect should be included in the terms of reference of the board and of executive management. The board should ensure that executive management is able to perform its responsibilities and duties. In view of the company's values, risk appetite and key policies, executive management should have sufficient latitude to propose and implement corporate strategy. Executive management should at least:

a be entrusted with the running of the company;

b put internal controls in place (i.e., systems to identify, assess, manage and monitor financial and other risks) without prejudice to the board's supervisory role and based on a framework approved by the board;

c present to the board complete, timely, reliable and accurate financial statements, in accordance with the applicable accounting standards and company policies;

d prepare the company's disclosure of financial statements and other material financial and non-financial information;

e present the board with a balanced and comprehensible assessment of the company's financial situation;

f provide the board in due time with all information necessary for the latter to carry out its duties; and

g be responsible and accountable to the board for the discharge of its responsibilities.

The 2009 Code states that the board of directors should be composed of both non-executive directors, who do not participate in the company's daily activities, and executive directors, who belong to executive management and thus participate in the company's daily activities. At least half the board should be made up of non-executive directors, at least three of whom are independent based on the criteria set out in Article 526 ter BCC. The board's composition should ensure that decisions are taken in the company's interest and should reflect gender diversity and diversity in general, as well as complementary skills, experience and knowledge. No individual or group of directors should dominate the board's decision-making process, and no individual should wield excessive decision-making powers. In January 2011, the Corporate Governance Committee, which issued the 2009 Code, issued an additional recommendation providing that within seven years, at least 30 per cent of board members should be women.[7]

The Act of 28 July 2011 introduced Article 518 bis into the BCC, which stipulates that at least one-third (rounded to the nearest whole number) of the board of directors of companies whose securities are listed on a regulated market should be of a different gender than the other members. If the required number of directors of the less-represented gender is not met, the next appointed director should be of that gender. If not, the appointment shall be deemed null and void. The same holds true if an appointment would cause the number of directors of the other gender to drop below the required minimum. This requirement and sanction are applicable as from the first day of the sixth financial year that starts to run after 14 September 2011. For listed companies

7 This recommendation has not yet been incorporated into the 2009 Code, nor has the BCC made this recommendation part of the reference corporate governance code (the 2009 Code).

whose free float[8] amounts to less than 50 per cent and for small listed companies,[9] this requirement and sanction are applicable as from the first day of the eighth financial year beginning after 14 September 2011.

For companies whose securities are admitted to trading on a regulated market for the first time, the requirement should be met as from the first day of the sixth financial year after the admission.[10]

If the required quota is not met, a board that meets the quota should be composed at the next general meeting. Otherwise, any financial or other benefit to which the directors are entitled by virtue of their office shall be suspended. These benefits will be reintroduced once the board meets the gender diversity requirement.[11]

The 2009 Code assigns a clear role to the chairperson of the board of directors. The chair and the CEO should not be the same person, and there should be a clear division between duties related to the running of the board (chair) and the management of the company's business (CEO). This division of responsibilities should be clearly established, set out in writing and ratified by the board. The chair should cultivate a close relationship with the CEO, providing support and advice while fully respecting the CEO's executive responsibilities. As a guideline, the chair should stimulate effective interaction between the board and executive management. The chair is responsible for leading the board of directors and can be entrusted by the board with specific responsibilities. The chair should take the necessary measures to foster a climate of trust within the board, contribute to open discussion, allow constructive dissent and ensure support for the board's decisions. The chair determines the agenda for board meetings, after consultation with the CEO, and ensures that procedures relating to preparations for board meetings, deliberations, the adoption of resolutions, and the implementation of decisions are properly followed. The chair is responsible for ensuring that the directors receive accurate, timely and clear information before the meetings and, where necessary, between meetings. All directors should receive the same information.

8 There is an inconsistency between the French and Dutch text of Article 518 *bis* BCC. The French version refers to the 'free float' while the Dutch version refers to 'the value of freely negotiable shares'. In our opinion, the French version is correct, since it appears that the Dutch text has not been fully updated following an amendment to extend the scope of the act from listed shares to listed securities.

9 Listed companies that meet at least two of the following three requirements on a consolidated basis: (1) fewer than 250 employees on average during the financial year, (2) a balance sheet total of less than €43 million, and (3) net annual turnover of no more than €50 million.

10 Applicable as from the first day of the first financial year starting after 14 September 2011.

11 This sanction is applicable as from the first day of the seventh financial year commencing after 14 September 2011. For listed companies whose free float amounts to less than 50 per cent and for small listed companies, this sanction is applicable as from the first day of the ninth financial year commencing after 14 September 2011.

The BCC obliges companies[12] whose shares are listed on a regulated market to set up a remuneration committee composed of non-executive directors, a majority of whom should be independent.[13] The members of the remuneration committee must possess the requisite level of expertise in the area of remuneration policy. The chair of the board of directors or another non-executive director should head the remuneration committee. The remuneration committee should meet at least twice a year and whenever it deems necessary in order to carry out its duties. The remuneration committee should report regularly to the board of directors on the exercise of its duties. The CEO should attend meetings of the remuneration committee when the committee is discussing the remuneration of executive management. The remuneration committee should submit proposals to the board of directors on the company's remuneration policy and on the individual remuneration of directors and executive managers and, where appropriate, on proposals to be submitted by the board of directors to the general meeting of shareholders (i.e., proposals on the remuneration of directors). The remuneration committee also prepares the remuneration report that forms part of the annual report and provides explanations on this report at the annual general meeting of shareholders.

The 2009 Code provides for practically the same requirements with respect to the remuneration committee. The 2009 Code further specifies, however, that the remuneration committee should have at least three members and should submit proposals to the general meeting of shareholders on the remuneration of directors and executive managers, including proposals on variable remuneration and long-term incentives, such as the grant of stock options or other financial instruments and arrangements for premature termination. The remuneration committee should review (at least every two to three years) its terms of reference and its own effectiveness and recommend necessary changes, if any, to the board.

In addition to a remuneration committee, the BCC obliges companies whose securities are listed on a regulated market[14] to set up an audit committee, composed of

12 There is an exception for small listed companies that meet the criteria set out in Article 526 *quater* Section 4 BCC. In that case, no remuneration committee need be set up. Rather, the board of directors will perform the duties of the remuneration committee and should have at least one independent member. If the chairperson of the board is an executive director, he or she cannot chair board meetings when the board is acting as the remuneration committee. There is also an exception for public undertakings for collective investment with variable capital, within the meaning of Article 10 of the Act of 20 July 2004 on certain forms of collective management of investment portfolios, and for companies whose business is the issuance of asset-backed securities, as defined in Article 2(5) of Commission Regulation (EC) No. 809/2004.

13 In accordance with the requirements set out in Article 526 *ter* BCC.

14 There is an exception for small listed companies that meet the criteria set out in Article 526 *bis* Section 3 BCC. In that case, no audit committee need be set up. Rather, the board of directors will perform the tasks of the audit committee and should have at least one independent member. If the chairperson of the board is an executive director, he or she cannot chair board meetings at which the board is acting as the audit committee. There is

non-executive directors. At least one member should be independent[15] and must possess the requisite level of expertise in the area of accountancy and audits. The audit committee should report regularly to the board of directors on the exercise of its duties and in any case when the board draws up the annual accounts, consolidated annual accounts and the short-form financial statement (intended for publication). The audit committee should monitor the financial reporting process, the effectiveness of the company's internal control and risk management systems, the internal audit – if any – and its effectiveness, the audit of the annual and consolidated accounts, including the follow-up of any questions and recommendations by the statutory auditor, and review and monitor the independence of the statutory auditor, in particular with respect to the provision of additional services to the company. The statutory auditor should report to the audit committee on key matters arising from the audit of the annual accounts, in particular on material deficiencies in internal control of the financial reporting process. The statutory auditor shall confirm to the audit committee annually, in writing, its independence from the company, inform the audit committee on an annual basis of any additional services provided to the company, and examine, together with the audit committee, the risks to its independence and the safeguards to be implemented to minimise these risks. The audit committee should make a proposal on the (re)appointment of the statutory auditor or external auditor which should be placed on the agenda of the general meeting.

The requirements of the 2009 Code with respect to the tasks and duties of the audit committee are much more detailed and give further guidance as to what should be done to fulfil the mandatory tasks set out above. The 2009 Code also indicates *inter alia* that (1) the audit committee should have at least three members, (2) at least half of the audit committee's members (versus one in the BCC) should be independent, and (3) the chairperson of the board of directors cannot also chair the audit committee. The audit committee should meet at least four times a year and review (at least every two to three years) its terms of reference and its own effectiveness and recommend any necessary changes to the board. The committee should meet with the external and internal auditors at least twice a year to discuss the audit process. An independent internal audit function should be established, or at least once a year it should be considered whether this is necessary. In June 2012, the Corporate Governance Committee issued additional advice in relation to the audit committee's proposal regarding the (re)appointment of the statutory auditor or external auditor. The Committee advised that when appointing an auditor, the audit committee should solicit offers on the basis of predetermined selection criteria (e.g., technical skill, price, financial and economic expertise). The audit committee should also review the work of the statutory or external auditor every three years with a view to the submission of a proposal to the board of directors on the reappointment of the auditor.

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also an exception for public undertakings for collective investment with variable capital, within the meaning of Article 10 of the Act of 20 July 2004 on certain forms of collective management of investment portfolios, and for companies whose business is the issuance of asset-backed securities, as defined in Article 2(5) of Commission Regulation (EC) No. 809/2004.

15 In accordance with the requirements set out in Article 526 *ter* BCC.

The board in turn will forward the proposal to shareholders and, if applicable, the works council.

The 2009 Code introduced a third committee, namely the nomination committee, whose duties may also be exercised by the remuneration committee, in which case it shall be known as the remuneration and nomination committee. The nomination committee should have at least three members, a majority of whom should be independent non-executive directors. The chair of the board of directors or another non-executive director shall chair the nomination committee. The chair cannot preside over meetings of the nomination committee when the committee is discussing the appointment of the chair's successor. The nomination committee should make recommendations to the board with regard to the appointment of directors, the CEO and other executive managers and should consider proposals made by relevant parties, including management and shareholders. It should meet at least twice a year and review (at least every two to three years) its terms of reference and its own effectiveness and recommend any necessary changes to the board.

The 2008 financial crisis led to an animated debate on the (at times excessive) remuneration of directors and executive managers of Belgian companies. In an attempt to rein in the remuneration of directors and executive managers, several new provisions were adopted in 2010 and codified in the BCC.

As a general rule, the general meeting of shareholders has exclusive power to determine the remuneration of directors. The board of directors, in turn, determines the remuneration of executive management, unless the company's articles of association provide otherwise. In listed companies, the articles of association sometimes provide that the shareholders' general meeting determines the overall remuneration for the board of directors as a whole, while the board itself decides how to distribute this total amount among its members.

The BCC stipulates that the remuneration of individual directors and executive managers shall be determined further to a proposal by the remuneration committee. The remuneration committee should also submit proposals on the company's remuneration policy, which must be explained in the remuneration report that forms part of the board's annual report. The general meeting of shareholders need not approve the remuneration policy *per se* but does have the power to vote on the remuneration report in which the remuneration policy is described. There are no consequences, however, if the general meeting rejects the remuneration report. The remuneration report should also be provided to the works council or, in the absence thereof, the employee representatives on the committee for prevention and protection at work or, if there is no such committee, the trade union representatives.

If an executive manager receives variable remuneration (i.e., remuneration linked to performance), the criteria used to determine such remuneration should be set out in the contractual or other provisions governing the company's relationship with the manager, and payment can only take place if these criteria have been met within the specified time period. If this is not the case, the executive's variable remuneration cannot be taken into account to determine his or her severance package.

If the variable remuneration of an executive manager of a listed company makes up more than one-quarter of his or her annual remuneration, at least 25 per cent of such variable remuneration should be based on previously established and objectively verifiable performance criteria measured over a period of at least two years, and at least another 25 per cent should be based on previously established and objectively verifiable performance criteria measured over a period of at least three years, unless the articles of association provide otherwise or the general meeting of shareholders expressly consents to deviate from this rule.

Unless the articles of association provide otherwise or the general meeting of shareholders expressly agrees, shares shall only be finally acquired and share options or any other rights to acquire shares shall only be exercisable by a director or executive manager of a listed company after a holding period of at least three years is satisfied.

The general meeting of shareholders should also approve in advance[16] any severance package agreed by the company with an executive manager if the severance pay amounts to more than 12 months' remuneration, as well as any variable remuneration granted to an independent or non-executive director.[17] If the severance package represents more than 18 months' remuneration, a reasoned opinion from the remuneration committee is also required. Any such contractual provision that has not been approved by the general meeting shall be deemed null and void. The proposal should also be notified to the works council or, if there is none, the employee representatives on the committee for prevention and protection at work or, in the absence thereof, the union representatives.

The aforementioned provisions of the BCC are supplemented by the 2009 Code principles and best practices with regard to the level and structure of executive remuneration, including the following:

a the level of remuneration should be sufficient to attract, retain and motivate executive managers who meet the profile determined by the board;

b the level and structure of the remuneration of executive managers should be such that qualified and expert professionals can be recruited, retained and motivated, taking into account the nature and scope of their individual responsibilities;

c an appropriate percentage of an executive manager's remuneration should be linked to the company's and the individual's performance; and

d severance pay should not exceed 12 months' fixed and variable remuneration.

Further to a special recommendation of the remuneration committee, the severance package can amount to 18 months' fixed and variable remuneration. In any case, the severance package should not take into account variable remuneration or exceed 12 months' fixed remuneration if the departing CEO or executive manager did not meet the agreed performance criteria. The 2009 Code also adds that the prior approval of the general meeting of shareholders is required for schemes that provide for the remuneration of executive managers with shares, options or any other right to acquire shares.

The 2009 Code further provides that the remuneration of non-executive directors should take into account not only their role as ordinary board members but also any specific positions they may hold, such as chair of the board, or chair or member of a

16 This rule applies to any agreements entered into or renewed as from 3 May 2010.

17 For non-executive dependent directors, this rule applies to any agreements entered into or renewed after 3 December 2011.

board committee, as well as their resulting responsibilities and commitments in terms of time, and that non-executive directors should not be entitled to performance-based remuneration such as bonuses, long-term stock-based incentive schemes, or fringe or pension benefits.

ii Directors

The 2009 Code indicates that both executive and non-executive directors, regardless of whether the latter are independent or not, should exercise independence of judgement in their decisions. Directors should make sure they receive detailed and accurate information and should study this information carefully so as to acquire and maintain a clear understanding of the key issues relevant to the company's business. They should seek clarification whenever they deem it necessary to do so.

While executive and non-executive directors are part of the same body (namely, the board of directors), they play complementary roles on the board. The 2009 Code stipulates, as a guideline, that executive directors should provide all relevant business and financial information needed for the board to function effectively. Non-executive directors should constructively challenge and help develop strategy and key policies proposed by executive management. They should also scrutinise the performance of executive management in meeting agreed goals.

Non-executive directors should be made aware of the extent of their duties at the time of their appointment, in particular the time commitment involved. They should not consider taking on more than five directorships in listed companies. Changes to commitments and the assumption of new commitments outside the company should be reported to the chairperson of the board, as they arise.

Pursuant to the BCC, a director can be either a natural person or a legal entity. In the latter case, a permanent representative should be appointed from among the entity's shareholders, directors, members of executive management or personnel, who is solely responsible for performing this office in the name and on behalf of the legal entity. The representative shall be liable for the performance of this office as if he or she had been appointed in his or her own name, notwithstanding the joint liability of the legal entity that is represented. The directors of autonomous governmental companies, public institutions and any legal entities over which the state exerts direct or indirect influence[18] must be natural persons if they are remunerated for the directorship.[19] Any payment to a legal entity, acting as director, in this case will be deemed null and void. A listed company that falls into any of the aforementioned categories (e.g., Belgacom Group NV) must ensure that its remunerated directors are natural persons.

18 Holding directly or indirectly a majority of the share capital or voting rights, having the power to appoint a majority of the members of the governing or executive body or to appoint a person entrusted with governmental supervision including by means of a contract.

19 Act of 19 December 2012 on the remuneration of employees and office holders in institutions of public utility, autonomous governmental companies and legal entities over which the state exerts, directly or indirectly, a preponderant influence, published in the *Belgian State Gazette* on 28 January 2013, entered into force on 1 August 2013.

Directors cannot use the information obtained in their capacity as directors for purposes other than the exercise of their functions. They have an obligation to treat confidential information received in their capacity as directors with care.

Each member of the board should arrange his or her personal and business affairs so as to avoid direct and indirect conflicts of interest with the company. Transactions between the company and its board members should take place at arm's length. The board should establish a policy for transactions or other contractual relationships between the company, including its related companies, and its board members, which are not covered by the statutory provisions on conflicts of interest. This policy should be disclosed in the company's corporate governance charter. Comments on the application of this policy should be included in the corporate governance statement (which forms part of the annual report). The BCC indicates a specific procedure to be followed when directors have a pecuniary conflict of interest with the company. In listed companies, a director with a conflict of interest of a financial nature cannot participate in the deliberations or vote on the decision in question.

The board should also take all necessary and useful measures to ensure effective and efficient execution of the Belgian rules on market abuse. It should draw up a set of rules (the dealing code) regulating transactions (and the disclosure thereof) in shares of the company or in derivatives or other financial instruments linked to shares carried out for their own account by directors or other persons with managerial authority.

Directors can be held liable for shortcomings in the performance of their official duties in accordance with the applicable statutory provisions. For a violation of the law or the company's articles of association, directors can be held jointly and severally liable (unless they were not personally involved in the violation and brought it to the attention of the company's shareholders at the first general meeting after becoming aware of it). In addition, directors can be held liable in a number of specific circumstances (e.g., in the event of bankruptcy, a conflict of interest or tax liability).

Although the term of office of a director in an NV/SA cannot exceed six years by law, the 2009 Code advises setting the maximum term of directors at four years. The 2009 Code indicates that the board of directors should establish nomination procedures and selection criteria for its members, including specific rules for executive and non-executive directors where appropriate. The chair of the board (or another non-executive director) leads the procedure, while the nomination committee makes proposals regarding the candidates. For any new appointment to the board, the skills, knowledge and experience of existing board members and those needed on the board should be evaluated and, in the light of that assessment, a description of the role and skills, experience and knowledge should be prepared. For a director to qualify as independent, a number of criteria should be met.[20]

20 Article 526 ter BCC.

III DISCLOSURE

Companies whose securities are listed on a regulated market[21] must publish annually and biannually[22] a financial report. Such listed companies are also obliged to publish *ad hoc* information if the information in question can be considered inside information. The annual financial report must contain the annual accounts and consolidated annual accounts, the board's annual report (including the BCC requirements, such as the corporate governance statement and remuneration report), and a number of specific items that could have consequences in the event of a takeover[23] (e.g., shareholder agreements or limitations on the transferability of shares and securities), the statutory auditor's report and a declaration by the issuer on the faithful nature of the accounts and report. If the issuer decides to publish a communication between the end of the financial year and publication of the annual financial report, this communication should meet certain criteria. The biannual financial report should contain interim financial statements and an interim report, information on external control and a declaration by the issuer regarding the faithful nature of the statements and report.

