The Corporate Governance Review

Third Edition

Editor
Willem J L Calkoen

Law Business Research

The Corporate Governance Review

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The Corporate Governance Review

Third Edition

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Willem J L Calkoen

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EDITOR'S PREFACE

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

In this third edition, we can see that corporate governance is becoming a more prominent topic with each year. We see that everyone wants to be involved in 'better corporate governance': parliaments, governments, the European Commission, the SEC, the OECD, the UN (as demonstrated in its 'protect, respect and remedy' framework), 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getting more complex and overregulated, and there are more black swans, while good strategies can become quite quickly outdated. Most directors are working diligently; nevertheless, there have been failures in some sectors and this means that trust has to be regained. How can directors carry out 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 imperious CEOs? Can lead or senior directors create sufficient balance? Should outside directors understand the business? How much time should they spend on the function? How independent must they be? Should their pay be lower? What about diversity?

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 practices 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 in order to create trust. What more can they do to show stakeholders that they are improving the enterprises other than by setting a better 'tone from the top'. Should they put big signs on the 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 codes along the model of the Cadbury 'comply-or-explain' method. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs have 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.

This all implies that executive and non-executive directors should work harder and increasingly as a team on strategy and innovation. It is still a fact that more money is lost due to lax directorship than to 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 various chapters of this book show a convergence. The concept underlying this book is to achieve a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that will permit convenient comparisons, where a quick 'first look' at key issues is 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, and 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
April 2013

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 ('the 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. Most of these provisions have been adopted in the past four years. Compliance with these mandatory provisions is mostly ensured by the listed company's auditor and oversight by the Financial Services and Markets Authority ('the FSMA').

Besides that, other financial and *ad hoc* disclosure requirements for listed companies are laid down in the Royal Decree of 14 November 2007 on issuers' obligations whose financial instruments are admitted for trading on a regulated market. Listed companies should also disclose the transparency notices they received from their shareholders in accordance with the Act of 2 May 2007 and the Royal Decree of 14 February 2008.

In addition to these provisions, the other main source of guidance with respect to corporate governance for Belgian listed companies is the Belgian Corporate Governance Code 2009 ('the 2009 Code'),[2] which was published on 12 March 2009 and is 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 (then named CBFA), the Federation of Belgian Enterprises, Euronext Brussels, the Belgian Institute of Chartered Accountants and the Central Economic Council. The

1 Elke Janssens is a partner and Virginie Ciers a senior associate at NautaDutilh. The authors would like to acknowledge the assistance of Anne Tilleux, associate partner at the firm, in the outlook section of this chapter.

2 See www.corporategovernancecommittee.be.

2009 Code replaces the Belgian Corporate Governance Code of 2004 ('the Lippens Code'). The FSMA monitors compliance by listed companies with the 'comply-or-explain' principle that is applicable to the 2009 Code. The 2009 Code 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 (either a Belgian or regulated market organised by another Member State of the European Economic Area ('EEA')) and those whose shares are traded on a multilateral trading facility ('MTF') (i.e., in Belgium, mainly the Vrije Markt/Marché Libre and Alternext)[4] if it has 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 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 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 governmental actions taken in the area of corporate governance is the adoption of corporate governance rules that introduce the obligation to ensure that at least one-third of the members of the board of directors of listed companies is of a different gender than that of the other members.[5] This legislative action follows the recommendation of the Corporate Governance Committee of January 2011 on gender diversity. The way to introduce more women in management boards has been a highly debated subject. The legislator has finally taken the decision to introduce this by means of hard law instead of soft law (such as by way of a mere recommendation in the 2009 Code).

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

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

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

It should be noted that specific, even more stringent, corporate governance rules are applicable to financial institutions, and beside the 2009 Code, which is applicable to listed companies, the Code Buysse II also exists, which contains corporate governance recommendations for non-listed companies. The Code Buysse II was issued in 2009 and is an update of the Code Buysse of 2005, and is of a voluntary nature.

This chapter, however, will only focus 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 public limited company ('NV/SA').[6] Companies with other corporate forms can be listed if their shares are freely transferable.

The basic corporate governance structure of an NV/SA is a one-tier model, whereby the board of directors has 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 also 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 authority

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.

of executive managers, other than the CEO, to represent the company in certain acts is based on 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 the 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 undertaken 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 in 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 in place 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 executive management performance 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 the shareholders and potential shareholders;
d approve the framework of internal control and risk management set up by executive management;
e review the implementation of this framework, taking into account the review made by the audit committee;
f supervise the performance of the statutory or registered auditor (or both);
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 those of the 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 their 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 the executive management and thus participate in the company's daily activities. At least half the board should comprise non-executive directors, at least three of whom should be 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 corporate 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, namely that within seven years, at least 30 per cent of board members should be female.[7]

In the Act of 28 July 2011, Article 518-bis was introduced 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 of the board of directors. If the minimum number of directors of a gender different from that of the other members is not met, the next appointed director should be of that specific gender. If not, the appointment is null and void. The same is valid if an appointment would lead to the situation wherein the number of directors of the other gender drops below the minimum requirement. This requirement and sanction is applicable as from the first day of the sixth financial year that began after 14 September 2011. For listed companies of which the free float[8] amounts to less than 50 per

7 This recommendation has as such 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).

8 There is an inconsistency between the French and Dutch text of Article 518-bis of the BCC. The French text refers to the 'free float' and the Dutch text to 'the value of the freely tradable shares'. In our opinion, the French version is the correct version, since it seems that the Dutch

cent and for small listed companies,[9] this requirement and sanction is applicable as from the first day of the eighth financial year that began after 14 September 2011.

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

If the minimum quota is not met, the first upcoming general meeting should compose a board of directors in accordance with the aforementioned gender quota. If such does not take place, any financial or other benefit of the directors linked to their mandate will be suspended. These benefits are re-attributed when the board of directors is composed in accordance with the gender requirement.[11]

The 2009 Code gives a clear role to the chair of the board of directors. The chair and the CEO should not be the same person. There should be a clear division between 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 agreed by the board. The chair should establish 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 other specific responsibilities. The chair should take the necessary measures to foster a climate of trust within the board, contribute to open discussions, 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 preparatory work, 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.

The BCC obliges companies[12] whose shares are listed on a regulated market to set up an advisory remuneration committee composed of non-executive directors, a majority

text has not been fully updated following an amendment to the scope of the Act from listed shares to listed securities.

9 Listed companies that meet at least two out of the following three requirements on a consolidated basis: (1) an average number of employees during the concerned financial year of less than 250 persons; (2) a balance sheet total not exceeding €43 million; (3) an annual net turnover not exceeding €50 million.

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

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

12 There is an exception for small listed companies that meet the criteria set out in Article 526-quater Section 4 of the BCC. In that case, no remuneration committee need be set up, but the board of directors should perform the tasks of the remuneration committee and should have at least one independent member. If the chair of the board is an executive director, he or she cannot preside

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 chair 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 the meetings of the remuneration committee when the committee is discussing the remuneration of other executive managers. 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 the resulting 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 requirements of the 2009 Code with respect to the remuneration committee are practically the same as those of the BCC. The 2009 Code further specifies 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 early 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 also obliges companies whose securities are listed on a regulated market[14] to set up an audit committee composed of 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 audit. The audit committee should

over board meetings when the board is performing the tasks of the remuneration committee. There is also an exception for public institutions for collective investments with variable participation rights, 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 of the BCC.

14 There is an exception for small listed companies that meet the criteria set out in Article 526-bis, Section 3 of the BCC. In that case, no audit committee need be set up, but the board of directors should perform the tasks of the audit committee and should have at least one independent member. If the chair of the board is an executive director, he or she cannot chair board meetings when the board is performing the tasks of the audit committee. There is also an exception for public institutions for collective investments with variable participation rights, 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 of the BCC.