Listed companies are subject to other disclosure requirements with respect to any changes in the conditions, rights and guarantees linked to their securities, special reports of the board of directors, and draft amendments to the articles of association. Listed companies should also disclose the transparency notices they receive from their shareholders in accordance with the Act of 2 May 2007 and the Royal Decree of 14 February 2008.

In addition to the disclosures set out above, the 2009 Code indicates that the company should draw up a corporate governance charter describing the main aspects of its corporate governance policy and containing the minimum information set out in the 2009 Code. The charter should be updated as often as necessary to reflect the company's corporate governance at all times. It should be made available on the company's website and should specify the date of its most recent update.

The corporate governance charter should include at least:

a a description of the company's governance structure and the terms of reference of its board of directors;

b the policy established by the board for transactions and other contractual relationships between the company, including related companies, and board members and executive managers, to the extent not covered by the statutory provisions on conflicts of interest;

c the measures taken by the company in order to comply with the Belgian rules on market abuse;

d the terms of reference of each board committee;

e the terms of reference of executive management;

21 Some of the provisions also apply to companies whose securities or shares are listed on certain multilateral trading facilities.

22 The latter is applicable to companies whose shares or debt instruments are listed.

23 Act of 1 April 2007 on public takeover bids.

f the identity of major shareholders, with a description of their voting rights and special control rights, and, if they act in concert, a description of the key elements of existing shareholders' agreements;

g any other direct and indirect relationships between the company and its major shareholders; and

h a statement that the company has adopted the 2009 Code as its reference code.

The board of directors should also include a corporate governance statement in its annual report, describing all relevant corporate governance events that have taken place in the past year. This statement should be included in a specific section of the annual report and should contain the minimum information set out in the 2009 Code. If the company has not complied fully with one or more provisions of the Code, it should explain its reasons for not doing so in its corporate governance statement (the 'comply-or-explain' principle).

The BCC has made a corporate governance statement mandatory.

Pursuant to the BCC, the following items should be disclosed in the corporate governance statement in the company's annual report:[24]

a a statement that the company has adopted the 2009 Code as its reference code and the place where the 2009 Code can be consulted, as well as relevant information on the corporate governance practices applicable in addition to the 2009 Code and the place where these can be consulted;

b if the company does not fully comply with the 2009 Code, an indication of the provisions of the 2009 Code that were not complied with during the year and an explanation for such non-compliance;

c a description of the main features of the company's internal control and risk management systems in relation to financial reporting;

d the shareholder structure on the closing date of the financial year as it appears from the notifications the company received;

e the holders of securities to whom special control rights have been granted and a description of these rights;

f any limitations on voting rights, provided for by law or the company's articles;

g the rules for the appointment of directors and amendments to the company's articles of association;

h the powers of the board of directors, specifically the possibility to issue or purchase own shares;

i a description of the composition and running of the board of directors and its committees; the 2009 Code adds that this description should include at least:

- a list of all board members, indicating which are independent;

24 These requirements are applicable to companies whose shares are listed on a regulated market. The requirements under (a), (b) and (i) are also applicable to companies whose securities, other than shares, are listed on a regulated market when their shares are listed on an MTF. The requirement set out under (c) is also applicable to companies whose securities are listed on a regulated market.

- information on any directors who have ceased to meet the requirements for independence;
- an activity report on board and board committee meetings, indicating the number of board committees;
- information on meetings and the individual attendance records of directors;
- a list of all members of board committees;
- if applicable, an explanation as to why the appointment of the former CEO as chair is in the best interests of the company; and
- a list of all members of executive management; and

j an overview of the efforts taken to ensure that at least one-third of the members of the board of directors are of a different gender than the other members.

The 2009 Code adds that the following should be set out in the corporate governance statement:

a comments on the application of the policy established by the board for transactions and other contractual relationships between the company, including related companies, and its board members and executive managers, to the extent not covered by the statutory provisions on conflicts of interest;

b information on the main features of the process for evaluating the board, its committees and individual directors;

c key features of any incentives granted in the form of shares, options or any other right to acquire shares as approved by, or submitted to, the general meeting of shareholders; and

d a general description of the main features of the company's internal control and risk management systems.

As mentioned above, the BCC indicates that the corporate governance statement should also include a remuneration report, prepared by the board of directors further to a proposal of the remuneration committee.

The following information should be disclosed in the remuneration report pursuant to the BCC:

a a description of the company's internal procedure to develop a remuneration policy for directors and executive managers and set the level of individual remuneration for directors and executive managers;

b the remuneration policy for directors and executive managers, containing at least the following items of information:

- the principles on which remuneration is based, including the relationship between remuneration and performance;
- the importance of the various components of remuneration;
- the characteristics of performance-based bonuses in the form of shares, share options or other rights to acquire shares; and
- information on the remuneration policy for the next two years. Furthermore, any significant changes to the remuneration policy since the end of the financial year should be expressly mentioned.

c the individual remuneration and other benefits granted directly or indirectly by the company, or another company that falls within the same scope of consolidation, to non-executive directors;

d the remuneration granted to executive managers who are also directors, but in that case only the remuneration received in their capacity as directors. It is unclear whether this information should be disclosed on an individual or collective basis;

e if the executive managers receive variable remuneration linked to the performance of the company, a company that falls within the same scope of consolidation as the company or a business unit of the company or their own performance, the criteria used to evaluate the achievement of the specified goals, the evaluation period and a description of the methods applied to verify whether the performance criteria are met. This information should be disclosed in such a way as to prevent the disclosure of confidential information about the company's strategy;

f the remuneration and other benefits granted directly or indirectly to the CEO[25] by the company or a company that falls within the same scope of consolidation, indicating:

- base remuneration;
- variable remuneration – for all incentives, the form in which the variable remuneration is paid;
- pension benefits – the amounts paid or the value of services provided during the financial year, per pension scheme, with an explanation of the applicable pension schemes; and
- other components of remuneration, such as the cost or monetary value of insurance coverage and fringe benefits, with an explanation of the details of the main components.

Moreover, any significant changes to the remuneration policy since the end of the financial year should be expressly mentioned;

g on a collective basis, the remuneration and other benefits granted directly or indirectly to other members of executive management (excluding the CEO) by the company or a company that falls within the same scope of consolidation, with a breakdown between:

- base remuneration;
- variable remuneration – for all incentives, the form in which the variable remuneration is paid;
- pension benefits – the amounts paid or the value of the services granted during the financial year, per pension scheme, with an explanation of the applicable pension schemes; and
- other components of remuneration, such as the cost or monetary value of insurance coverage and fringe benefits, with an explanation of the details of the main components.

25 The term CEO can refer here to the main representative of the executive directors, the chairperson of the management committee, the main representative of 'other leaders' or the main representative of the persons entrusted with daily management of the company.

In addition, any significant changes to the remuneration policy since the end of the financial year should be expressly mentioned;

h for each executive manager (including the CEO):
- the number and key features of shares, share options or any other rights to acquire shares granted, exercised or expired during the financial year;
- the provisions on severance pay; and
- whether the company has the right to recover any variable remuneration granted on the basis of incorrect financial data; and

i if an executive manager (including the CEO) leaves the company, the decision of the board of directors, further to a proposal of the remuneration committee, on whether the person is eligible to receive a severance package and the method used to calculate the severance pay.

The 2009 Code adds that the remuneration report should also explain whether, with respect to the disclosure of the remuneration of the CEO and other executive managers, the company has materially deviated from its remuneration policy during the financial year. If, on or after 1 July 2009, the contract of the CEO or any other executive manager provides for a severance package in excess of 12 months' (but less than 18 months') base and variable remuneration, the remuneration report should indicate the circumstances under which the severance package can be paid, and a justification for such payment, on an individual basis.

In 2012, the FSMA conducted its third annual study[26] on compliance with the 2009 Code and found that significant progress has been made over the past three years. The main improvements related to the remuneration report, in that no company found it necessary to 'explain' non-compliance in its 2011 annual report. Many of the recommendations set out in the first two studies have been taken into consideration by Belgian listed companies. The FSMA points out, however, that its recommendation to specifically mention when a provision is not applicable, which would further increase transparency, is not yet followed by all companies. It also specifically points to the requirement to mention the following with respect to each executive manager (including the CEO) in the annual report (on the basis of the BCC): (1) provisions on severance pay and (2) whether the company has the right to recover any variable remuneration granted on the basis of incorrect financial data. These requirements are not set out in the 2009 Code, only in the BCC.

The FSMA makes some further recommendations to companies to improve the quality of their corporate governance disclosures.

One-on-one contacts between directors and majority or institutional shareholders are common in listed companies; such contacts should comply with the rules set out in Section V.iv, *infra*.

26 'The first legal remuneration reports: second follow-up study of Study No. 38' – December 2012 (available at www.fsma.be).

IV CORPORATE RESPONSIBILITY

The Belgian corporate governance rules do not specifically cover corporate responsibility, with the exception of Article 518 bis, which was inserted in the BCC in 2011 and provides that at least one-third (rounded to the nearest whole number) of the board members of companies whose securities are listed on a regulated market should be of a different gender. Most listed companies should meet this target as from 2017. The 2009 Code moreover mentions that 'in translating values and strategies into key policies, the board should pay attention to corporate social responsibility, gender diversity and diversity in general'. In January 2011, the Corporate Governance Committee, which issued the 2009 Code, issued an additional recommendation, stating that within seven years, at least 30 per cent of board members should be women.[27]

The report on the main differences between the 2009 Code and the Lippens Code notes that corporate social responsibility and diversity have become increasingly relevant topics over the past few years. However, the objective of the 2009 Code is to issue broad recommendations on how companies should be directed, managed and controlled, without going into each and every aspect of corporate responsibility. In view of the importance of issues such as corporate social responsibility and diversity, however, it was deemed appropriate to insert a supplementary guideline in the 2009 Code and indicate that people governance is another area of concern raised during the public consultation on the 2009 Code.

Unlike financial institutions, which have specific rules on compliance policies and risk management, there are currently few specific rules on compliance and risk management for listed companies. The only provision in the 2009 Code is that an independent internal audit function should be established, with resources and skills adapted to the company's nature, size and complexity, and that if the company does not have such a position, the need for one should be reviewed at least annually. The effectiveness of the internal control and risk management systems set up by executive management should be monitored by the audit committee at least once a year, with a view to ensuring that the main risks (including those relating to fraud and compliance with existing legislation and regulations) are properly identified, managed and disclosed in accordance with the procedures approved by the board.

The 2009 Code further indicates that the audit committee should review the specific arrangements in place that staff may use to raise, in confidence, concerns about possible improprieties in financial reporting or other matters. If deemed necessary, arrangements should be made for the proportionate and independent investigation of such matters, appropriate follow-up actions and schemes whereby staff can inform the chairperson of the audit committee directly. It should be noted that the rules on personal data protection should of course be respected when establishing a whistle-blowing scheme.

27 This recommendation has not yet been incorporated into the 2009 Code, nor has the BCC made this recommendation part of the reference corporate governance code (i.e., the 2009 Code).

V SHAREHOLDERS

i Shareholder rights and powers

The basic rule is that each share of the same value carries one vote. If the shares do not have the same value or if there is no value mentioned, the shares carry voting rights in proportion to the capital they represent, with the share with the lowest value carrying one vote. Fractions of votes are not taken into account.[28]

Controlling shareholders often have the right to appoint a majority of the company's directors, so that they *de facto* influence the management of the company.

Any powers not granted by law or the company's articles of association to the general meeting of shareholders are reserved to the board of directors. A number of decisions are reserved by law to the general meeting and cannot be delegated[29] to the board of directors, such as approval of the annual accounts and discharge of the directors and statutory auditor, the final appointment of directors and the statutory auditor, the initiation of claims by the company against the directors, dissolution of the company, a merger, division, etc. In 2010, a number of decisions relating to the remuneration of executive managers and directors were also made subject to the approval of the general meeting (see above).

In general, a validly adopted decision of the general meeting of shareholders is, by law, binding on dissenting shareholders or shareholders who did not attend the meeting. Any party that can prove standing, including a shareholder, may however seek to invalidate a decision of the general meeting due to:

a a formal irregularity, provided this irregularity could have influenced the decision;
b a violation of the procedural rules of the general meeting or the passage of a resolution on an item that was not on the agenda, provided there is fraudulent intent;
c an *ultra vires* act or abuse of power;
d the exercise of suspended voting rights, if this influenced the adoption of the decision; or
e any other reason set out in the BCC.

In addition, dispute resolution procedures are available to shareholders pursuant to which they can be obliged to sell their shares or purchase the shares of other shareholders in the event of a serious conflict among them (Articles 635 to 644 BCC) or the involuntary dissolution of the company can be requested, as a last resort(Article 645 BCC).

One or more shareholders who, individually or collectively, hold one-fifth of the share capital can also request the board of directors and the statutory auditor to call a general meeting. It is generally accepted that these shareholders also have the possibility to determine the agenda for the meeting. In accordance with Article 533 ter of the BCC, shareholders holding at least 3 per cent of the share capital of a listed company have the right to submit proposals regarding items on the agenda and propose resolutions (this

28 Except as mentioned in Article 560 BCC.

29 It is generally accepted that, in certain cases, some powers can be delegated.

does not apply to meetings held on second call, i.e., meetings called because the required quorum was not met at the first meeting).

Shareholders also have the right to ask the directors (and the statutory auditor) questions during general meetings or in writing before the meeting (to be answered at the meeting). The directors or the statutory auditor, as the case may be, have a duty to answer these questions. There is, however, an exception to this rule: directors and the statutory auditor can refuse to answer a question if doing so would cause harm to the business of the company or violate their or the company's duty of confidentiality. The questions should relate to items on the agenda or to a report prepared by the board of directors or the statutory auditor. Questions on the same topic may be consolidated and answered together.

One or more shareholders owning at least 95 per cent of the securities to which voting rights are attached can initiate a squeeze-out in order to obtain 100 per cent of all voting securities or securities that allow their holders to acquire voting securities.

ii Shareholders' duties and responsibilities

The 2009 Code stipulates that, in companies with one or more controlling shareholders, the board should endeavour to have the controlling shareholders make considered use of their position and respect the rights and interests of minority shareholders. The board should encourage the controlling shareholders to respect the 2009 Code.

Aside from this reference, there are no specific duties or best practices in the corporate governance rules pertaining to controlling shareholders and institutional investors. The general rule of law that minority shareholders can seek to invalidate a resolution of the general meeting on the ground of abuse of majority of course still applies. Such a request must be made within six months from the time the resolution became enforceable against the shareholder or was notified to the shareholder. Pursuant to this principle, a resolution can be invalidated if the voting rights were not exercised in the company's interest or the voter abused his or her rights, meaning the voting rights were exercised in an obviously unreasonable manner.

iii Shareholder activism

As indicated above, the general meeting of shareholders normally determines the remuneration of directors, but not of executive managers (except for the approval of severance pay in certain cases), so it does not have a complete 'say-on-pay'. The general meeting of shareholders has the power to vote separately on the remuneration report in which the remuneration policy is described, but there are no consequences if it rejects the report.

If one or more shareholders do not agree with the board's management of the company, there is judicial relief available to them.

The BCC does not contain express rules on the invalidation of resolutions by the governing body (i.e., the board of directors); however, based on general rules of law, the courts tend to accept that resolutions of the board of directors can be declared null and void at the request of any interested party (including a shareholder).

In general, the grounds for invalidating resolutions of the board of directors are the following:

a violation of the convocation formalities or procedural requirements for the meeting;
b violation of rules of law or the articles of association (e.g., an *ultra vires* act);
c resolutions that are obviously in violation of the company's interests; and
d resolutions adopted fraudulently.

Directors can be held liable, in accordance with the BCC, for shortcomings in their management of the company, breach of rules of law or the articles of association and, in certain cases, violation of their general duty of care (the relevant standard is how a reasonably prudent director would have acted under the same circumstances). The general meeting of shareholders has the power to initiate proceedings on behalf of the company against one or more directors on the above-mentioned grounds. Such a decision should be approved by a majority of votes cast. No action can be taken if the general meeting has already discharged the directors. There is also a possibility for minority shareholders to initiate the same proceedings on behalf of the company if they represent at least 1 per cent of the voting securities or hold at least €1.25 million of the company's capital on the day the general meeting voted to discharge the directors. Minority shareholders that validly approved the discharge cannot bring such proceedings.

At the request of one or more shareholders holding at least 1 per cent of the total voting rights or securities that represent at least €1.25 million of the company's capital, the court may also appoint, if there are indications that the interests of the company are seriously jeopardised or could be jeopardised, one or more experts to verify the company's books and accounts and the actions of its corporate bodies.

In certain cases, one or more shareholders can also request the appointment of a temporary administrator to manage the company in lieu of the board of directors.

The BCC provides for the possibility to solicit proxies for certain shareholder meetings. Such solicitation should, however, comply with the requirements of the BCC.[30] A public solicitation of proxies (i.e., when advertisements or intermediaries are used or if more than 50 shareholders are targeted) should be approved by the FSMA and a number of requirements should be met.[31] Proxy solicitation is mostly done by associations that defend (minority) shareholders' rights.

Several associations that defend (minority) shareholders have campaigned to involve as many shareholders as possible in certain proceedings (e.g., the *Fortis* case in 2008, the case against the National Bank of Belgium in 2010, the *Lernout & Hauspie* case, the *Madoff* case and the *Lehman Brothers* case).

Pursuant to the Act of 28 March 2014,[32] class actions are now possible in Belgium. However, certain limitations apply. A class action may only be brought: (1) against a company; (2) by a consumer; and (3) for breach of a contractual obligations or a specific

30 Article 548 BCC.

31 Article 549 BCC.

32 Act of 28 March 2014 on class actions, *Belgian State Gazette*, 29 April 2014.

law. Thus, shareholders who would like to introduce a claim against (current or former) directors cannot bring a class action under Belgian law. Therefore, only investors that take part in the proceedings against a company have the right to claim damages.

iv Contact with shareholders

The basic rule is that the company should treat all similarly situated shareholders equally.

The Royal Decree of 24 November 2007[33] regulates periodic (annual and semi-annual) and occasional information (i.e., inside information) to be disclosed by listed companies, in addition to the mandatory disclosures set out in the BCC (e.g., annual accounts and annual reports). Periodic information should be disclosed quickly and on a non-discriminatory basis so that it can reach as many people as possible, and disclosure should take place, insofar as possible, simultaneously in Belgium and other Member States of the EEA. The company should use media that are expected to ensure disclosure in all Member States of the EEA. Any inside information should be disclosed as simultaneously as possible to all categories of investors in the Member States where the company has requested or agreed to trade its financial instruments on a regulated market.

The 2009 Code stipulates that the company should design a disclosure and communications policy that promotes effective dialogue with shareholders and potential shareholders. Individual meetings with institutional investors are also encouraged in order to receive explanations on their voting behaviour. It is indeed common practice for companies to hold individual meetings with their controlling shareholders, institutional shareholders, or both. However, the information disclosed in these meetings should be information that is already public or that is made public at the same time, in order to avoid the unequal treatment of shareholders.

Each director has a duty to keep information about the company confidential unless required to disclose it pursuant to a statutory or ethical duty. This duty also extends to the company's shareholders. Some scholars argue, however, that directors representing a controlling shareholder can consult with that shareholder on decisions to be taken by the board of directors and the position the director will adopt in future deliberations, unless the board of directors specifically decides otherwise. This does not mean that the directors can inform the person they represent of information he or she can then use for his or her own purposes (e.g., to determine whether to sell or purchase shares).

In addition to this general duty of confidentiality, it is also forbidden for anyone in possession of inside information (e.g., directors) to *inter alia* disclose such information to anyone else except in the normal course of business or in the performance of his or her professional duties.

The general rule is that inside information should be immediately disclosed. However, the company can decide, at its own risk, to postpone the disclosure of inside information if such disclosure could harm the company's legitimate interests, provided that the delay in disclosure does not mislead the public and confidentiality can be

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33 Royal Decree of 24 November 2007 on the obligations of issuers of financial instruments traded on a regulated market, *Belgian State Gazette*, 3 December 2007.

guaranteed. If inside information is disclosed in the normal exercise of the discloser's profession, function or work, the information should simultaneously be made public unless the person to whom the inside information is disclosed is bound by a duty of confidentiality (e.g., the printer or the communications department). If the disclosure of inside information is postponed, the company should take the necessary measures to, *inter alia*, bar access to this information to all persons who do not need it to exercise their functions.

Based on the foregoing, in our opinion, directors cannot disclose inside information to a shareholder further to a confidentiality agreement. The only exception to this rule is if a third party or a shareholder requests information from the company in order to determine, for example, the appropriateness of making a public offer, in which case the board of directors can grant access to the information in question if it enters into a confidentiality agreement that includes a standstill clause (i.e., no transactions in the company's shares until the information has been made public) and provided disclosure is in the company's interest.

VI OUTLOOK

There is currently no corporate governance legislation in the pipeline. Some (minor) legislative proposals with respect to the remuneration of directors and management have been made, such as a proposal to provide that listed companies are obliged to disclose the difference between the median salary of executive directors and the median salary within the company as a whole, and a proposal to ensure employee representation on the remuneration committee.

This does not mean, however, that corporate governance is no longer a hot topic. Indeed, we are now able to see the level of implementation of recent corporate governance legalisation and whether companies comply with the rules. Several studies are being carried out (e.g., by the FSMA, VBO and GUBERNA) and the Corporate Governance Committee continues to follow up on the progress of and compliance with the corporate governance rules, issuing advice where necessary. In 2013, the Corporate Governance Committee decided that it is not yet necessary to update the 2009 Code, based on an independent study conducted in September 2012 indicating that, overall, the 2009 Code and Belgian law are characterised by an above average implementation of EU corporate governance requirements and that, in future, the main changes to the 2009 Code and Belgian law are expected to result from changes at the EU level, at which many changes in the field of corporate governance are expected.

On 12 December 2012, the European Commission approved a new action plan outlining future initiatives in the areas of company law and corporate governance for the purpose of improving corporate competitiveness and sustainability. The action plan identifies three main areas for action: enhancing transparency, increasing shareholder engagement, and supporting corporate growth and competitiveness. These goals are to be achieved through the implementation into the national laws of the Member States of 16 different actions considered fundamental.

As regards enhancing transparency between companies and their shareholders, the Commission would like to introduce measures aimed at:

a encouraging companies to enhance board diversity (i.e., in terms of skills and views of the board members) and assign greater weight to the reporting of non-financial risks;

b improving corporate governance reporting on the reasons for derogating from particular recommendations of the applicable corporate governance codes;

c improving the visibility of shareholders and the identification of shareholders by issuers; and

d strengthening the transparency rules applicable to the voting and engagement policies of institutional investors.

Various initiatives will also be taken to encourage and facilitate long-term shareholder engagement in order to avoid the inability to take corrective action and the supervision of management exclusively by the board. These initiatives include:

a ensuring greater transparency with regard to remuneration policies and the individual remuneration of directors, as well as a right of shareholders to vote on and approve remuneration policies and the remuneration report;

b implementing adequate safeguards to protect the interests of shareholders in related-party transactions (i.e., transactions between the company and its directors or controlling shareholders (conflicts of interests, corporate opportunities, etc.));

c ensuring a coherent and effective operational framework for proxy advisers, especially as regards transparency and conflicts of interest;

d clarifying the concept of 'acting in concert' with a view to increasing legal certainty on the relationship between investor cooperation with corporate governance issues and the rules on acting in concert; and

e investigating whether employee share ownership can and should be encouraged.

In addition, the action plan foresees improvement of the statutory framework for cross-border transactions and the unification of all major company law directives into a single instrument. This would make European company law more accessible and comprehensible and reduce the risk of future inconsistencies.

Certain measures proposed by the European Commission have already been implemented in Belgium, such as the right of the shareholders of a Belgian listed company to vote on and approve the remuneration policies of the company's executive directors and the remuneration report. However, many of the proposed measures will require legislative initiatives that will apply either to only listed companies (e.g., voting policies of institutional investors) or to all companies, listed or unlisted (e.g., provisions on cross-border divisions).

Following this action plan, in 2014 the European Commission issued a proposal for a revision of the Shareholders' Rights Directive (Directive 2007/36/EC). The proposal contains provisions on:

a enhancing the transparency of institutional investors and asset managers with regard to their investment and engagement policies in the companies in which they invest;

b disclosure by listed companies of their remuneration policy and the remuneration of individual directors, including the right of shareholders to vote on and approve the remuneration policy and the remuneration report;

c the obligation for listed companies to submit related-party transactions representing more than 5 per cent of the company's assets, or which could have considerable consequences for the company's profits or turnover, to the general meeting for approval (and disclose smaller transactions representing more than 1 per cent of the company's assets);

d the transparency to be shown by proxy advisers on the methodologies for the preparation of their recommendations and how they manage possible conflicts of interests; and

e the possibility for listed companies to request information on the identity of their shareholders from intermediaries and the facilitation of the exercise of shareholders' rights (e.g., voting rights), in particular in cross-border situations.

The European Parliament also passed a resolution on a proposal for a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures. The resolution strives to ensure equal access for both women and men to non-executive positions on boards of listed companies so that by 2020, at least 40 per cent of non-executive directors' positions are held by women. If the directive is adopted, the relevant provisions of Belgian law (Article 518 bis BCC) will need to be modified as they currently provide that only 30 per cent of the directors of a Belgian listed company should be women, as from 2017.

Chapter 17

LUXEMBOURG

Margaretha Wilkenhuysen and Andréa Carstoiu[1]

I OVERVIEW OF GOVERNANCE REGIME

Luxembourg corporate and securities legislation is passed by the Parliament. Luxembourg's main statutes include the 10 August 1915 law on commercial companies, as amended from time to time (the Law), the Market Abuse Law[2] and the Securitisation Law.[3] On 1 November 2007, EU Directive 2004/39 on Markets in Financial Instruments was implemented to introduce new provisions on transparency for shares and transaction reporting. Companies whose shares are admitted to trading on a regulated market in a Member State of the EU, including Luxembourg, may also be subject to the law dated 19 May 2006 on takeover bids, as amended (the Takeover Bid Law). The Takeover Bid Law notably provides for minority shareholder protection, the rules of mandatory offers and disclosure requirements. Companies intending to admit their shares to trading on a regulated market or to make a public offer may also be subject to the law dated 10 July 2005 on prospectuses for securities (the Prospectus Law), which in particular imposes the publication of prospectuses. EU Transparency Directive No. 2004/109 was also transposed into Luxembourg legislation on 11 January 2008 through the law on transparency requirements (the Transparency Law) in relation to information about issuers whose securities are admitted to trading on a regulated market, as amended. In addition, on 1 July 2011, Directive 2007/36/EC on the Exercise of Certain Rights of Shareholders of Listed Companies came into force, aiming to increase shareholders' activism and setting out a number of shareholders' rights (the Shareholder Law). More

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2 Law of 9 May 2006 on Market Abuse implementing EC Directives 2006/6, 2003/124, 2003/125 and 2004/72.

3 Law of 22 March 2004 on Securitisation.

recently, the law dated 21 July 2012 on mandatory squeeze-out and sell-out of securities of companies currently admitted or previously admitted to trading on a regulated market or having been offered to the public (the Squeeze-out Law)[4] came into force on 1 October 2012, introducing a squeeze-out right in favour of dominant shareholders and a sell-out right in favour of minority shareholders in companies whose shares are admitted to trading on a regulated market.[5]

The law of 6 April 2013 on dematerialised securities entered into force on 19 April 2013. It introduces a legal regime for dematerialised securities, inspired by existing regimes in Belgium, Switzerland and France. The law of 12 July 2013 implemented into Luxembourg law Directive 2011/61 on Alternative Investment Fund Managers (the AIFM Directive). This law introduced a new partnership structure – the special limited partnership – into Luxembourg law and some technical amendments concerning limited partnerships by shares, as well as modernising common limited partnerships. This law also made some changes to the rules regarding the companies and trade registry and the accounting and annual accounts of companies. The law of 30 July 2013 reformed the commission of accounting principles and other rules regarding the accounts and consolidated accounts of companies.

Further, on 18 August 2014 the law of 28 July 2014 on the immobilisation of bearer shares came into force, which creates a new practical modality related to the bearer shares without renovating the legal status thereof. In short, this law has instituted in Luxembourg the requirement to deposit bearer shares with a recognised depositary, which will be appointed by the board of directors or management board of the relevant public limited liability company or partnership limited by shares. The law allows access to information about the identity of the shareholders holding bearer shares to public authorities while preserving the confidentiality of such information about third parties; indeed, the bearer shares register is not meant to be accessible to the public, but only to the judicial and fiscal authorities.

Also worth mentioning is the law of 10 March 2014, which implements Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society. This law provides the possibility for a European Cooperative Society (SCE) to be formed *ex novo* by: five or more natural persons resident in at least two EU Member States; five or more natural persons and companies or other legal bodies formed under the law of an EU Member State and resident in (or governed by the law of) at least two different EU Member States; or by companies and firms or other legal bodies formed under the law of an EU Member State and governed by the law of at least two different

4 See 'Présentation générale et réflexions sur la nouvelle loi du 21 juillet 2012 relative aux retrait et rachat obligatoires en dehors d'une offre publique d'acquisition', by Elisa Faraldo Talmon, senior associate at NautaDutilh Avocats Luxembourg S. à r.l., Ariane Mehrshahi and Jean-Michel Schmit, both lawyers at the Luxembourg Bar Association. in *ACE Comptabilité, fiscalité, audit, droit des affaires au Luxembourg*, Kluwer, ACE 2012/10 pp. 3–12.

5 Until the Squeeze-out Law came into force, a squeeze-out and a sell-out right existed only in the context of a public takeover under the law dated 19 May 2006 implementing the Directive on takeover bids 2004/25/EC.

EU Member States. SCEs can also be formed by more traditional methods, like a merger between cooperatives formed under the law of an EU Member State with registered and head offices in the European Union, provided that at least two of the cooperatives are governed by the laws of different EU Member States or by conversion of a cooperative that was formed under the law of an EU Member State and has a registered and head office in the European Union, provided that it has had an establishment or subsidiary governed by the law of another EU Member State for at least two years.

Corporate governance in Luxembourg is statute-based, consisting primarily of the Civil Code, the Law and, for listed companies, the rules and regulations of the Luxembourg Stock Exchange (LuxSE) and the above laws. However, the statutory law provisions only give very general governance rules or principles. More specific corporate governance is based on a flexible 'comply or explain' system, enabling the specific circumstances of companies, such as their size, shareholding structure, activities, exposure to risks and management structure, to be accounted for.

As a complement to the general statutory law, the LuxSE's 10 Principles of Corporate Governance (the LuxSE Principles), as modified in October 2009 and reviewed in March 2013 (3rd edition),[6] provide guidelines on best practice in corporate governance for all companies listed on the LuxSE and all Luxembourg companies whose shares are traded on a regulated market. The LuxSE Principles consist of general principles that must be complied with and recommendations that, although obligatory in principle, may be deviated from when justified in specific circumstances, provided that adequate explanation is provided. The recommendations are supplemented by guidelines on how a company should implement or interpret them. The obligation to 'comply or explain' does not apply to the guidelines. All Luxembourg companies whose shares are admitted for trading on a regulated market operated by the LuxSE must follow the LuxSE Principles.

The LuxSE Principles refer to general corporate governance issues, such as duties of the managing board, the management structure, conflicts of interest provisions, remuneration and reporting issues. The LuxSE Principles are highly flexible and adaptable to the activity, size and culture of individual companies. Their stated objective is to provide guidance without being overly restrictive, aiming to encourage transparency and dialogue and to facilitate the exercise of power within companies without restricting freedom of enterprise. They also aim to enable the shareholders of listed companies to be actively involved in the company's activities.

Unlike certain neighbouring countries, in Luxembourg listed companies are often controlled by one or more major shareholders, rendering it impossible to rely solely on market monitoring to ensure that listed companies comply with the LuxSE Principles. Therefore, a system of monitoring involving the shareholders, the board and the LuxSE, at a minimum, is required to ensure proper observance of the principles of corporate governance.

The other main regulatory authority is the Luxembourg Supervisory Commission of the Financial Sector (CSSF). The CSSF has jurisdiction regarding items for which

6 www.bourse.lu/corporate-governance.

the laws or regulations in force require disclosure, whether or not such information is dealt with in the LuxSE Principles, including the authority to impose sanctions. The LuxSE's role in the external monitoring of compliance with the principles of corporate governance does not affect the CSSF's legal responsibility as a regulator.

The CSSF is responsible for supervising credit institutions, financial sector professionals, collective investment undertakings, pension funds, stock exchanges, securities markets and so forth. The CSSF's internal committees are responsible for regulatory work, and it has eight departments charged with the prudent supervision of the financial sector, one department for general supervision and one department responsible for the public oversight of the audit profession. The supervision of securities markets department supervises the financial instrument markets and market operators, as well as international and national investigations regarding stock market offences in cooperation with the foreign competent authorities. This department also deals with issues concerning the authorisation of new markets, and is in charge of approving prospectuses drawn up for offers of securities to the public and admission of securities to trading on a regulated market, following up on the transparency requirements in relation to issuers of listed securities and handling files relating to takeover bids.

The CSSF's regulatory framework is in line with the European directives and aims to promote prudent business policy complying with regulatory requirements, to protect the financial stability of the supervised companies and of the financial sector as a whole, to supervise the quality of the organisation and internal control systems and to strengthen the quality of risk management. The CSSF acts solely in the public interest, and ensures that all financial sector laws and regulations are observed and that international agreements and European directives in the fields of its responsibility are implemented and respected, notably through CSSF circulars concerning the application of legislation. The regulatory framework is continually updated through regular consultation between the government, the legislator and the private sector. The recommendation of the European Commission of 25 July 1977 for a European code of conduct relating to transactions in transferable securities was published in the Luxembourg Official Administrative Gazette on 25 June 1997 and is applicable to companies listed on the LuxSE. However, on 8 July 2003 Luxembourg's first instance court ruled that the recommendation was not part of Luxembourg law and thus was not compulsory *per se*.[7]

As an operationally independent body, the CSSF has sufficient powers to conduct effective supervision and regulation of the Luxembourg securities market. It is funded by taxes levied from companies under its supervision. In order to conduct its tasks effectively, the CSSF has broad powers including the authority to attend meetings of LuxSE entities, to suspend rulings or to suspend market intermediaries' decision-makers if they fail to observe legal, regulatory or statutory provisions.

Other professionals in the financial sector and private-sector companies also have an indirect regulatory role through their consultative participation with the government and the legislator in the field of regulation.

7 Luxembourg District Court, 8 July 2003, *Bulletin Banque et Droit*, 2003, No. 34, p 23.

Apart from listed companies, specific obligations tend to be market-driven commitments rather than legally binding duties as there are currently no codified mandatory rules inducing companies to take corporate governance principles or corporate social responsibility (CSR) issues into account in their internal decision-making procedures. The engagements undertaken so far, with the exception of the LuxSE Principles, are non-compulsory soft law with reputational rather than legal force, and are minor in comparison to other marketplaces.

Corporate governance is, however, gaining momentum. In September 2009, the Association of the Luxembourg Fund Industry (Alfi)[8] published a Code of Conduct for Luxembourg funds to provide their boards with high-level principles and best practice recommendations. The principle-based Code of Conduct was introduced to formalise and specify best practice in light of the implementation of Directive 2006/46/EC, aiming to facilitate cross-border investments and improve public confidence in financial statements and reports, notably through greater transparency and EU-wide comparability mechanisms. Although the Code of Conduct and the other guidelines and recommendations have not been updated since 2009, Alfi has developed an SRI Working Group to promote the adoption of socially responsible investment funds by a wide field of service providers and investment funds, and hold workshops to assist the development of CSR.

Since 2003, the Labour and Employment Minister has aimed to bring government, labour and corporate sectors together to educate, inform and drive support for the development of CSR in Luxembourg. Although no CSR legal requirements are in place, a growing number of companies have undertaken commitments. In 2005 the Ministry of Labour and Employment and the ADT-Center,[9] an advisory body specialising in gender, diversity management and CSR issues, began working together under an agreement to promote CSR and to build partnerships between local stakeholders (including small and medium-sized enterprises, multinationals and non-governmental organisations) with the notable aims of promoting and developing CSR within corporations; informing about existing and future best practices; stimulating the debate on CSR in corporations; and raising awareness of CSR principles with the public and corporations. Under the agreement, the Ministry of Labour and Employment is charged with promoting employment for mature, disabled and gifted people, health and safety in the workplace and generating employment.

Additionally, Inspiring More Sustainability Luxembourg (IMS)[10] is a non-profit organisation created by six major Luxembourg firms to exchange, discuss and promote CSR policies; it now has over 100 member companies and associations based or operating in Luxembourg. IMS' aims include facilitating the relationship between businesses and the territories within which they operate (including sustainable development, dialogue with local communities and workplace welfare) and general diversity management aimed at preventing workplace discrimination. During its six years of existence, IMS has

8 www.alfi.lu.

9 www.adt-center.lu.

10 www.imslux.lu.

organised over 40 conferences and 30 workshops attracting nearly 4,000 participants. In 2012, IMS plans to launch a new project to further promote CSR via partnerships between non-profit organisations and companies.

In line with the above, the banking association ABBL, representing the major Luxembourg industry, highlights in its code of conduct the criterion of diversity in relations between financial sector professionals and their customers.[11] In addition, 2012 saw the release of CSSF Circular 12/552 on central administration, internal governance and risk management, which will be applicable to banks and investment firms from 1 July 2013, aimed at ensuring that such entities have a formalised and robust internal governance framework; it also centralises in one single document all the main requirements referring to governance matters and implementing EU rules, including those of the Internal Governance Guidelines of the European Banking Authority.[12] The changes wrought by the circular are significant and will generate many changes in the internal organisation of banks and investment firms. The circular will apply on both a stand-alone and a consolidated basis.

While CSR commitments displayed on the participating companies' websites have no legal basis, and therefore are not subject to legal enforcement, the unique nature and size of the Luxembourg marketplace has increased the effect of 'peer pressure' on companies.

More specifically, Directive 2006/46/EC of 14 June 2006, implemented by the law of 5 December 2007, includes a provision on corporate governance practices that listed insurance companies should apply.[13] The law requests listed companies in the insurance field to declare their obligatory and voluntary adhesion to corporate governance codes, and all other information purporting to their corporate governance practice. Gradual legislative recognition of corporate governance practice may also follow in other areas in the future, especially as the European Commission recently adopted a new action plan[14] outlining initiatives to be implemented in the areas of company law and corporate governance. The key elements of the action plan include (1) increasing transparency between companies and their shareholders, (2) increasing long-term shareholder engagement and (3) improving cross-border initiatives and transactions.