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 financial overview (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 follow-up on any questions and recommendations by the statutory or registered auditor; and review and monitor the independence of the statutory or registered auditor, in particular with respect to the provision of additional services to the company. The statutory or registered auditor should report to the audit committee on key matters arising from the audit of the annual accounts, in particular on material weaknesses in internal control in relation to the financial reporting process. The statutory auditor or registered auditor shall annually confirm, in writing, to the audit committee, its independence from the company; annually inform the audit committee of any additional services provided to the company; and examine together with the audit committee the risks to its independence and precautions to be taken to minimise these risks. The audit committee should make a proposal regarding the (re)appointment of the statutory auditor or external auditor and this should be put 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 legal tasks set out above. The 2009 Code also indicates, *inter alia*, that the audit committee should have at least three members, that at least half (versus one in the BCC) of the audit committee's members should be independent and that the chair 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 at least twice a year with the external and internal auditors to discuss the auditing 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 proposal regarding the (re)appointment of the statutory auditor or external auditor, to be made by the audit committee. The Committee advised that in the appointment of an auditor, the audit committee could invite offers on the basis of predetermined selection criteria (e.g., technical competence, price, financial and economic competence). The audit committee should also review the work performed by the statutory or external auditor every three years in view of a proposal to reappoint the auditor to the board of directors, which will then propose it to the shareholders and, if applicable, to the works council.

The 2009 Code also introduces a third committee, the nomination committee (whose duties may also be exercised by the remuneration committee, which shall then be a 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 also chair meetings of the nomination committee when the latter 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 control the remuneration of directors and executive managers, several new provisions were adopted in 2010 and codified in the BCC.

As a general rule, the shareholders' general meeting 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 annual report of the board of directors. The general meeting of shareholders does not have to 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 none, 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, and 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 trade 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 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

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

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

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 the 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 as to the time commitment involved. They should not consider taking on more than five directorships in listed companies. Changes to relevant commitments and the assumption of new commitments outside the company should be reported to the chair of the board as they arise.

In accordance with the BCC, a director can either be a physical person or a legal entity. In the latter case, a permanent representative should be appointed from among its shareholders, directors, members of the executive committee or its personnel, to be exclusively entrusted with the execution of this mandate in the name and on behalf of the legal entity. This representative will be liable for the execution of this mandate as if he or she were exercising the mandate in his or her own name, notwithstanding the joint liability of the legal entity being represented. Recently, it was decided that the directors of autonomous governmental companies, public institutions or any legal entities over which the state has a direct or indirect influence,[18] need to be physical persons if they are to receive remuneration for the execution of their mandate.[19] Any payment to a legal entity is in such case null and void. Any listed company that falls under the aforementioned definition (e.g., Belgacom Group NV) will thus need to ensure that if its directors are to be remunerated, they must be physical persons.

Directors cannot use the information obtained in their capacity as directors for purposes other than for 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

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

19 Act of 19 December 2012 regarding the remuneration of personnel and mandate holders of institutions of public use, the autonomous government companies and the legal entities on which the state has directly or indirectly a preponderant influence, published in the Belgian State Gazette on 28 January 2013. The Act will enter into force on 1 August 2013.

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 disclosed in the corporate governance statement (which forms part of the annual report). The BCC indicates a specific procedure that should 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, tax liability, etc.).

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. In order for a director to qualify as independent, a number of criteria should be met.[20]

III DISCLOSURE

Companies whose securities are listed on a regulated market[21] are held to publish annually and biannually[22] a financial report. Quarterly financial reports should also be published by companies whose shares are listed on a regulated market. Such listed company is also held to publish *ad hoc* information if such information can be considered inside knowledge. The annual financial report contains the statutory and consolidated annual accounts, the annual report (including the statutory BCC requirements (such as, *inter alia*, the

20 Article 526-ter of the BCC.

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.

corporate governance statement and remuneration report), and some specific items that may have a consequence in the case of a public takeover[23] (e.g., shareholders' agreements, limitations to the transferability of shares and securities), the statutory auditor's report and a declaration of the issuer on the faithful representation of the accounts and report. If the issuer would decide to publish an annual communiqué between the end of the financial year and the publication of the annual financial report, this should meet certain criteria. The biannual financial report should contain interim financial statements and an interim report, information on external control and a declaration of the issuer on the faithful representation of the statements and report. The quarterly financial report should give information on important transactions and events, and a general description of the financial position and results of the company.