11 The first principle of the Code is loyalty, equity and integrity: 'Professionals… deal with these customers without discrimination on grounds of origin, colour of skin, gender, sexual orientation, family situation, state of health, handicaps, morals, political or philosophical opinions, trade union activities, membership of a particular ethnic group, nation, race or religious creed.'

12 The CSSF circular 12/552 on central administration, internal governance and risk management, released on 11 December 2012. See: www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf12_552_upd241114.pdf.

13 Articles 85-1 *et seq*: www.legilux.public.lu/leg/a/archives/2007/0211/a211.pdf#page=2.

14 Action plan adopted by the European Commission on 12 December 2012 in the context of its 'Europe 2020' Strategy, which generally aims to improve the business environment in Europe by adapting EU company law and governance rules to the modern needs of society and the changing economic environment.

Such elements may only be achieved through national legislation, therefore bringing corporate governance obligations to the fore (such corporate governance rules only being applicable to companies listed on a stock exchange).[15]

Regarding listed companies, the Transparency Law, for example, requires LuxSE-listed companies to publish information regarding their share capital and all regulated information (including financial reporting and shareholding) on their websites, and the Market Abuse Law stipulates that complete and effective public disclosure of any inside information must be published on both the company's and the LuxSE's websites (i.e., whenever an issuer, or person acting on its behalf, discloses any inside information to a third party in the normal exercise of business (simultaneously in the event of intentional disclosure, promptly in the event of unintentional disclosure)). Listed companies must also publish their corporate governance charters on their websites. In practice, listed companies tend to publish not only regulated information, but also all past and present press releases and corporate information.

A limited legal requirement for employee representatives on certain company boards has also been introduced (see Section IV, *infra*).

While corporate governance in Luxembourg is currently generally based on voluntary adherence, a growing number of institutional guidelines and codes are being developed. At the same time, the Luxembourg government is working towards promoting corporate governance responsibility on a national level. Of particular note are the dispositions relating to employee representation (see Section IV, *infra*).

The importance of CSR is gathering momentum, as demonstrated by the increasing number of companies opting to follow institutional CSR recommendations or drawing up and publishing their own guidelines. While the majority of CSR is still soft-law based, reputational risk is of increasing importance in the various markets. In addition, the implementation of EU Directive 2007/36/EC into Luxembourg law by the Shareholder Law marked an important step in Luxembourg CSR legislation. The Shareholder Law applies to companies that have their registered office in Luxembourg and whose shares are admitted to trading on a regulated market in a Member State of the European Union, as well to Luxembourg companies whose shares are traded on a non-European regulated market if such companies have elected to opt into the rules of the Shareholder Law (see Section V, *infra*). The Shareholder Law goes beyond the Directive's requirements, and aims to increase shareholders' active participation in their companies by enabling them to exercise their voting rights, ensuring their right to place items on shareholders' meetings' agendas and to ask questions.

II CORPORATE LEADERSHIP

i Board structure and practices

Structure

Although the law of 25 August 2006, which introduced Article 60 *bis* of the Company Law, provided the possibility for public limited liability companies to choose a two-tier

15 See for details: http://europa.eu/rapid/press-release_IP-12-1340_en.htm.

board structure, the one-tier board structure remains by far the preferred option in Luxembourg, with the company being managed exclusively by a board invested with the broadest powers to act in the name and on behalf of the company.

In a two-tier system, the company is managed by two bodies: the management board, charged with the day-to-day management of the company, and a supervisory board. Article 60 *bis* details the supervisory board's responsibilities, which include permanent supervision and appointment of the management board members, the right to inspect all company transactions, the obligation of independence from the management, and liability towards the company and any third party in accordance with general law. However, there is no specific guidance relating to the role of the supervisory boards or the senior manager in relation to these duties.

Composition of the board

The board is composed of appointed members (the company's directors). The Law requires a minimum of three directors (Article 51); the maximum number of directors is undefined (the LuxSE Principles advise 16 directors as a reasonable limit). While the directors are appointed by the shareholder(s) of the company, the directors choose a chair from among their members. The Law does not provide any specific powers to the president of the board, although companies may choose, for example, to grant a power of representation to the president in the articles of association (AoA). However, unlike other civil law jurisdictions, the president of the board does not act on behalf of the company in his or her position as president, but rather on the basis of his or her position as director of the company.

Article 51 *bis* of the Law provides that, where a legal entity is appointed as director of a public limited company, it shall designate a permanent representative to exercise that duty in the name and for the account of the legal entity. Such provision applies only to the public limited company. However, an interesting applicability issue of Article 51 *bis* to a partnership limited by shares was indirectly raised by the District Court of Luxembourg on 11 December 2013. The question was to establish whether the obligation to appoint a permanent representative of a legal person to a board of a public limited company also applies to the legal person of a general partner of a partnership limited by shares. Depending on the final resolution of the case (the decision of the District Court being an interlocutory decision), such obligation might expand to cover any partnership limited by shares.

Most articles of association provide that any two directors can represent the company without evidence of a board resolution (although in practice the board may ratify actions taken previously by sole directors).

The Law provides for three mechanisms: the board can adopt a decision and give specific mandates (limited in time and scope) to one or more of its members, or other individuals, to act on its behalf;[16] the AoA may entitle one or more directors to represent the company in any legal proceedings, either individually or jointly;[17] and

16 Article 1984 *et seq* of the Luxembourg Civil Code.

17 Article 53(4) of the Law.

the appointment of a 'day-to-day' manager. The board may designate such manager as a general representative of the company charged with its day-to-day business and individually representing the company towards third parties for such business (Article 60 of the Law). Power may be delegated to one or more directors, officers, managers or other agents, who may but are not required to be shareholders, acting either individually or jointly. While their appointment, removal from office and powers may be specified, limited or extended by the AoA or the competent corporate body, the Law states that no restrictions to their representative powers may be validly opposed in relation to third parties, even if their appointment is published. The liability of the day-to-day management is based on the general rules relating to mandates. When a member of the board is appointed as day-to-day manager, the Law requires the board to report annually to the shareholders on the salary, fees and any advantages granted to such director.[18]

A company will generally be bound by acts of its directors or by the person entrusted with its day-to-day management, even if such acts exceed the company's corporate object, unless the company proves that such third party knew that the relevant acts exceeded the company's corporate object or could not, in view of the circumstances, have been unaware of it. The publication of a restriction of a director of the board's powers in the company's AoA is deemed insufficient to constitute such proof.[19]

Regarding listed companies, LuxSE Principle 4 distinguishes between executive and non-executive managers: executive managers are defined as senior managers who are not board directors but who are members of a body of executives charged with the day-to-day management of the company. There is no other distinction under Luxembourg law, with all board members having the same rights and obligations. A more permanent division of tasks and responsibilities between board members is possible (e.g., by providing for different classes of directors), but any such division is purely internal and is unenforceable in relation to third parties. It is, however, possible for the board to delegate certain specific powers to single board members or non-board members in the framework of a specific delegation of power.

Finally, the European Commission has proposed legislation with the objective of attaining a 40 per cent presence of women among non-executive board-member positions in publicly listed companies.[20] Luxembourg is currently reported as having

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18 Article 60 of the Law.

19 Article 60 *bis* of the Law.

20 Proposal of the Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges of 14 November 2012, 2012/0299 (COD) (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0614:FIN:en:PDF). At the same time the European Business School's 'Women on Boards' Initiative published its 'Global Board Ready Women' list online, which contains 8,000 board-ready young graduate women, at http://europa.eu/rapid/press-release_IP-12-1358_en.htm.

an average of less than one in 10 female board members, with over half of the largest companies having no women on their boards at all.[21]

Separation of CEO and chair roles: chair's role and responsibilities

While the roles of CEO and chair tend to be separated in practice, there are no legal dispositions or guidelines pertaining to a separation of roles or responsibilities.

For listed companies, LuxSE Principle Recommendation 2.4 requires that the chair prepares the board meeting agendas after consulting the CEO and ensures that the procedures for preparing meetings, deliberations, decision-making and the implementation of decisions are correctly applied. Under this non-compulsory guideline, the chair should ensure the proper application of the rules of governance and provide advice to the board.

Luxembourg law does not currently provide for a specific procedure for direct communication between the CEO or the chair and the shareholders.

For listed companies, under LuxSE Principle 10 companies should 'establish a policy of active communication with the shareholders' and allow shareholder dialogue with the board and the executive management.

Remuneration of directors and senior management

Directors, as such, are not employees of the company, and their remuneration falls under the general rules on mandates and corporate law. Generally, and unless otherwise provided by the AoA, services rendered by the company directors are considered to be provided remuneration-free. If the AoA authorise remuneration, the global amount to be paid to the directors will be fixed by the general meeting of shareholders, and the board will allocate such amount between board members as it deems fit. The rules on conflicts of interest forbid directors from taking part in or voting on resolutions relating to their own remuneration.

Senior managers are generally employees of the company, and the Luxembourg Labour Law will be applicable as regards their relationship with the company. Concerning listed companies, the LuxSE Principles recommend appointing a remuneration committee to deal with such issues; under LuxSE Principle 8, the company must 'secure the services of qualified directors and executive managers by means of a fair remuneration policy that is compatible with the long-term interests of the company', thereby introducing a sustainable aspect rather than concentrating on short-term gains.

21 http://ec.europa.eu/justice/gender-equality/files/womenonboards/impact_assesment_quotas_en.pdf.

Committees

The company's AoA may allow for the creation of committees appointed by the board to ensure that the directors' obligations are fulfilled. The LuxSE Principles advise listed companies to appoint, from among the board's members, *inter alia*:

a a committee to assist the board in relation to corporate policies, internal control, financial and regulatory reporting, and risk management;[22]

b an audit committee;

c a nomination committee to nominate suitable candidates as directors; and

d a corporate governance committee to ensure compliance with corporate governance practice.[23]

The AoA will outline the number of members of each committee, their function and scope of powers, and the committees themselves will be appointed by and under the supervision of the board.

LuxSE Principle 3 requires listed companies and their boards to establish such committees as necessary for the proper performance of the company's tasks. The LuxSE Principles also recommend that the board appoint as many special committees as are needed to examine specific topics, under the overall responsibility of the board.

Board and company practice in takeovers

Takeover bids are covered by the Luxembourg Takeover Act of 21 April 2004 (transposing EC Directive 2004/25). Although Luxembourg law admits the principle of defensive measures, there has been no case law specifically covering the question as yet. The principle is generally considered as a form of obligation for the board to act in good faith with respect to the shareholders' interest. The board may adopt defensive measures (e.g., issuing new shares within the limits of authorised capital or selling key assets) without the approval of the shareholders, but these measures must be taken in the best interests of the company. Further, the board may not prohibit the shareholders from accepting an offer. It should be noted, however, that measures aimed at frustrating bids in the long term are not generally deemed to be admissible under Luxembourg legislation. It would, therefore, not be possible to repeat defensive measures whenever the bid is repeated or take defensive measures that have a long-term effect.

ii Directors

Although no general legal obligations are in place, the LuxSE Principles require that listed companies' boards have a sufficient number of independent directors (the number depends on the nature of the company's activities and share ownership structure), defining independent directors as not having 'any significant business relationship with the company, close family relationship with any executive, or any other relationship with the company, its controlling shareholders or executives which is liable to impair

22 Should the company not have an audit committee, LuxSE Principle 9, Recommendation 9.1 requires that the board reassess the need to create an audit committee annually.

23 See, for example, CISCO systems INC at http://investor.cisco.com/governance.cfm.

the independence of the director's judgement' (LuxSE Principle 3, Recommendation 3.5). While there are no specific legal provisions regarding independent directors, it is generally understood that all directors, including independent directors, should be provided with timely information for the proper performance of their duties.

Liability of directors

The directors' duties are owed to the company and as such they may be held liable towards the company both on civil and criminal grounds. They are jointly and severally liable in accordance with the general provisions on civil liability[24] and the provisions of the Law,[25] both towards the company and towards all third parties for any damage resulting from the violation of the Law or of the AoA of the company.

Directors must act in the best corporate interests of the company and are obliged to comply with the Law and with the company's AoA. This includes the obligation to act as reasonably prudent businesspersons. They must manage the company's business in good faith, with reasonable care, in a competent, prudent and active manner, at all times in the company's best interests, and must refrain from doing anything that does not fall within the scope of the company's corporate objectives. The Law also imposes certain general duties on directors, including the general management of the company, representation of the company in relation to third parties and upholding their duty to avoid any conflict of interests.

However, it should be noted that directors of LuxSE-listed companies are held to a number of more specific duties under the Transparency Law and the Market Abuse Law, in addition to the LuxSE regulations and principles. Under LuxSE Principle 2, the board of a listed company is bound by a fiduciary duty to its company and shareholders, and must act in the company's best interests and protect the general interests of the shareholders by ensuring the company's sustainable development.

In the event of misconduct, according to prevailing doctrine and case law, the shareholder's meeting must decide whether to make any claim against a director in connection with faults committed by such director in the performance of his or her functions. Creditors of a company may, under certain circumstances, institute action on behalf of the company if the latter fails to do so and if such failure harms the company's creditors (under Article 1166 of the Civil Code).

Directors' liability in relation to the company is exonerated further to cover the discharge granted to the board by the annual shareholders' meeting approving the annual accounts. Such discharge is valid for the period covered by the accounts presented to and approved by such meeting, provided that they do not contain any omission or false statement of a material fact. Although a discharge given by the general meeting of shareholders extinguishes the board members' liability towards the company, it is important to note that proceedings initiated by third parties are not affected by such discharge.

24 Articles 1382 and 1383 of the Luxembourg Civil Code.

25 Article 59 of the Luxembourg Company Law.

The company, as well as third parties (including any shareholder or creditor with a legitimate interest), may bring an action against a director. Shareholders may, however, only seek compensation for a prejudice that is distinct from the company's collective damage, and that can be defined as an individual and personal damage.

If the shareholders have suffered collective damage, it is up to the shareholders' meeting to ask for compensation, in which case action must be brought by the shareholders' meeting on behalf of the company (an action initiated by a single shareholder will be dismissed). The legal basis for the action differs depending on whether the proceedings are invoked by the company or by third parties.

Any action by the company has a contractual basis, whereas an action by third parties will be brought on the grounds of tort liability. Whereas, under contractual liability, only reasonably foreseeable damage is to be repaired (except in cases of fraud), under tort liability all damage caused by the misconduct must be repaired. In order to elude collective liability, a director must prove that he or she has not taken part in the breach of the Law or of the AoA of the company, that no misconduct is attributable to him or her and that he or she reported the breach to the next shareholders' meeting following his or her discovery or knowledge of the breach.

For listed companies, the LuxSE rules and regulations provide a series of sanctions in the event of its rules being breached, including fines or compensation for damage caused to the stock market.

The directors of an SA are appointed for a period that cannot exceed six years,[26] although they can be re-elected unless the company's AoA provide otherwise, and they may at any time be removed from office by the general meeting of shareholders[27] without cause by simple majority. It is also possible to provide for stricter conditions in the AoA via a super-majority vote to appoint or revoke such directors. Another possibility is to provide each category of shareholder with authorisation to nominate candidates, among which the general meeting of shareholders will elect the directors.

Conflicts of interest of directors

Regarding the rules relating to conflicts of interest,[28] any director with an interest contrary to that of the company in a transaction submitted for approval to the board is obliged to inform the board, refrain from taking part in the deliberations or the vote and record his or her statement in the minutes of the meeting.

For listed companies, Principle 5 imposes that directors must:

a inform the board of any possible conflict of interest;

b take decisions in the best interests of the company;

c warn the board of possible conflicts between their direct or indirect personal interests and those of the company or an entity controlled by it; and

d refrain from taking part in any deliberation or decision involving such a conflict (unless they relate to current operations concluded under normal conditions).

26 Article 51(4) of the Law.

27 Article 2004 of the Luxembourg Civil Code.

28 Article 57 of the Law.

III DISCLOSURE

i Financial reporting and accountability

All companies must file all company accounts annually under the Law; Article 309 imposes consolidated accounting for all Luxembourg-based companies where the company has a majority of the shareholding or voting rights in another entity; is a shareholder or member in another entity and has the right to approve or appoint a majority of the members to the administrative, management or supervisory body of the entity; or is a shareholder or member of another entity and solely controls a majority of shareholders' or members' voting rights in the entity, further to a shareholder or member agreement.

The LuxSE Principles additionally require that a set of rules be drawn up to regulate the behaviour and the notification obligations relating to transactions of the company's securities, and to specify which transaction information should be made public. These rules should also place the appointment of a compliance officer, charged with monitoring compliance to the rules, under the responsibility of the board. Principle 9 requires directors to 'establish strict rules, designed to protect the company's interests, in the areas of financial reporting, internal control and risk management'. This includes creating, where relevant, an audit committee to discharge the board from its responsibilities of risk management, internal control and financial reporting. The effectiveness of the company's financial reporting, internal control and risk management system must also undergo regular scrutiny.

LuxSE-listed and Euro MTF-traded companies are additionally subject to the internal LuxSE rules and regulations, which contain a number of disclosure rules primarily derived from the Transparency Law as well as the Market Abuse Law. Legal obligations do not specifically include impacts outside the jurisdiction, unless such impacts influence the financial reporting obligations, in which case they must be reported.

The CSSF is responsible for verifying LuxSE-listed companies' reports and may issue administrative and criminal sanctions in cases of failure to report or misrepresentation, in particular under the Transparency Law. The company's corporate governance charter should also be made available on its website. In practice, companies publish press releases and past information in addition to regulated information (see Section I, *supra*).

However, since reporting on non-listed companies' social impacts remains on a soft-law basis, there are few legal consequences in cases of misrepresentation or failure to report. Some companies have put internal procedures in place in order to address complaints that an employee failed to comply with an internal code of conduct.[29] It cannot be excluded that a violation of a CSR obligation may potentially be alleged by a third party if a company does not respect one of its publicly available CSR engagements. However, so far there is no case law or doctrine in the field, and such a claim would depend on the third party being able to prove its personal interest or damage in the claim.

29 See, for example, PricewaterhouseCoopers' corporate governance procedure at www.pwc.lu.

Auditors' role and authority, and independence

The Law of 18 December 2009 on the Auditing Profession, as amended (the Audit Law),[30] and Luxembourg legislation exclusively reserves, *inter alia*, statutory audits to statutory auditors and to audit firms that have been approved by the CSSF. Access to the auditing profession is regulated by the Audit Law, and the titles 'auditor' and 'audit firm' are exclusively granted by the CSSF to applicants upon fulfilment of certain criteria. The CSSF also administers a database of statutory auditors, approved statutory auditors, audit firms, approved audit firms, trainee statutory auditors and candidates to the audit profession, including third-country auditors and audit entities registered pursuant to Article 79 of the Audit Law. Registered auditors and registered auditing firms must also be members of the Luxembourg national auditing organisation, the Institute of Registered Auditors, which is charged with enforcing the strict application of the rules of the auditing profession and members' respect of their professional obligations.

The question and definition of the independence of auditors remain unresolved. Under the Luxembourg definition, the requirement for registered auditors and registered auditing firms to be independent from the entity they are reviewing translates as auditors being prevented from being directly or indirectly associated with the decision-making process of the entity reviewed. The auditor is also prevented from auditing the accounts if there is any form of direct or indirect relationship, be it financial, business, employment or other, including the provision of additional services other than audit, between the registered auditor, the registered auditing firm or its network and the entity under review.

The 'comply-or-explain' model and mandatory disclosure

The LuxSE Principles were drafted to be highly flexible to be adaptable to the size, structure, exposure to risks and specific activities of each company. Their 'comply or explain' system allows companies to deviate from the recommendations when justified by companies' specific circumstances, provided that adequate explanation is provided.

The 'comply-or-explain' approach, recommended by the OECD and the European Commission, is favourably received by company boards and investors. The LuxSE Principles consist of three sets of rules: general principles (comply), recommendations (comply or explain) and guidelines. The general principles form the structure upon which good corporate governance should be based and are drafted in a sufficiently broad manner to enable all companies to be able to adhere to them, whatever their particular features. Without exception, all Luxembourg-based listed companies must apply the principles.

Given the flexible 'comply or explain' approach, shareholders (and in particular institutional investors) have a paramount role in the thorough evaluation of a company's corporate governance, should carefully examine the reasons provided by a company whenever it is found to have departed from the recommendations or failed to comply with them, and make a reasoned judgement in each case. The shareholders should be open to dialogue in cases where they do not agree.

30 www.legilux.public.lu/leg/a/archives/2010/0022/2010A0296A.html?highlight=audit.

Majority or controlling shareholders may see to the internal and external monitoring of the company, with the risks and advantages that this necessarily involves. The principles underline that the controlling or strategic shareholders make judicious use of their power and respect the rights and interests of the minority shareholders.

The possibility of one-on-one meetings of directors with shareholders is not regulated by Luxembourg legislation. While possible, in practice such meetings will depend on, *inter alia*, the size of the company, its structure, and the number and geographic location of shareholders and directors.

IV CORPORATE RESPONSIBILITY

For listed companies, the LuxSE Principle 2 guideline suggests that the board appoint a compliance officer whose duties and responsibilities should be defined by the corporate governance rules. The compliance officer's mission is, *inter alia*, to monitor compliance with such rules. The LuxSE Principles further suggest that the compliance officer has access at all times to the chairs of the board and the audit committee. Principle 9 requires the board to draw up strict rules to protect the company's interests, notably regarding risk management and financial reporting. Principle 9, Recommendation 9.1 obliges the board to appoint an audit committee when necessary to assist in the board's discharge of liability in the areas of reputational risk, financial reporting and so forth (see Section III, *supra*).

i Compliance policies and whistle-blowing

Whistle-blowing is becoming more widely used by Luxembourg companies eager to prevent fraudulent behaviour or activities that could damage their reputation. Currently, any Luxembourg company listed on an American stock exchange must comply with the Sarbanes-Oxley legislation. Luxembourg's national commission on data protection (the CNPD) published a guideline of the rules to be respected by Luxembourg entities putting a whistle-blowing policy in place, largely based on the US 'Article 29' Group. Notably, a company must notify the CNPD of the implementation of a whistle-blowing policy further to Articles 12 and 13 of Law of 2 August 2002 on Personal Data.[31] The CNPD provides guidelines to ensure that the whistle-blowing policy is perceived to support rather than replace efficient management and CSR. Article L127-1 was also recently added to the Luxembourg Labour Code with the aim of encouraging whistle-blowing activities. Article L127-1 states that employees may not be fired on the grounds of their protest against or refusal of something that they consider in good faith to constitute an unlawful taking of interest, corruption or undue influence as defined under Articles 245 to 252 and 310-1 of the Luxembourg Criminal Code, whether committed by their employer, any other person senior in rank to them, their colleagues or any third party in relation to the employer.

31 www.cnpd.public.lu/fr/legislation/droit-lux/doc_loi02082002_en.pdf.

ii CSR for other stakeholders and employees

Non-shareholders

Under Luxembourg law, directors are neither legally required to take the company's impacts on non-shareholders into account; nor are they prevented from doing so. The LuxSE Principles guideline recommends that the board give proper consideration to its staff policy and code of business ethics in determining the company's values. This could therefore be applied to the board's decision-making process, although it is only a very general guideline.

In practice, an increasing number of private companies are taking social criteria into account in their decision-making and disclosing such information to the marketplace (e.g., the CSR commitments published on several major Luxembourg-established companies' websites, such as SES, Axa and ArcelorMittal, which publicly declare that they will take the social and environmental impacts of the company's operations into account, both on a national and international level). Such consideration may extend to other companies or business partners, but on a voluntary basis only.

Employees

Articles L142-1 *et seq* of the Luxembourg Labour Code introduced a legal requirement for employee representatives on certain company boards. This legal obligation is limited to SAs fulfilling a double criteria: all companies established in Luxembourg and employing over 1,000 employees over a three-year period, and all companies established in Luxembourg in which the state either detains a financial participation of over 25 per cent, or which exercise a state-given concession.

Despite the lack of a more general legal requirement concerning representation on company boards, it should be noted that employees in Luxembourg workplaces with more than 15 employees have a legal right to representation at work (Article L411-1 of the Labour Code). The central element of workplace representation is the worker's representatives concerned with workers' everyday concerns and directly elected by all employees.

In larger companies employing an average of 150 or more workers over a three-year period, Articles L142-1 *et seq* of the Labour Code provide for a joint company committee – a joint employer–employee body aimed at improving industrial relations in the workplace. The law requires the company's managing director to inform and consult the joint committee at least once a year on the company's current and prospective staffing needs and on any training, refresher training or retraining implications for employees. The law authorises the joint committee to deliver an opinion on economic and financial decisions that could have a serious effect on the structure of the company or on employment levels. The committee also has the right to take part in joint decisions on a number of issues concerning human rights, such as:

a the introduction or running of technical equipment intended to monitor the behaviour and performance of employees at work;

b the introduction of, and alterations to, measures relating to occupational health and safety and the prevention of workplace accidents;

c the drawing up of, and amendments to, general criteria affecting the selection of staff for promotion, transfer and dismissal and at the recruitment stage; and
d the drawing up of, and amendments to, general criteria used in staff assessments.

Unlike some other European countries, there is no legally backed trade union workplace presence in Luxembourg, although trade unions have a substantial range of rights in the election and operation of employee delegations. Unions also have important rights in joint company committees, and to our knowledge the majority of employee representatives are union members.
Despite an increasing number of non-discrimination laws, including a new equal treatment chapter in the Luxembourg Labour Code[32] transposing Directive 2000/EC/78, there is no binding anti-discrimination legislation currently in place specifically targeting non-discrimination on company boards.

V SHAREHOLDERS

i Shareholder rights and powers

Equality of voting rights
The Shareholder Law came into force on 1 July 2011 aiming, *inter alia*, at strengthening the exercise of minority shareholders' voting rights in listed companies in order to improve the corporate governance of such companies. For the first time, Luxembourg law refers to a principle of equal treatment of shareholders, although such principle is limited to their participation in and exercise of voting rights. The Shareholder Law has amended the previous rule that one vote is in principle attached to one share, henceforth allowing the company to provide for different voting rights for different shares.

The powers of shareholders to influence the board
Article 53 of the Company Law reserves the management of the company to its board. Should a shareholder be directly involved in the management of the company, he or she may be deemed a *de facto* manager and as such be liable under the same circumstances as the appointed directors.

Shareholders do, however, control the appointment of the board (and therefore its composition) via a majority decision of over 50 per cent to appoint a new director. However, it should be noted that during the AGM, the shareholders can question the board on all aspects of the company's management, accounting and so forth throughout the year, and may withhold granting discharge. Although shareholders were in practice allowed to ask questions during the meeting and to receive answers, the Shareholder Law now expressly lays down that shareholder right in relation to the items on the agenda of the meeting.

32 Chapter V (equal treatment), Articles 241-1 to 254-1; see www.legilux.public.lu/leg/textescoordonnes/codes/code_travail/Code_du_Travail.pdf.

Under the Shareholder Law, in addition to the right to ask questions orally during a meeting, shareholders may pose written questions before the meeting. The company's AoA will provide the cut-off time by which the company should have received the written questions.

The company must answer any questions addressed to it. Should several questions relate to the same topic, the company may publish a detailed questions and answers document on its website, in which case the chair should draw the shareholders' attention to the publication.

Certain matters must also be reported to the shareholders, such as any director's conflict of interest relating to voting on a resolution.

Regarding actions against directors, unlike Belgian or French law, Luxembourg law does not allow for an individual shareholder or group of shareholders to commence legal proceedings against a director for damages caused to the company through the latter's actions or mismanagement. Any action against a company's management board must be brought by the company (i.e., the shareholders as an entity).

Decisions reserved to shareholders

Article 53 of the Company Law provides that a company's managing body has the most extensive powers to perform all actions necessary to fulfil the company's corporate objective, with the exception of the actions specifically limited by law to the shareholders' meeting (*inter alia*, all amendments to the company's AoA, approval of annual accounts and allocation of the company's results are reserved to the company's shareholders). The Shareholder Law has modified the level of shareholding required to exercise certain rights.

Rights of dissenting shareholders

Neither the Law nor Luxembourg doctrine currently recognises any right of action on behalf of the company in favour of individual shareholders.

Extension of the protection of minority shareholders by stipulating provisions in the company's AoA (e.g., the right of a minority coalition to propose directors, provisions for a more stringent majority for certain decisions, approval clauses or share transfer restrictions) is well recognised insofar as such arrangement does not conflict with Luxembourg's public order rules.

The use of shareholders' agreements of a purely contractual nature is far more common than providing for relevant provisions in the AoA, undoubtedly in most cases for reasons of discretion and flexibility, even though any compulsory implementation of this type of arrangement is at risk.

Providing additional protection in favour of groups of minority shareholders, whether in the AoA or otherwise, is quite common in Luxembourg, particularly among international joint ventures and groupings that use a Luxembourg company structure to promote mutual business activities.[33]

33 For further analysis on minority shareholders rights, see also Marc Elvinger, 'Les minorités en droit des affaires', Rapport Luxembourgeois (1) in *Annales du droit luxembourgeois*, 2005.

Also of note is the sell-out right in favour of minority shareholders. Under the Squeeze-out Law, under certain conditions in the event of a majority shareholder acquiring at least 95 per cent of the share capital of the company, the remaining minority shareholders are entitled to exercise a sell-out right within three months of the required notification and publication of the acquisition.[34]

Benefits for long-term shareholders

The Law does not provide for any specific benefits (e.g., extra votes or dividends) for long-term shareholders, although such facilities may be incorporated into the AoA.

Shareholder approval of board decisions

While the Law does not set out any specific areas in which board decisions must be approved by the shareholders, the AoA of the company may provide that all or certain board decisions must be ratified by the shareholders.

ii Shareholders' duties and responsibilities

Controlling shareholders' duties and liability

All shareholders have certain obligations by law, including the payment of shares, a proportional contribution to any losses suffered by the company and an obligation of loyalty.

In addition, the controlling shareholders are notably prevented from dictating or imposing an increase of the other shareholders' obligations without their prior consent, although such principle has been considerably attenuated by the Squeeze-out Law,[35] which granted the right to force the acquisition of shares held by minority shareholders to shareholders controlling at least 95 per cent of the share capital.

Institutional investors' duties and best practice

While institutional investors must bear in mind potential reputational repercussions relating to their investments, there are no particular duties imposed specifically on institutional investors and no requirement for institutional investors to specifically consider third-party impacts in their investment decisions. However, a number of Luxembourg-based investors have signed the United Nations Principles for Responsible Investment[36] (an investor initiative in partnership with the UN Environment Programme Finance Initiative and the UN Global Compact), and a growing number have taken the private initiative to take such risks into account (e.g., Axa Investment Managers, which expressly includes environmental and social criteria in its investment decisions).[37]

34 See footnote 4, *supra*.

35 Ibid.

36 www.unpri.org.

37 www.axa-im.com/en/responsible-investment.

Code of best practice for shareholders

Luxembourg has no official code of best practice for shareholders, although companies may draw up internal codes of best practice for their shareholders.

iii Shareholder activism

Shareholder activism is not a defined notion under Luxembourg law, and neither derivative actions nor proxy battles are common practice in Luxembourg.

iv Contact with shareholders

Further to the Shareholder Law, listed companies must give at least 30 calendar days' notice before holding a meeting (notwithstanding particular requirements under the Takeover Bid Law). Parliament has imposed a longer notice period than the 21-day notice period required under the Shareholder Directive. Should the quorum not be met at the first meeting, a second meeting must be convened at least 17 calendar days before the meeting is held. The convening notice must be published in the Luxembourg Official Gazette, a Luxembourg newspaper and other media in a manner that ensures the effective distribution of the information to the public throughout the European Economic Area. In the event that all the shares are registered, convening notices may be sent by registered letter to the shareholders, members of the board (or the management board and the supervisory board) and the statutory auditors. The Shareholder Law requires that, in addition to the agenda, date and place of the general meeting to be held, convening notices must also include:

a a clear description of the shareholders' rights to put items on the agenda and to table draft resolutions, the procedure for voting by proxy and a form to be used for such purpose and, if provided for in the company's articles of incorporation, the procedure to vote by electronic means;

b postal and e-mail addresses via which documents can be submitted;

c where applicable, a copy of the 'record date' as defined by the Shareholder Law (i.e., the date by which shareholders must register their shares in order to participate and vote at the general meeting). The date for listed companies is set at midnight CET on the 14th calendar day before the meeting. The shareholder must notify the company at the latest by such date of their intention to participate in the meeting; and

d the company's website address, which must contain all the above information, as well as a full copy of the draft resolutions.

The Shareholder Law allows distance voting by shareholders in advance of the meeting, provided that the company has outlined the related requirements in its articles of incorporation. The Shareholder Law details the content of the ballot paper, which must include, *inter alia*, the full identity of the shareholder, the content of the vote cast in advance, the agenda of the meeting and the deadline before which the ballot paper must be received.

The Shareholder Law imposes that proxy voting be offered to shareholders, under certain conditions, with the proxy holder having the same rights as the shareholder. The company has no obligation to verify that the proxy holder votes in accordance with the shareholder's instructions.

VI OUTLOOK

While corporate governance is currently, in general, voluntary, a growing number of institutional guidelines and codes are being developed, and the Luxembourg government is working towards promoting corporate governance on a national level. The following bills are also due to be implemented into Luxembourg law in 2015:

a Bill No. 6,777 introducing the simplified limited liability company and amending the amended law of 10 August 1915 on commercial companies, and the amended law of 19 December 2002 concerning the register of commerce and companies as well as accounting and the annual accounts of companies;

b Bill No. 6,718 concerning the report on payments made for the benefit of governments and amending various provisions on accounting and the annual accounts of companies and consolidated accounts of certain types of companies; and

c Amendment Bill No. 6,545 regarding the reform of social dialogue in undertakings and modifying the amended law of 19 December 2002 on the register of commerce.

Chapter 21

NETHERLANDS

Geert Raaijmakers and Jos Beckers[1]

I OVERVIEW OF GOVERNANCE REGIME

i Legal framework: laws and self-regulation

In the Netherlands, the general rules of civil law relating to the governance of companies and listed companies are laid down in Book 2 of the Dutch Civil Code (DCC). This sets out the duties and powers of the various corporate bodies, as well as rules on representation, conflicts of interest and the liability of management board members. The DCC also contains rules regarding financial reporting and disclosure. Compliance with the rules in the DCC can, if necessary, be forced through the courts. In this context, it should be mentioned that a right of inquiry was introduced in Book 2 of the DCC in 1994: shareholders with a specific capital interest may request a court specially designated for this purpose – the Enterprise Chamber of the Amsterdam Court of Appeal – to initiate an inquiry into the company's policy and affairs. Upon a showing of mismanagement, the Enterprise Chamber can intervene by, *inter alia*, suspending or nullifying a management board decision, suspending or removing management or supervisory board members and appointing temporary board members. In practice, inquiry proceedings have played an important role in the development of law in the area of corporate governance, for example with regard to the issue of the respective roles of the management board and the shareholders in determining the strategy of the relevant company.

In addition, the Netherlands has rules on the supervision of the business conduct of listed companies, laid down in Chapter 5 of the Financial Supervision Act (FSA). The FSA contains rules on, *inter alia*, the disclosure of major holdings, financial reporting, the prevention of market abuse and the obligations of institutional investors. Supervision

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of compliance with these rules is carried out by a specially designated body, the Authority for the Financial Markets (AFM).

Alongside these statutory rules, there is a system of self-regulation consisting of codes of conduct containing principles and best-practice provisions drawn up by the sector itself. The first Dutch Corporate Governance Code (also known as the Tabaksblat Code), containing governance rules for listed companies, entered into effect in 2004. Since 2009, a revised version (the Corporate Governance Code) has been in effect, with more attention being paid to risk management, the supervisory duties of the supervisory board and the level and structure of remuneration. In the latest compliance report regarding the Code (over reporting year 2013), the need for an update is again voiced (see Section VI, *infra*).

Since January 2010 the banks have been governed by the Banking Code; this mirrors the Corporate Governance Code in many respects, but also contains rules specifically targeted at banks (risk appetite, the treatment and interests of clients). The Banking Code applies to both listed and unlisted banks. In January 2015 the Code was updated. In addition, the Insurers Code for the insurance industry took effect on 1 January 2011. The Insurers Code is nearly identical to the Banking Code and applies to both listed and non-listed insurance companies. As of July 2013 a new version entered into force in which the disclosure requirements regarding compliance with the Code and applicable statutory rules were strengthened. Thus, listed banks and insurance companies fall both under the Corporate Governance Code, as well as the Banking and Insurers Codes.

The above-mentioned codes adopt a 'comply or explain' system: in their annual reports, companies must state how they applied the principles and best-practice provisions and, if applicable, provide a reasoned explanation of why a provision has not been applied. For all these codes, there is a separate monitoring committee that annually reports on the extent to which each code has been complied with, and on any problem areas that have emerged in this regard.

ii General: corporate governance developments

From the late 1990s, the attention of the legislature and courts in the Netherlands was particularly focused on strengthening the role of shareholders in the governance of companies – a development that was originally motivated by various accounting scandals, which had undermined confidence in management. In this regard, the tide now appears to be turning. It is felt that the stakeholder model traditionally followed in the Netherlands, the main focus of which is balancing the different interests of the various parties involved in a company, has come under too much pressure from shareholder activism. It became apparent that newly acquired shareholder rights were not being exercised so much by institutional investors, but by short-term investors such as hedge funds. For these investors, short-term increases in shareholder value are as a rule more important than the company's long-term interests. Since the commencement of the financial crisis in 2008, the regulatory focus in the Netherlands has shifted towards improving corporate management and supervision and promoting dialogue between, on the one hand, the management and supervisory boards and, on the other, shareholders.