Listed companies also have other disclosure requirements with respect to any changes in the conditions, rights and guarantees linked to their securities, any special reports of the board of directors and draft amendments to the articles of association. Certain listed companies also need to publish annually a document that contains or refers to all information published in the previous 12 months (e.g., prospectus, financial information, *ad hoc* information, transparency notices).[24] Listed companies should also disclose the transparency notices they received from their shareholders in accordance with the Act of 2 May 2007 and the Royal Decree of 14 February 2008.

Besides the disclosures set out above, the 2009 Code indicates that the company should establish 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 needed 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 its related companies, and its 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 committee;

e the terms of reference of executive management;

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;

23 Act of 1 April 2007 on public takeover bids.

24 Cfr. Articles 65–66 of the Act of 16 June 2006 on the public offer of securities and admission of securities to a regulated market.

g any other direct and indirect relationships between the company and the 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:[25]

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 legal or statutory limitations on voting rights;

g the rules for the appointment of directors and for 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;
- information on any directors who have ceased to meet the requirements for independence;
- an activity report on board and board committees meetings, including the number of board committees;

25 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.

- meetings and the individual attendance records of directors;
- a list of all members of the board's committees;
- if applicable, an explanation as to why the appointment of the former CEO as chair is in the best interest of the company; and
- a list of all members of executive management; and

j an overview of the efforts undertaken to ensure that at least one-third of the members of the board of directors is of a different gender than that of the other members.[26]

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

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 in accordance with 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.

26 Applicable as from the first day of the financial year that starts after 14 September 2011.

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

d The amount of 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[27] 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 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.

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

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

- 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.

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 lapsed 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.

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 reported 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 such severance can be paid, and a justification for such payment, on an individual basis.

In 2012, the FSMA conducted its third annual study[28] regarding the observance of the rules of the 2009 Code, in which significant progress in the past three years has been noticed. The main improvements were noticed in the context of the remuneration reports, where no company found it necessary to 'explain' any non-compliance in any annual reports in 2011. Many of the recommendations set out in the first two studies have been taken into consideration by Belgian listed companies. The FSMA, however, points out 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 again makes some recommendations to the companies to further improve the quality of the disclosures in respect of corporate governance.

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

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

IV CORPORATE RESPONSIBILITY

The Belgian corporate governance rules do not specifically cover corporate responsibility issues, except for Article 518-bis that was introduced in 2011 in 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 board members. 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, namely that within seven years, at least 30 per cent of board members should be female.[29]

The report on the main differences between the 2009 Code and the Lippens Code notes that corporate social responsibility and diversity are topics that have become increasingly relevant 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 set out 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 the 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 according to the framework 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

29 This recommendation has as such 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).

such matters, appropriate follow-up actions and schemes whereby staff can inform the chair 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.

V SHAREHOLDERS

i Shareholder rights and powers

The basic rule is that each share with 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 share capital they represent, with the share with the lowest value carrying one vote. Fractions of votes are not taken into account.[30]

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 the law or the company's articles of association to the shareholders' general meeting are reserved for the board of directors. A number of decisions are reserved by law to the general meeting and cannot be delegated[31] 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 remuneration of executive managers or directors were also made subject to 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 whereby 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 of the BCC), or whereby as a last resort the involuntary dissolution of the company can be requested (Article 645 of the BCC).

One or more shareholders who, individually or collectively, own 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

30 Except as mentioned in Article 560 of the BCC.

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

to determine the agenda for the meeting. In accordance with Article 533-ter of the BCC, shareholders owning 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 does not apply to meetings on second call, i.e., meetings called because the required quorum was not met at the first meeting).