In this connection, attention is currently being paid in the Netherlands (but also at a European level) to the issue of how the participation of institutional investors can be enhanced. The underlying notion is that the existence of a sustainable relationship between a company's management board and such shareholders with a long-term vision will serve to benefit the company. To this end, efforts are being made by the legislator to facilitate the exercise of shareholder rights and to also make the process more transparent, so that the behaviour of shareholders is easier to understand and predict. This has resulted in the passing of the Corporate Governance Act,[2] which *inter alia* includes a regime aimed at identifying the shareholder (the ultimate investor) of a listed company and entered into force on 1 July 2013. In addition, the threshold for exercising the right to put an item on the agenda has been raised. Similarly, the European Commission, in its Corporate Governance Action Plan of December 2012, has announced various measures to encourage long-term shareholder engagement. In the course of 2013/2014 a number of initiatives were taken to implement the Action Plan, of which the revision of the Shareholders Directive is the most prominent (see also Section V.i, *infra*)

Moreover, the role of the different stakeholders in determining a company's policy and strategy has been the subject of discussion in various legal actions. An important judgment on this issue was given by the highest court in the Netherlands, the Supreme Court, in the summer of 2010, in which it was made clear that in principle the decision-making process about the strategy is a duty of the board, not of the shareholders (see also Section V.iv, *infra*).

The bankruptcy of a number of large undertakings and serious problems in the housing association sector and other semi-public institutions have led to greatly increased concern about the quality of board members and supervisory board members, which was given extra impetus by the aid provided by the state to various major Dutch banks (including another nationalisation). This has not only resulted in legislative measures, such as the introduction of a broader suitability test for board members and supervisory board members of financial institutions[3] and a cap on holding multiple supervisory board memberships (see Section II.ii, *infra*), but also appears to be reflected in judgments in matters involving directors' liability; in February 2012, the Utrecht District Court ruled that two top executives of the Dutch/Belgian Fortis Bank were personally liable on account of having provided misleading information[4] Following on from this, public pressure has caused the remuneration of board members of financial institutions to be subject to ever-tougher legislation. Where initially the governance codes were predominant in this field, increasingly the legislator has been stepping in. More particularly, limits have been placed on the variable component of remuneration,

2 Act of 15 November 2012 in response to the Corporate Governance Code Monitoring Committee's Recommendation of 30 May 2007 (Bulletin of Acts and Decrees 2012, 588). See also Section V.iv, *infra*.

3 Act of 22 December 2011 in connection with the Suitability Requirement (Bulletin of Acts and Decrees 2012, 7). The act entered into force on 1 July 2012. See also Section II.ii, *infra*.

4 At the time of writing, appeal proceedings are pending.

the idea being to bring a stop to the adoption of short-term strategies. Developments in the Netherlands in this regard are ahead of the measures taken at EU level.

In short, the subject of corporate governance is high on the agenda in the Netherlands. An actual change in culture and behaviour is expected of companies in general and the banking sector in particular, with legislative action being taken where self-regulation fails to deliver the desired result.

II CORPORATE LEADERSHIP

i Board structure and practices

Dutch corporate law has traditionally provided for a two-tier board structure, consisting of a management board and a separate supervisory board (each of which is governed by different statutory provisions); however, the institution of a supervisory board is only mandatory for companies subject to the 'structure regime'.[5] A company is subject to this regime if, for a period of three consecutive years:

a its issued capital and reserves amount to not less than €16 million;
b it has a works council instituted pursuant to a statutory requirement; and
c it regularly employs at least 100 employees in the Netherlands.

Through the influence of international developments, the one-tier board structure, consisting of a single board comprising both executive and non-executive members, has also made its way into Dutch corporate practice. Because Dutch law was not based on this type of governance model, the Dutch parliament passed the Management and Supervision Act[6] to create a statutory basis for and deal with the special characteristics of companies with one-tier boards, which entered into force on 1 January 2013. The Corporate Governance Code already contained provisions relating to listed companies with a one-tier board structure.

In the meantime, a number of Dutch listed companies have opted for the one-tier model. The reasons for this vary greatly. Generally, the model is considered to be suited to companies in a highly dynamic environment such as companies in the technology sector, complex companies that need to act quickly in crisis situations, companies that are in the process of being listed and in which a major shareholder is closely involved in the company's management or supervision (family businesses), and companies that form part of an international group or have an international group of shareholders.[7] In practice, the one-tier model and the two-tier model appear to be growing closer to one another: in companies with a two-tier board structure the supervisory board is now expected to play a more active role, while in those with a one-tier structure it is often

5 Book 2, Title 4, Part 6 of the DCC.

6 Act of 6 June 2011 amending Book 2 of the DCC in connection with the Amendment of the Rules on Management and Supervision in Public Limited Liability Companies and Private Limited Liability Companies (Bulletin of Acts and Decrees 2011, 275).

7 See Rients Abma (in Dutch), Naar de one-tier board, Goed Bestuur 2012/3.

required that the majority of board members consist of independent non-executives. For this reason, some commentators speak of a convergence towards a 1.5-tier structure.[8]

Management board

The management board is charged by law with the duty to manage the company, subject to restrictions imposed in the articles of association.[9] It is generally accepted that management in any event includes directing the company's day-to-day affairs and setting out its strategy. It should be borne in mind that in accordance with the Dutch stakeholder model, the board must take into account various interests, not only those of the enterprise and shareholders, but also those of other interested parties, such as employees and creditors.

In recent years the average size of the boards of Dutch listed companies has declined; a significant number of companies even have two-member boards. The rise of this 'CEO–CFO model' can be explained by a number of factors, one of which is the popularity of the executive committee, in which board members as well as senior managers have seats; in these setups a larger management board makes less sense. Although clearly desirable in terms of efficiency, executive committees also raise several governance issues that require due consideration. The new Corporate Governance Code Monitoring Committee has drawn attention to this in its first compliance report.

Supervisory board

The function of the supervisory board is to supervise and advise the management board and oversee the general state of affairs within the company.[10] Like the management board, the supervisory board must take into account the interests of the company and its enterprise, as well as those of all other stakeholders.

The supervisory board of a structure-regime company has a number of important rights, including the right to appoint, suspend and remove management board members, and the right to approve (or refuse to approve) certain management board decisions, such as a decision to issue shares, enter into a joint venture, make a major acquisition or large investment, amend the articles of association or dissolve the company.[11]

To enable the supervisory board to perform its supervisory duties, the DCC requires the management board to provide the supervisory board at least once a year with information about the company's strategic policy, its general and financial risks and its internal control system. The Corporate Governance Code expands upon the supervisory duties: if the supervisory board consists of more than four members, it must

8 Willem JL Calkoen, *The One-Tier Board in the Changing and Converging World of Corporate Governance*, dissertation Rotterdam 2011, p. 305.

9 Article 2:129 of the DCC.

10 Article 2:140(2) of the DCC.

11 Article 2:164 of the DCC.

appoint from among its members an audit committee[12], a remuneration committee and a selection and appointment committee, whose duties are also specified.[13]

ii Directors

Appointment and removal

As previously stated, management board members of structure-regime companies are appointed and removed by the supervisory board. In companies not governed by this regime, the general meeting of shareholders has this power. Under the Corporate Governance Code, management board members are in principle appointed for a maximum term of four years, but reappointment for successive four-year terms is permitted.

With regard to their removal, it should be noted that management board members have both a corporate and an employment relationship with the company. For a long time, it was unclear whether the removal of a management board member by the supervisory board or general meeting of shareholders terminated both of these relationships, or only the corporate one. In a decision rendered in April 2005, however, the Supreme Court ruled that removal also terminates the employment relationship.[14] Removal does not, however, preclude the management board member from seeking to recover damages on the grounds of an obviously unreasonable dismissal.

Under the Corporate Governance Code, the remuneration in the event of dismissal in principle may not exceed one year's salary (fixed remuneration component). According to the reports of the Corporate Governance Code Monitoring Committee, however, compliance with this provision in particular has been limited since the Code took effect in 2004. The reason usually given for this is the need to respect existing agreements. In its report published in December 2012, the Monitoring Committee urged that employment contracts be amended on this point. Under the Management and Supervision Act, management board members of listed companies will explicitly no longer have an employment relationship with the company. The intention is to prevent management board members, once dismissed, from being entitled to damages in addition to severance pay, but it remains to be seen how efficient this rule will turn out to be; various structures to find a way around it have been described in literature.

Supervisory board members of structure-regime companies are appointed by the general meeting of shareholders based on a nomination by the supervisory board.[15] The general meeting of shareholders may, however, overrule such a nomination. The general meeting of shareholders and the works council may recommend persons for nomination. An individual supervisory board member of a structure-regime company may only be removed by the Enterprise Chamber of the Amsterdam Court of Appeal, at the request of the company, the general meeting of shareholders or the works council.[16] However,

12 As a result of recently adopted EU legislation the responsibilities of the audit committee will increase in the future, see the end of Section III, *infra*.

13 Principle III.5 of the Corporate Governance Code.

14 Unidek, 15 April 2005.

15 Article 2:158 of the DCC.

16 Article 2:161 of the DCC.

the general meeting of shareholders may pass a 'vote of no confidence' in the supervisory board as a whole, which results in the immediate removal of all board members. This has been attempted only once; in the *Stork* case (2007) the Enterprise Chamber ordered a standstill by freezing both the removal of the board scheduled by two dissenting hedge funds as well as the anti-takeover measures enacted by the company.[17]

Independence and expertise

Due in part to the financial crisis, during which the supervision exercised by supervisory boards proved in some cases to be inadequate, the functioning of such boards is now more than ever in the political spotlight. The DCC and codes contain several provisions intended to safeguard the independence of supervisory board members, such as the absence of family ties and business interests.[18] The Dutch Central Bank, in its capacity as regulator of banks and insurance companies attaches great value to the independence of supervisory board members for the purpose of good corporate governance, and in 2012 has, further to the provisions of the code, developed its own policy rules. It requires that supervisory board members are independent 'in mind' (independent with respect to partial interests), 'in state' (formal independence) and 'in appearance' (no conflicts of interest).

The codes, moreover, pay a great deal of attention to the expertise of supervisory board members. For example, under the Banking Code supervisory board members are expected to have knowledge of the risks of the banking business and of the bank's public functions. Moreover, banks are expected to introduce a permanent education programme, while legislation has also been enacted; since 1 July 2012 management and supervisory board members of financial institutions have been subjected to a stricter 'fit and proper' test, to be applied by the AFM or the Dutch Central Bank.[19] Such a test would be in line with the common practice in countries with a one-tier board model. The test focuses not only on the individual qualities of the would-be management board member or supervisory board member, but also takes account of the composition of the group as a whole. In addition to testing for knowledge, attention is increasingly paid to behavioural and psychological factors: does the board contain the right mix of characters? Is there room for dissent or does the CEO dominate decision-making? In its report 'Leading by Example' (March 2013), the Dutch Central Bank has shown that it has structured its supervision in a completely new way by not only examining the figures but also looking at the behaviour of members of the management boards of large financial institutions. In this regard, the Dutch Central Bank has developed methodologies for mapping behavioural and cultural aspects. The underlying idea is that a financial institution's corporate culture can have a major influence on the institution's achievements, integrity and reputation and thus on the level of trust in the financial sector as a whole. Recently the Dutch Central Bank showed its teeth in public by requiring the CFO of a big insurer to resign after being found no longer fit and proper because of his

17 *Stork*, 17 January 2007.

18 Principle III.2 of the Corporate Governance Code.

19 See footnote 3, *supra*.

role in the changed company's policy on coverage of interest rate derivatives; until then the Central Bank's influence was obvious, but more behind the scenes and for the most part limited to proposed appointments of board members.

Caps on the holding of multiple supervisory board memberships
Another question to which attention has been drawn as a result of the financial crisis is whether the potential supervisory board member is able to devote sufficient time to the performance of his or her duties. To this end, the number of supervisory positions a management board member or supervisory board member is allowed to hold at large legal entities has, as of 1 January 2013, been limited by law. In principle, a management board member may hold a maximum of two positions as a supervisory board member in addition to his or her management board position; for a supervisory board member the limit is a total of five supervisory positions. The purpose of this is not only to improve the quality of supervision, but also to eradicate the 'old boys network'. It is noteworthy that the CRD IV Directive likewise limits the number of directorships that can be held by a member of a management body of a bank or investment firm.[20] The directive is stricter than Dutch law in certain respects, in that it in principle permits a total of only three or four directorships. This applies only to members of a management body of a 'significant institution' (a concept that is to be elaborated upon at national level under guidance of the European Banking Authority), taking into account the size of the institution in question and the nature, scale and complexity of its activities. The Dutch rules implementing CRD IV entered into force in August 2014.[21]

Diversity
Over and above these measures to improve the quality of management and supervision, rules to promote gender diversity within the management boards and supervisory boards of large companies have applied in the Netherlands since 1 January 2013, the target being a division within the board of at least 30 per cent females and 30 per cent males. The rules are of a 'comply or explain' nature: if the target is not met this will not lead to the imposition of sanctions, but an explanation must be given in the annual report as to why the target was not met and what steps will be taken towards meeting it. At EU level, negotiations are currently ongoing between the European Parliament and the Council on a draft directive promoting gender diversity within the management of large listed companies.[22] Pursuant to the draft directive, by 2020 at least 40 per cent of the non-executive directors of such companies must be women and heavy sanctions will

20 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

21 Act of 25 June 2014 implementing capital requirement directive and regulation (Bulletin of Acts and Decrees 2014, 253).

22 Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (COM (2012) 614).

apply in the event of non-compliance. However, there are strong objections on the part of a number of EU member states, including the Netherlands, and it therefore remains to be seen in what form the directive finally crosses the finishing line. The European Commission expects the directive to be adopted mid-2015. Finally, EU directive 2014/95 is narrower in scope but still relevant, requiring 'large' companies to have a description of the diversity policy applied in relation to the undertaking's administrative, management and supervisory bodies.[23]

Collective responsibility
Under Dutch corporate law, the management of a company is in principle the responsibility of the board members collectively as well as of each board member individually. The company's articles of association or internal rules may, to some extent, assign certain specific duties to individual board members, but the board as a whole remains responsible. The Management and Supervision Act, which has created a basis for the one-tier board model, expressly authorises the allocation of duties between one or more non-executive members and one or more executive members of a one-tier board. In this case, too, however, the board as a whole remains responsible for the company's management, including the non-executive members (see below).

Representation
The power to manage the company entails, *inter alia*, the power to represent it in transactions with third parties.[24] Under the DCC, both the management board as a whole and each board member individually have this power. The articles of association may, however, limit or exclude the individual representative power of one or more board members. For example, the articles may provide that the company may only be represented by the board as a whole or by the chair and the financial director acting together.

Conflicts of interest
Before 1 January 2013, a management board member with a conflict of interest in relation to a particular matter was not authorised to represent the company. If he or she did so nevertheless, the company, in principle, would not be bound towards the third party in question, and the transaction could be invalidated. Because this in practice led to legal uncertainty, the system has been changed. In line with the best practice provision of the Corporate Governance Code, the act provides that neither a management board member nor a supervisory board member will be permitted to take part in any discussion or decision-making that involves a subject or transaction in relation to which he or she has

23 Directive 2014/95 of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. Due for implementation before 6 December 2016.

24 Article 2:130 of the DCC.

a conflict of interest.[25] If he or she nevertheless does so, he or she may be liable towards the company, but the transaction with the third party will in principle remain valid.

Internal liability

A management board member who has performed his or her duties improperly may be held personally liable to the company. With effect from 1 January 2013 the article dealing with responsibility, the allocation of duties and liability of directors has been reworded,[26] whereby regard was given to earlier judgments.[27] In principle, each board member is liable for the company's general affairs and for the entire damage resulting from mismanagement by any other board member (principle of collective responsibility). A board member may, however, avoid liability by proving that he or she cannot be blamed for the mismanagement. The allocation of duties between the board member and his or her fellow board members is one of the relevant factors in that respect. The board member will furthermore have to prove that he or she has not been negligent in taking measures to prevent the consequences of the mismanagement. The same liability rules also apply to supervisory board members.

The explanatory memorandum to the Management and Supervision Act specifically states, with respect to the one-tier board model, that an internal allocation of duties among the board members is permitted, but that this does not change the directors' collective responsibility for the company's management. The non-executive board members (i.e., those not charged with attending to the company's day-to-day affairs) may therefore be held liable for the mismanagement of an executive board member. For that reason it is advisable that board members keep each other informed of their actions and actively inform each other, sometimes also referred to as a monitoring duty.

The Supreme Court has held that only the company may sue a board member for mismanagement under Article 2:9 of the DCC; shareholders in the Netherlands are not entitled to file a derivative action to recover damages for a reduction in the value of their shares.[28] The rationale for this decision is that an action by the company benefits all creditors, while an action by a shareholder benefits only himself or herself.

External liability

In principle, management board members are not personally liable to creditors for the company's debts. This may, however, be different if matters have been misrepresented in the annual accounts, the interim figures or the annual report. A parent company or its directors may, under certain circumstances, also be liable for the debts of a subsidiary. This may be the case if the parent company has been closely involved in the policies of the subsidiary or, alternatively, has failed to intervene, or when it has limited the remedies for recourse available to the subsidiary.

25 Best Practices II.3.3 and III.6.2 of the Corporate Governance Code.

26 Article 2:9 of the DCC.

27 Staleman-Van de Ven, 10 January 1997.

28 Poot-ABP, 2 December 1994.

If a company is declared bankrupt, special rules – including certain evidentiary presumptions – apply. Under these rules, each management board member is personally liable for debts that cannot be satisfied from the assets of the bankruptcy estate if the management board was guilty of clear mismanagement during the three-year period preceding the bankruptcy and it is likely that this was an important cause of the bankruptcy. Under Article 2:138(2) of the DCC, the failure of the management board to comply with its accounting obligations and its obligation to file the annual accounts constitutes an instance of clear mismanagement and a presumption that such mismanagement was an important cause of the bankruptcy. Persons who have co-determined the company's policy can also be held liable under these rules.

Beyond the situations described above, clear mismanagement constitutes conduct that is seriously irresponsible, reckless or rash; the trustee in bankruptcy must show that no reasonably thinking board member would have acted in this way under the same circumstances. Supervisory board members are not immune in this respect. In two major bankruptcies of listed companies in 2013, both the management board members and the supervisory board members were held liable, the latter for inadequate supervision.[29] In the case of the listed company Landis, the supervisory board members had failed in their supervision of the proper maintenance of the company's books and records; in the case of the securities brokerage and trading firm Van der Moolen, the supervisory board members were held liable for mismanagement by reason of both their passive attitude and the defective governance of the company.

The special rules on liability in the event of bankruptcy were introduced in 1987 in an effort to combat the abuse of legal entities, and are regularly invoked by bankruptcy trustees. There has recently been renewed attention to the subject of abuse of legal entities. As part of a general revision of bankruptcy law, draft legislation has been drawn up with the aim of preventing dishonest management board members from being able to continue their activities at or through new entities.[30]

Standardisation of rules

As at early 2014, draft legislation has been drawn up with the aim of standardising the rules on the responsibilities of management board members and supervisory board members for all the different types of legal entities. This also applies to the rules on conflicts of interest and on liability.[31] The new legislation will not result in any substantive changes for companies with a share capital. It is not yet foreseeable when a draft bill will be presented to Parliament.

29 Landis, 19 June 2013 and Van der Moolen, 15 February 2013.

30 In September 2014 the Bill regarding the Directors Disqualification under Civil Law Act was submitted to the Dutch Parliament.

31 In February 2014 the draft Legal Entities Management and Supervision Bill was presented to market parties for consultation purposes.

III DISCLOSURE

Listed companies are subject to various disclosure obligations. The general rules on financial reporting can be found in Book 2 of the DCC, while the FSA contains additional rules applicable to listed companies. The Corporate Governance Code also lays down several specific financial disclosure obligations for listed companies.

The DCC contains rules with regard to the composition of the annual accounts and annual report, the auditor's opinion, the adoption of the annual accounts and the publication requirement. Listed companies are required to send their annual accounts to the AFM after adoption. If the AFM believes that annual accounts do not comply with the relevant rules, it may initiate special 'annual accounts proceedings' before the Enterprise Chamber of the Amsterdam Court of Appeal. Shareholders and employees may also initiate such proceedings. In such proceedings, the Court may order the company to amend the annual accounts and annual report in accordance with its instructions.

The transparency requirements in the FSA can, in general terms, be divided into two categories: one-off disclosure obligations and periodic disclosure obligations. The main example of the first category is the obligation to immediately publish price-sensitive information.[32] Publication may only be postponed if (1) the postponement serves a legitimate interest of the issuer, (2) the postponement is unlikely to deceive the public and (3) the issuer can guarantee the confidentiality of the information. The conditions governing the postponement regime are strictly interpreted by the court. In the case of the forthcoming takeover of a supermarket chain, a sharp rise in the number of shares traded in a short period of time caused a lower court to draw the conclusion that confidentiality was apparently no longer guaranteed.[33] In the view of the court, the fact that the traded volumes were not accompanied by a rise in share price did not justify the conclusion that no information had been leaked; the conclusion was that the takeover plans must have been disclosed. On appeal experts will now have to address the question of whether it was possible to infer from the market developments that the information about the offer had ceased to be confidential.

A breach of the obligation to disclose price-sensitive information may have far-reaching consequences, as is demonstrated by the *Fortis* cases. In 2007/2008 this Belgian/Dutch bank got into financial difficulties as a result of the takeover of ABN-AMRO, but failed to disclose this information in time. Fortis was not only fined by the AFM regulatory authority, but was also found guilty of mismanagement by the Enterprise Chamber. This judgment was upheld by the Supreme Court in early December 2013. In a third action the civil court ruled that two top executives were personally liable for the consequences of providing misleading information. Evidently, directors of banks – or rather, systemically important banks – find themselves in a difficult position: on one hand they have to keep their clients' confidence in order to prevent a bank run, while on the other hand they have to be open towards the shareholders.

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32 Section 5:25i of the FSA.

33 VEB-SdB NV, 30 March 2011.

The periodic disclosure obligations consist mainly of the annual, half-yearly and quarterly financial reporting requirements.[34] Under the Transparency Directive, which was adopted in October 2013, the publication of quarterly financial reports is no longer required.[35] However, the Directive permits EU member states to, under certain circumstances, continue to require the publication of quarterly financial reports. This also applies in the case of financial institutions. Based on the consultation document published in September 2014, the Dutch government does not intend to deviate from the directive in this respect. In addition, shareholders of listed companies are required to notify the AFM if their holdings of voting rights or capital in listed companies reach, exceed or fall below particular thresholds.[36] Gross short positions in excess of a certain threshold (3 per cent) must also be disclosed; this obligation, which has applied since 1 July 2013, is intended to give an insight into the shareholder's true economic interest and, at the same time, to shed light on 'empty-voting'.[37] With this requirement, Dutch law was one step ahead of the revised Transparency Directive (see above).[38] Moreover, since 1 January 2013 shareholders have been obliged to disclose the loss or acquisition of predominant control (30 per cent shareholding or voting rights), as a result of the mandatory bid regime arising from European legislation. The issuer is required to disclose certain information as well, such as changes in its issued capital or in the number of voting rights on its shares. Management and supervisory board members of listed companies are also required to notify the AFM of their holdings of shares or voting rights in the company and of any transactions in such shares or changes in such voting rights.

Chapter V of the Corporate Governance Code furthermore contains provisions on the auditing of the financial reports and the position of the internal audit function and the external auditor. These provisions cover subjects such as the role, appointment, remuneration and assessment of the functioning of the external auditor, as well as the relationship and communication of the external auditor with the management board, supervisory board and audit committee.

With regard to accounting firms, the landscape is being transformed. A first significant change entered into force with effect from 1 January 2013: an accounting firm carrying out statutory audits of a 'public interest entity' – such as a bank, insurance company or listed company – is not allowed to at the same time perform consultancy work for that same entity. Moreover, with effect from 2016, such entities will be obliged

34 Section 5:25c et seq of the FSA.

35 Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. The deadline for implementation of the Directive in national law expires at the end of 2015.

36 Section 5:38-44 of the FSA.

37 The absence of any economic interest with the party legally entitled to exercise the voting right at the general meeting of shareholders.

38 The Directive may nevertheless require amendments to Dutch law, as several reactions to the consultation have suggested.

to engage the services of a different accounting firm after a period of eight years. Furthermore, auditors will be required to enact an extensive, supplementary control statement for the audit committee of the board of directors. This forms part of a shift in responsibilities to the audit committee. In the future, audit committees will have to explain how the audit contributed to the integrity of the financial reporting, what the audit committee's role has been in the process and bear responsibility for the selection procedure regarding the auditor. By extension the role of the management board in the selection and the execution of the audit will be diminished.

IV CORPORATE RESPONSIBILITY

As previously stated, the Netherlands has traditionally followed the stakeholder model, under which management and supervisory board members are required to take into account the interests of all stakeholders when making decisions and performing their duties. According to Paragraph 7 of its preamble, the Corporate Governance Code is based on the principle that a company is a long-term alliance between the various parties involved in the company, such as employees, shareholders and other investors, suppliers, customers, the public sector and public interest groups. Paragraph 8 of the preamble indicates that corporate social responsibility issues must also be taken into account by the management and supervisory boards. This social undertone is not surprising given that the Corporate Governance Code was drawn up in response to the accounting scandals in the United States and Europe, and was intended to restore confidence in management and the financial market parties. The Code therefore requires the management board to draw up a policy statement setting out, *inter alia*, the corporate social responsibility issues that are relevant to the enterprise.[39] This policy statement must be submitted to the supervisory board for approval, and its main elements must be published in its annual report. In its December 2012 report the Corporate Governance Code Monitoring Committee adopted the view that there was no need to charge a separate committee within the supervisory board with aspects of corporate social responsibility. The Monitoring Committee expressed the view that corporate social responsibility must form an integral part of the undertaking's strategy and that it is a matter for the management board members and supervisory board members collectively. A separate committee might, in its view, even be an obstacle towards an integral approach. In its final report (August 2013) the Monitoring Committee did, however, recommend that more attention be paid in reports to corporate social responsibility and that the role played by corporate social responsibility within the company be made clear. This would also be in line with the current trend towards 'integrated reporting', whereby both financial as well as non-financial aspects are addressed. The newly installed Monitoring Committee is further developing the subject of corporate social responsibility, following its 2013 compliance report (published January 2015).

While socially responsible entrepreneurship initially appeared to be restricted to a small group of idealists, companies now seem to be increasingly aware of its importance,

39 Best Practice II.1.2d of the Corporate Governance Code.

also for commercial considerations. The OECD guidelines for Multinational Enterprises provide the legal framework.

i Risk management

As a result of the financial crisis, risk management in listed companies has gained a prominence in the Corporate Governance Code. The management board is responsible for managing the risks associated with the company's activities;[40] this is elaborated upon in the Code. In practice, for that matter, the Code also turns out to have a knock-on effect on other sectors. Often the rules of the Code are also used by non-listed companies, serving as a model for codes of conduct in all sorts of sectors or semi-public sectors, such as health care and education. In addition, Article 2:391 of the DCC requires the management board to describe in the annual report the main risks to which the enterprise is exposed. If necessary, to properly understand the results or position of the company and its group companies, the annual report must also contain an analysis of both financial and non-financial performance indicators, including environmental and employment-related issues.

ii Client focus

As far as the banking sector is concerned, it should be noted that an independent fact-finding committee, established in 2008 to investigate the banking crisis (the Maas Committee), concluded in its final report that banks must once again focus mainly on their clients and less on the interests of shareholders. The Maas Committee stressed the banks' public role and responsibility; in order to restore confidence in the banking sector and its management, remuneration policy and practices also had to change.

The Banking Code and the Insurers Code reflect these principles to a certain extent. The 'client focus' principle forms part of these codes and is regarded as a necessary precondition for the continuity of the undertaking.[41] The need for this was stressed once again by the 'usury policy affair'. It emerged that for years insurance companies had sold investment-linked insurance policies that were particularly profitable for themselves and their agents. While, with respect to 2010, the Banking Code Monitoring Committee still reported that banks were wrestling with how to put the 'client focus' principle into practice and bring about the related changes in culture, it sounded a more optimistic note with regard to the period 2010–2012. The Monitoring Committee concluded that application of the Banking Code had resulted in fewer, simpler and more transparent products. The client focus principle appeared to have been included in the banks' key values and to have formed part of their strategic choices. It noted, however, that phasing out more risky products and activities would have repercussions on returns, which in turn would affect the banks' capacity to lend money. According to the Monitoring Committee's 'Recommendations regarding the Future of the Banking Code', a report issued in March 2013, proper consideration must be given to the correct balance between being a commercial business, on the one hand, and fulfilling a public utility role, on the

40 Principle II.1 of the Corporate Governance Code.

41 Principle 3.2.2 of both codes.

other. The Monitoring Committee's mandate has now expired and a new committee has not yet been appointed. The Dutch Banking Association is currently working on a 'social statute' setting out the sector's core values, a new banking code with governance rules and, finally, rules of conduct to be enforced through disciplinary proceedings. Integrity, service and expertise must be restored as the sector's paramount focus.

iii Remuneration policy

Under the Corporate Governance Code the purpose of the remuneration structure should be to promote the company's medium and long-term interests. The remuneration must 'not encourage management board members to act in their own interests or take risks that are not in keeping with the adopted strategy, and must not 'reward' failing board members upon termination of their employment'.[42]

The Banking Code and the Insurers Code both also contain a section on remuneration policy. This policy must be 'meticulous, restrained and long-term, in line with the bank's strategy and risk appetite, objectives and values, taking into account the bank's long-term interest, the relevant international context and wider societal acceptance'.[43] In the event of dismissal, remuneration under the codes may not exceed one year's salary (the fixed-remuneration component). The allocation of variable remuneration must be related to the bank's long-term objectives and must be based in part on the bank's results. The variable remuneration per annum may not exceed 100 per cent of the fixed income.

However, influenced by the moral indignation regarding the role played by the banks in the financial crisis, the values of the codes of conduct are coming under increasing scrutiny. Initially, the discussion focused on the granting of bonuses to management board members of banks that had received public funds during the financial crisis; the Banking Code contains no specific provisions in this regard. Under political pressure, the granting of bonuses to management board members of banks receiving state aid was therefore outlawed in 2012. The fixed salaries of management board members had to be frozen as well, to avoid compensation.

Meanwhile, criticism has spread across the entire financial sector, regardless of whether state aid is received. In its response, the legislator has adopted the Banking Code standard regarding the variable remuneration of management board members (a maximum of 100 per cent of the fixed salary) and subjected it to stricter conditions: if breached, the rate of a newly introduced bank tax will be increased by 10 per cent.[44] The Dutch government moreover intended to maximise variable remuneration within the financial sector at 20 per cent of the fixed salary. A draft bill to this end was presented to market parties for consultation purposes at the end of 2013. The draft bill pertains not only to bonuses for banks' management board members, but also to the variable remuneration

42 Principle II.2 of the Corporate Governance Code.

43 Principle 6.1.1 of both codes.

44 Banking Tax Act (Bulletin of Acts and Decrees 2012, 325); the Act entered into force on 1 October 2012.

of all employees. The relevant legislation entered into force in February 2015.[45] The new rules go further than EU law: under the CRD IV Directive, bonuses are subject to a cap of 100 per cent of the fixed annual salary and higher bonuses (up to 200 per cent) are permitted subject to shareholder approval. For this reason the draft bill has met with criticism from the Dutch Banking Association, which is concerned about potentially negative effects on the competitiveness of the Dutch banking sector.

On 1 January 2014, legislation providing for the power to claw back bonuses from management board members entered into force.[46] This power also already formed part of the codes of conduct, but its scope was more limited. The new law applies not only to financial undertakings but to all Dutch public limited liability companies (NVs) and makes it possible to set aside existing contracts with management board members. From now on, the supervisory board may adjust the amount of a bonus that has been awarded to a management board member if the amount proves to be unacceptably high, such as where a company has suffered serious losses or the share price has risen excessively. It is also possible to claw back a bonus paid to a management board member if it has been awarded on the basis of incorrect information. The Clawback Act was the subject of extensive parliamentary debate because of a controversial provision requiring listed companies to, in merger and takeover situations, deduct from a management board member's salary any increase in the value of the company's shares following the merger or takeover. A management board member with shares in the company is therefore precluded from profiting from the transaction. The – understandable – rationale behind this provision is to eliminate personal gain as the driving force behind the decision-making in such situations. Critics have pointed out that this provision possibly violates the right, under international law, to the undisturbed enjoyment of property[47] and will in practice lead to enforcement problems and/or constructions designed to circumvent the relevant rules.

Although the discussion specifically focuses on remuneration, it is in fact a general behavioural and cultural change that is expected. Expectations are also high in politics in this respect concerning the moral and ethical declaration contained in the Banking and Insurers Codes enacted in early 2013. Initially, the oath concerned management board members and supervisory board members, but as of 2015 a larger group is subjected to the oath by law. In addition to all these national measures, new rules applicable to remuneration in the financial sector were, starting from 2011, also enacted as part of legislation implementing CRD III, which has since been replaced by CRD IV.[48] These rules require financial enterprises to set down in writing and implement remuneration policies aimed at preventing the remuneration of policymakers, co-policymakers and employees engaged in the provision of financial services from leading to the improper treatment of clients and consumers. In addition, the remuneration policy must not

45 Bulletin of Acts and Decrees 2015, 45.

46 Clawback Act (Bulletin of Acts and Decrees 2013, 563).

47 First Protocol to the European Convention on Human Rights.

48 Decree on Sound Remuneration Policies 2011 pursuant to the FSA, and Regulation on Sound Remuneration Policies 2011 pursuant to the FSA. CRD IV was implemented on 1 August 2014.

encourage the taking of unacceptable risks. Therefore, variable remuneration is subject to strict conditions at EU level as well.

V SHAREHOLDERS

i Shareholder rights and powers

The general meeting of shareholders has important powers within the company, such as the power to amend the articles of association, dissolve the company, approve a merger, adopt the annual accounts and appoint supervisory board members. In addition to these specific powers, Article 2:107 of the DCC assigns all residual powers (i.e., those not assigned to the management board or other corporate bodies) to the general meeting of shareholders. The general meeting of shareholders of a Dutch public limited liability company (NV) is not, however, entitled to give the management board binding instructions regarding the manner in which the board carries out its duties. Under the influence of the corporate governance debate, the position of shareholders was strengthened in the early years of this century. Since 2004, management board decisions resulting in an important change in the company's identity or character have required the approval of the general meeting of shareholders.[49] This applies, for example, to decisions to transfer the enterprise or almost the entire enterprise, enter into or terminate a significant long-term cooperation, or acquire or divest a significant holding. It should be noted that in 2007 the Supreme Court rendered a judgment interpreting Article 2:107a of the DCC restrictively. The Court held that this provision only applies to decisions that are so fundamental that they change the nature of share ownership, in the sense that the shareholder will, as a result of the decision, in effect have provided capital to and hold an interest in a substantially different enterprise.[50]

At European level as well, the focus at the turn of the century was on promoting greater shareholder participation in corporate governance. This was expressed in the Shareholder Rights Directive,[51] which grants shareholders in listed companies various rights aimed at facilitating voting (including cross-border), such as e-voting and proxy voting. Under Dutch law, however, shareholders already had these rights. To improve the transparency of the voting process, the Directive also requires listed companies to publish voting results on their website within a period not exceeding 15 days after the general meeting. This right is new in the Netherlands[52] and is quite important: given the complex chain of intermediaries between the ultimate investor and the company, it is in practice often unclear whether the investor's vote has in fact been cast in accordance with his or her instructions. The obligation to publish voting results is intended to correct this.

The Directive also provides for the system – now mandatory in listed companies – of record dates, under which only shareholders registered on a particular date (approximately four weeks) before the general meeting are entitled to vote at that meeting. *Inter alia*,

49 Article 2:107a of the DCC.

50 ABN-AMRO, 13 July 2007.

51 Directive 2007/36/EC.

52 Article 5:25ka(3) of the FSA.

the introduction of a record date eliminates the need for share blocking – a mechanism prohibiting share trading during the period immediately before a general meeting – in order to facilitate voting. Share blocking discourages institutional investors from voting because it requires them to suspend their investment activity in respect of the blocked shares during the relevant period. The introduction of record dates removes this obstacle to voting and therefore enhances participation by institutional investors. Over the past few years, there has been a strong increase in the turnout percentage among shareholders of the largest Dutch listed companies. Eumedion, the interest group representing institutional investors, concludes that in addition to the prohibition on share blocking, the extended period for convening general meetings of shareholders (42 days) also seems to have contributed to increased shareholder participation. The Dutch government, however, has expressed its wish to again shorten the convocation period and the record date period, on the grounds that the current length of these periods may hamper a speedy decision-making process. No concrete proposals have yet been presented, although the Minister of Finance has recently expressed sympathy for the suggestion of the Central Bank to shorten these periods for listed financial institutions.

Another important shareholder right is the right to have items placed on the agenda of a general meeting.[53] In 2004, this right was granted to shareholders separately or collectively representing a certain percentage of the company's issued capital.[54] Originally this threshold was 1 per cent; with effect from 1 July 2013 it was raised to 3 per cent. With the implementation of the Shareholder Rights Directive in July 2010, this right was strengthened. Until then, the company could refuse such a request based on a compelling interest; the legislation implementing the Directive in the Netherlands eliminated this possibility. The consequences in practice of the right to have an item placed on the agenda of a general meeting are discussed further in Section V.iv, *infra*.

ii Equality of voting rights

The most fundamental right of a shareholder is the right to vote at meetings. In principle, Dutch corporate law adheres to the principle of equality of voting rights: all shares carry equal rights and obligations in proportion to their nominal value and all shareholders whose circumstances are equal must be treated in the same manner.[55] The articles of association may, however, provide otherwise. The principle of one share, one vote also applies.[56] There are, however, important exceptions to these principles, a few of which are mentioned below.