The 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 interests of the company or violate their or the company's duty of confidentiality. The questions should relate to the 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 shareholder(s), the board should endeavour to have the controlling shareholder(s) make considered use of their position and respect the rights and interests of minority shareholders. The board should encourage the controlling shareholder(s) 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 (a variant of abuse of power; see below) of course still applies. Such a request must be made within six months from the time the resolution became enforceable against the shareholder or the day on which it is 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 shareholders' general meeting normally determines the remuneration of directors, but not the remuneration 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 the law or the articles of association (e.g., an *ultra vires* act);

c resolutions that are obviously in violation of the company's interest; and

d resolutions adopted fraudulently.

Directors can be held liable in accordance with the BCC for shortcomings in their management of the company pursuant to general rules of law, for breach of law or the articles of association and in certain cases in tort for a violation of their general duty of care (the relevant standard is what a reasonably prudent director would have done 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 director(s). 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 shareholders' meetings. Such solicitation should, however, comply with the requirements of the BCC.[32] A public solicitation of proxies (i.e., when advertising 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.[33] Proxy solicitation is mostly carried out 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). In Belgium, however, class actions are not yet possible; therefore only the investors that take part in the proceedings against a company have the right to potential damages.

32 Article 548.

33 Article 549 of the BCC.

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[34] regulates periodic (annual, semi-annual and quarterly) 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, 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 legal 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. But 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 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, communications department). If the disclosure of inside

34 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.

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 best interest.

VI OUTLOOK

At this point in time there are no Belgian corporate governance drafts in the legislative pipeline. Several proposals with respect to remuneration of directors and management were pending in the last legislature, but these have not yet been submitted again for discussion to the new parliament.

This does not mean, however, that corporate governance is no longer a hot topic. Indeed, only now we are able to see the level of implementation of all the corporate governance legalisation that has entered into force in recent years and whether all companies duly observe the rules. Several studies are being carried out (e.g., by the FSMA, VBO, GUBERNA) and the Corporate Governance Committee is continuously following up on the progress and observance of the corporate governance rules, issuing advice where necessary.

On 12 December 2012, the European Commission also 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.

Finally, the Commission will improve the legal framework for cross-border transactions in order to support the growth and competitiveness of European businesses. To this end, various actions will be taken with respect to:

a the cross-border transfer of a company's registered office without the loss of legal personality;

b the cross-border merger rules, in particular asset valuation methods, the duration of the period of protection for creditors, and the consequences of completion of the merger for creditors;

c a new legal framework for cross-border divisions;

d follow-up of the proposed European Private Company Statute, with a view to enhancing cross-border opportunities for SMEs;

e information campaign on the European Company and European Cooperative Statutes in order to encourage companies to opt for these corporate forms; and

f measures targeting corporate groups, i.e., greater transparency regarding the information available about corporate groups and recognition of the concept of 'group interest'.

In addition, the action plan foresees merging 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 not (e.g., provisions on cross-border divisions).

As regards the time frame, the European Commission aims to take these initiatives in 2013, with the exception of those concerning corporate groups, which are scheduled for 2014.

Appendix 1

ABOUT THE AUTHORS

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.

Ms Janssens received her law degree from the University of Brussels (VUB) in 1996. In 1998, she obtained an LLM in business law from the Université Libre de Bruxelles in 1998 and a master's degree in management from VUB in 2001. She also completed an executive MBA at the Solvay Business School from 2006 to 2007. She was admitted to the Brussels Bar in 1997 and is a partner at NautaDutilh.

She is the author of numerous publications in the fields of corporate and financial law. She is also a member of the editorial board of various law journals and regularly lectures at seminars.

VIRGINIE CIERS

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Virginie Ciers is a senior associate in NautaDutilh Brussels corporate practice. In that capacity, she assists clients on all kinds of corporate matters including M&A, private equity, general corporate, corporate governance and commercial advice.

Ms Ciers received her law degree from the University of Ghent in 2007 after spending half a year at Hofstra University (Hempstead, New York) on an exchange programme. She was admitted to the Brussels Bar in 2007 and joined NautaDutilh in September of that same year.

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