The first exception is the use of 'loyalty shares', to which extra voting rights or extra dividends are attached as a reward for long-term shareholders. The Supreme Court has held that the distribution of loyalty dividends is permitted.[57] In the political arena, there have been various calls for the enactment of statutory rules on loyalty shares. In

53 Article 2:114a of the DCC.

54 This was done by means of the Corporate Governance Act; see Section V.iv, *infra*.

55 Article 2:92 of the DCC.

56 Article 2:118(2) of the DCC.

57 DSM, 14 December 2007.

2012, after consulting with experts and interested parties, the government decided to refrain from proposing new legislation for the time being. It was concluded that the advantages of these shares are too uncertain and their limited marketability is a definite drawback. Legal commentators have also pointed out that a long-term shareholder is not necessarily an involved shareholder, participating actively in the company's governance. Such a shareholder would nevertheless profit from the extra dividends or voting rights. Plans to float the shares of the nationalised bank ABN AMRO have caused the discussion regarding loyalty shares to be reopened. In the course of 2015, the government is expected to formulate a new position. A recent merger of two companies (Fiat Industrial and CNH Global) into a Dutch NV seems to indicate that the enactment of statutory rules on this issue is unnecessary. The Dutch NV introduced loyalty shares with extra voting rights, based on the French model.[58]

A second exception to the principle of equality of voting rights is the issuance of protective preference shares: listed companies may protect themselves against hostile takeovers or shareholder activism by issuing preference shares to an independent foundation set up in advance for this purpose. The shares, which are issued when a threat materialises, change the balance of control within the general meeting of shareholders and make it possible to pass certain resolutions desired by management or in some cases block certain undesired resolutions. Because preference shares are purchased for an amount less than their real value, the foundation acquires substantial control for little invested capital. The Supreme Court permits the issuance of protective preference shares provided they are necessary with a view to the continuity of the enterprise, and are adequate and proportional. The construction must be temporary in nature and intended to promote further dialogue.[59] In the autumn of 2013, the Dutch telecom company KPN successfully staved off a hostile takeover bid by the Mexican company América Móvil with the help of such a foundation. In the wake of the bid, politicians again considered the question of whether the Netherlands is not too liberal and whether there should not be more possibilities for government intervention in takeovers of companies that serve a strategic public interest. A draft bill is expected early in 2015 introducing the requirement for a declaration of non-objection for takeovers in strategic sectors, such as vital telecom infrastructure.

A third exception to the principle of equality of voting rights is financial preference shares, which are used as a financing instrument. In respect of these shares, too, there is a disproportionate relationship between the voting rights acquired and the capital invested. With respect to the issuance of financing preference shares, the Corporate Governance Code provides that the voting rights attached to such shares must be based on the fair value of the capital contribution.[60] This represents an attempt to return to the one-share, one-vote principle.

58 M van Olffen (in Dutch), Nederlandse loyaliteitsaandelen met een Frans sausje, in Ondernemingsrecht 2013/67.

59 RNA, 18 April 2003.

60 Best Practice IV.1.2 of the Corporate Governance Code.

iii Shareholders' duties and responsibilities

Under Dutch law, shareholders – unlike management and supervisory boards – are in principle not required to be guided by the interests of the company and its affiliated enterprise. Shareholders may therefore in principle give priority to their own interests, with due regard for the principles of reasonableness and fairness. Based on these principles, however, larger shareholders are considered to have a certain responsibility towards other parties. Paragraph 9 of the Corporate Governance Code's preamble provides: 'The greater the interest which the shareholder has in a company, the greater is his or her responsibility to the company, the minority shareholders and other stakeholders.' Institutional investors in particular are therefore being called upon to accept greater responsibility. Although the Corporate Governance Code recognises that such investors act primarily in the interest of their ultimate beneficiaries or investors, it also provides that 'they have a responsibility to the ultimate beneficiaries or investors and the companies in which they invest, to decide, in a careful and transparent way, whether they wish to exercise their rights as shareholder in a listed company'.[61]

In this connection, the Corporate Governance Code seeks to increase the transparency of voting behaviour. Institutional investors must publish their voting policy on their website and report annually on how that policy has been executed in the preceding year. They must also report quarterly to the general meeting of shareholders on how they have exercised their voting rights.[62] Eumedion adopted a set of 'Best Practices for Engaged Share-ownership' in June 2011. These best practices, *inter alia*, call on institutional investors to inform clients of conflicts of interest if, in relation to a particular matter, such investors have divergent roles that could affect their voting behaviour. An example of this is the relation between corporate pension funds and their parent companies or between insurance companies and their clients. According to the monitoring report regarding compliance with best practices in 2013, the concept of responsible and engaged share ownership has meanwhile become common practice. A large majority of institutional investors applies a voting and engagement policy and reports on this. The principle that is complied with the least is the best practice of identifying conflicts of interest.

At the European level, similar developments are taking place. In late December 2012, the European Commission adopted the Corporate Governance Action Plan, containing various initiatives to increase the engagement of shareholders with the corporate governance of undertakings. In this regard, the European Securities and Markets Authority (ESMA) drew up guidelines at the end of 2013 to clarify the concept of 'acting in concert' in the Directive on Takeover Bids, see Section V.v *infra*. In addition, the European Commission is of the opinion that institutional investors should be more transparent about their voting policies, as this would lead to better investment decisions and could also facilitate dialogue with the relevant company. In this context, the unclear role of proxy advisers is seen as a problem area. These issues are dealt with in the proposed revision of the Shareholders Directive.

61 Principle IV.4 of the Corporate Governance Code.

62 Best Practices IV.4.1–IV.4.3 of the Corporate Governance Code.

iv Shareholder activism

In practice, the shareholder rights described in Section V.i, *supra*, such as the right to have an item placed on the agenda of a general meeting, have, in the past few years, also been actively exercised by hedge funds. Although the aim of the new rights was to increase shareholder participation and strengthen the monitoring of management boards, the actions of hedge funds have also revealed a shadow side to participation. In particular, the focus on short-term profits has had adverse effects in some cases. An example of this is the role of hedge fund the Children's Investment Fund (TCI) in the acquisition of ABN AMRO – one of the largest banks in the Netherlands. TCI, which held only about 2 per cent of the shares, in 2007 pressed the ABN AMRO management to sell all or part of the bank and distribute the proceeds as a bonus dividend. TCI was able to have this proposal placed on the agenda of the general meeting and it was ultimately adopted. In the end, TCI's conduct led to the acquisition of ABN AMRO by three foreign banks. It later emerged that one of these banks was unable to finance the acquisition; consequently, the Dutch state bought back a stake in ABN AMRO.

This transaction caused the government and political parties to reconsider the desirability of shareholder activism and raised the question of whether the enhancement of shareholder rights had gone too far. In May 2007, the Corporate Governance Code Monitoring Committee recommended certain legislative changes intended to counteract the short-term orientation of activist shareholders. In the Monitoring Committee's view, a sustainable relationship should exist between a company and its shareholders. To achieve this, the Monitoring Committee felt that shareholder conduct ought to become more transparent and dialogue between the parties ought to be encouraged. The Corporate Governance Act, which entered into force on 1 July 2013, reflects this train of thought.[63] The Act therefore reduces the minimum threshold for the obligation to disclose substantial holdings of capital or voting rights in listed companies (from 5 per cent to 3 per cent); gross short positions will also have to be disclosed.[64] In addition, the threshold for the right of shareholders to have items placed on the agenda for a general meeting has been substantially raised, from a capital interest of 1 per cent to a capital interest of 3 per cent. The alternative threshold in the case of an interest of €50 million for listed companies has been cancelled. Finally, the Act contains a mechanism enabling a listed company to identify its 'ultimate investors'. A controversial plan obliging the shareholder to indicate whether he or she agreed with the company's strategy was withdrawn during the parliamentary debate.

The idea behind the Act is to enable the management board, through the introduction of the above disclosure obligations, to learn the identity and intentions of its shareholders at an early stage, so that it can enter into a dialogue with them. The new obligations will also prevent a small group of unknown shareholders from surprising the company at a general meeting and forcing it to make certain policy changes. It should be noted that the issues of empty voting or securities lending have

63 Act of 15 November 2012 in response to the Corporate Governance Code Monitoring Committee's Recommendation of 30 May 2007 (Bulletin of Acts and Decrees 2012, 588).

64 See Section III, *supra*.

not been directly provided for in the Act. Hedge funds can use these devices to influence decision-making in the general meeting of shareholders, without bearing any economic risk. The system of record dates provided for in the Shareholder Rights Directive (see Section V.i, *supra*) is intended to discourage this practice. In the Netherlands the record date has been scheduled well before the date of the general meeting of shareholders at this moment (28 days). Consequently, it is clear for institutional investors that parties who seek to engage in securities lending near the record date presumably do so with a view to influencing decision-making at the general meeting, and not for the purpose of dividend arbitrage. Indirectly, the objective of the Act is to discourage empty voting. Shareholders of listed companies are not only obliged to disclose their long positions in excess of a certain threshold, but also their gross short positions (see Section III, *supra*). The shareholder is furthermore obliged, when exercising his or her right to place an item on the agenda (as per 1 July 2013) to disclose his or her full economic interests (both long and short). This will be published on the listed company's website. As a result, the shareholder's true motives for placing an item on the agenda should be revealed, which is supposed to discourage the practice of empty voting.

It should furthermore be noted that the Corporate Governance Code goes further than the Act in limiting the right to have items placed on the agenda.[65] The Code provides that a shareholder of a listed company may exercise this right only after having consulted the management board about this. If the item to be placed on the agenda may possibly result in a change in the company's strategy, the management board must be given a period of a maximum of 180 days to respond (the response time). The management board can use this period to confer with the relevant shareholder. The statutory period for such requests, however, is 60 days before the meeting – even for items relating to the company's strategy – and may therefore clash with the response time. The Enterprise Chamber recently issued a ruling on the relationship between the code provision and the statutory provision. The court held that the response time is an elaboration of the statutory principles of reasonableness and fairness that shareholders are required to adhere to in their relations with the company, and must therefore be respected by an activist large shareholder.[66] According to the court, the response time may only be disregarded on compelling grounds.

The trend toward limiting shareholder rights can also be discerned in Dutch case law. For example, the Supreme Court in summer 2010 held that it is up to the management board to determine corporate strategy. Decisions of this nature need not be submitted to the shareholders for approval or consultation, not even on the grounds of reasonableness and fairness or non-statutory governance rules.[67] This judgment limits the possibility for shareholders to demand strategic changes.

Finally, it is noted that at European level, hedge funds have become subject to government supervision. The Alternative Investment Fund Managers Directive[68]

65 Best Practices II.1.9 and IV.4.4 of the Corporate Governance Code.

66 Cryo-Save/Salveo Holding, 6 September 2013.

67 ASMI, 9 July 2010.

68 Directive 2011/61/EU.

establishes a licence system for this purpose. The Directive was implemented in Dutch law at the end of July 2013.

In short, it can be concluded that politicians have been taking measures to stem the excesses of shareholder activism in order to restore the balance of powers within companies. At the same time, efforts are being made to increase the participation of shareholders with a long-term vision. According to the latest surveys conducted by Eumedion, this appears successful; the engagement of the institutional investor with the decision-making process of listed companies has increased considerably. Shareholders have become particularly alert in matters concerning the remuneration and appointment of members of the management and supervisory boards.

v Contact with shareholders

To avoid confrontations with the general meeting of shareholders, management boards may try to align corporate policy somewhat with the desires of shareholders and to seek out their opinions in advance. Although the general meeting of shareholders has a statutory right to obtain information, based on which it is accepted that shareholders have the right to ask questions at a general meeting, it is unclear from the relevant DCC provisions whether the management board can itself take the initiative to discuss its intentions with individual shareholders outside a meeting. In practice, such one-on-one meetings do take place. According to best practice provision IV.3.13 of the Corporate Governance Code, the company should formulate a policy on bilateral contacts with shareholders and publish this policy on its website. It is important that particular shareholders are not favoured and given more information than others, however, as this would violate the principle that shareholders in the same circumstances must be treated equally. It goes without saying that price-sensitive information may not be disclosed. The fear of violating the market abuse rules causes some shareholders and companies to be hesitant about participating in one-on-ones.

Shareholders among themselves may, in addition, be afraid of being regarded as parties 'acting in concert', because under the provisions of the Directive on Takeover Bids[69] such parties are obliged to make an offer for the listed shares of a company if they collectively acquire dominant control (30 per cent or more of the voting rights in that company's general meeting of shareholders). What exactly is meant by 'acting in concert' is not very clear in practice and represents an obstacle in the path of cooperation among shareholders. For this reason, at the end of 2013 guidelines to clarify this concept were drawn up by ESMA at the European Commission's request (see Section V.iii, *supra*) There is now a 'white list' of activities on which shareholders can cooperate without being presumed to be acting in concert. However, if shareholders engaging in an activity on the white list turn out to in fact be cooperating with the aim of acquiring control over the company, they will be regarded as persons acting in concert and may have to make a mandatory bid. The sensitive subject of cooperation with regard to board appointments has been acknowledged, but was nevertheless left off the white list.

69 Directive 2004/25/EC.

VI OUTLOOK

Several issues are currently at the forefront of corporate governance in the Netherlands.

The social function of banks and insurance companies is emphasised, the argument strengthened by the various bailouts that were required to prevent a number of them from failing. This represents the justification for ever-greater interference by the state in this sector. The call to put an end to the bonus culture within the banking world is getting louder by the day. The sector's capacity to regulate itself appears to have been insufficient in this regard. Initially, the Dutch government merely acceded to the demand to prohibit executive bonuses at financial institutions receiving state aid, but as of February 2015 more comprehensive legislation entered into force, fixing the bonus within the financial sector at a maximum of 20 per cent of the fixed annual salary for all employees. The Netherlands is at the forefront of European countries in this respect.

Non-financial enterprises serving a specific public interest are also receiving a great deal of attention. The fear of takeovers by insufficiently solid parties appears to have increased. For this reason, protective measures via an independent foundation are again increasingly popular.

Moreover, the functioning of members of management boards and supervisory boards is at the centre of attention. Within the financial sector ever-stricter tests are applied for suitability. Boardroom conduct is being subjected to greater scrutiny for which purpose the use of behavioural psychology has been introduced. There is a prevailing view that behaviour and culture are decisive for the proper functioning of a company. The coming years will make clear whether the innovative approach of the Dutch regulators can be maintained, following the introduction of the European Banking Union.

In general more attention is being paid to diversity within boards, not only in relation to gender, but also in relation to background, culture and origin. A similar development is taking place in Europe, the idea being that more diversity within the board will improve the quality of the decision-making process and prevent one-sided group thinking.

In the courts of law, higher demands are being made upon the careful decision-making process within the board, while at the same time there seems to be a tendency to hold management board members and supervisory board members liable earlier in the case of failing management.

The quality of management and supervision within the semi-public sector is a subject of attention and discussion. Major losses and near-bankruptcies of housing associations, health-care institutions and institutes of further education are to blame for this. The remuneration of executives within the public or semi-public sector has been capped by law since 1 January 2013. These caps will also become applicable to other employees. Under proposed legislation that is currently being drawn up, it will be easier to impose liability on those exercising internal supervision within a foundation and to dismiss them for failure to properly perform their duties. In addition, a fundamental debate is ongoing regarding the question as to which interests the different semi-public enterprises are actually supposed to serve. As long as this issue remains unclear, it will also continue to be unclear what constitutes proper management and supervision. The semi-public sector finds itself in the difficult position of trying to combine the service of public interest with the running of a commercial enterprise.

A new Banking Code Monitoring Committee was appointed in October 2014. At the same time, the Banking Code itself has been revised, specifically in order to reduce the overlaps and inconsistencies with legislation and to focus attention on desired changes in behaviour and culture. A new Corporate Governance Code Monitoring Committee was appointed at the end of 2013. A review of the Code appears imminent as both the new committee and its predecessor have stressed the need for change, partly because the last update was in 2008 and a lot has changed since then.

To summarise, corporate governance is a hot topic in the Netherlands. The goal is to create a proper balance between the interests of the various stakeholders within an enterprise, without losing sight of the interests of society as a whole. In the end a model will have to be found whereby risky conduct is discouraged and public confidence in the management boards of banks and companies is restored.

Appendix 1

ABOUT THE AUTHORS

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NautaDutilh NV

Jos Beckers is a professional support lawyer specialising in corporate law and financial law. He regularly advises and publishes in both fields. Before joining NautaDutilh in October 2013, Jos earned master's degrees in international and European law and in corporate law (a research master's) from Radboud University Nijmegen in the Netherlands. In addition to teaching and publishing, he also worked on a doctoral thesis on the 'acting in concert' concept in the context of the mandatory bid rule. He is now finalising the thesis and expects to receive his PhD in 2015. Jos is a member of the Dutch Corporate Litigation Association and a fellow at the Business and Law Research Centre at Radboud University Nijmegen.

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Willem Calkoen specialises in mergers and acquisitions work – both public offers and private transactions – and in securities law and corporate governance.

He graduated from Utrecht University in 1970 and served as a naval reserve officer until 1972, when he joined NautaDutilh. He became a partner in 1980. He was chair of the Corporate M&A Committee of the Section on Business Law (SBL) of the International Bar Association from 1988 to 1992; an officer of the SBL from 1993 to 1998; and chair of the SBL from 1997 to 1998.

Mr Calkoen publishes regularly on topics such as joint ventures and corporate governance. He has been highly recommended in Pritchard's *European Legal 500 of 2004* and listed in *Who's Who Legal* for the Netherlands under M&A and corporate governance. He is acknowledged by *European Legal Experts 2005* as a corporate and commercial expert.

On 11 October 2011 Mr Calkoen defended his thesis, a comparative book on the corporate governance practices in the United Kingdom, the United States and the Netherlands.

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Andréa Carstoiu is an associate in our corporate practice. She assists clients with general corporate and commercial matters, including mergers and acquisitions, private equity, corporate restructuring, cross-border transactions, insolvency, civil and commercial litigation as well as international arbitration issues.

Ms Carstoiu obtained a postgraduate degree (DESS) in European business law from the Paris II Panthéon-Assas University. She also holds an LLM in business law from the Humboldt University of Berlin (*summa cum laude*) as well as an LLM Eur in european business law from the Ludwig Maximilian University of Munich.

Ms Carstoiu has written a number of articles on corporate law topics, including *Überseering und die Folgen* (Grin Verlag, 2008), as well as multidisciplinary publications such as 'Vérité historique, vérité judiciaire: l'affaire Sofri' (*Les Cahiers de la justice*, No. 3, ed ENM-Dalloz, 2008). She is the co-author of 'La Justice' (collection *Idées recues*, ed Le Cavalier bleu, Paris, 2008).

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Virginie received her law degree from the University of Ghent in 2007. During her studies, she spent six months at Hofstra University on an exchange programme. She was admitted to the Brussels bar in 2007 and joined NautaDutilh in September of that same year.

ELKE JANSSENS

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Elke Janssens focuses on corporate law and corporate governance. She advises listed companies and has assisted in several public offerings. Elke also regularly acts in negotiations for M&A transactions and restructurings.

Elke received her law degree from the Free University of Brussels (VUB) in 1996. She obtained a master's degree in business law from the Université Libre de Bruxelles (ULB) in 1998 and a master's in management from VUB in 2001. She completed coursework in the executive MBA programme at the Solvay Business School from 2006 to 2007. Elke was admitted to the Brussels bar in 1997 and is a partner at NautaDutilh.

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Geert Raaijmakers is a partner at NautaDutilh and specialises in corporate law, corporate governance and financial regulatory law. Geert is also a professor of corporate and securities law at the VU University in Amsterdam and a member of the Dutch Banking Code Monitoring Committee. He publishes regularly on developments in corporate and securities law, including articles on shareholder activism, corporate governance, mergers and sovereign wealth funds.

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Ms Wilkenhuysen received her law degree from the University of Leuven in 1991, a master's degree in business and tax law from the Free University of Brussels in 1993 and an LLM from Duke Law School in 1996. She joined NautaDutilh in 1997 and was named partner in 2007.

Ms Wilkenhuysen is a frequent writer and speaker and has published various books and articles (e.g., *Due Diligence* (2011 – new edition), *Cross Border Mergers* (2011) and *Capital Directive* (2014)). She is also a member of the International Bar Association, the European Private Equity and Venture Capital Association and the Duke Alumni Association.

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