The Corporate Governance Review

Eleventh Edition

Editor
Willem J L Calkoen

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PREFACE

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

In this 11th edition, we can see that corporate governance is becoming a more vital and all-encompassing topic, especially this year with covid-19 as well as climate issues, political instability, technological change, environmental, social and corporate governance (a stakeholder model to which many countries are moving), green finance and the demand from both employees and customers for a sound reputation for the best personal health and moral responsibility. 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, and most of us work for them. Most corporations aim to add value to society, and they very often do. There is increasing emphasis on this. Some, however, are exploiting, polluting, poisoning and impoverishing us, which can create a depressed reputation for business. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards, management and employees. Do they show commitment to all stakeholders and to long-term shareholders, 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, European Commission, US Securities and Exchange Commission (SEC), Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports and 17 social development goals, the media, supervising national banks, more and more shareholder activists, proxy advisory firms, the Business Roundtable and all 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getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated.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 very diligently. Nevertheless, there have been failures in some sectors and trust must 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 non-executive directors know? What systems should be set up for better enterprise risk management? How can chairs create a balance against imperial chief executive officers (CEOs)? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? Is diversity and inclusion actively being pursued? Is the remuneration policy fair? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans and takeover defences?

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. We see a large influence on norms by codes and influential investor groups.

More international investors, Business Roundtable, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have 'selected engagements' with stewardship shareholders to create trust: one-on-ones. 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 and work at complying with demands and trends for a better society?

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 when CEOs have gradually amassed too much power, or companies have not developed new strategies and have incurred bad results – and sometimes even failure. More are failing since the global financial crisis than before, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, stewardship codes for shareholders and shareholder activists, and requirements for reporting on non-financial issues. The European Commission has developed regulation for these areas as well. We see governments wanting to involve themselves in defending national companies against takeovers by foreign enterprises. We also see a strong movement of green investors, which often is well appreciated by directors. There is a move to corporate citizenship. Business Roundtable, with about 180 signatories, has embraced stakeholder corporate governance.

This all implies that executive and non-executive directors should work harder and more as a team on long-term policy, strategy, entrepreneurship and investment in research and development. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management, with new risks entering, such as the increasingly digitalised world and cybercrime, is an essential part of directors' responsibilities, as is the tone from the top.

Each country has its own laws, codes and measures; however, the chapters in this Review also show a convergence. Understanding differences leads to harmony. The concept underlying the book is that of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, when 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 this Review will be seen 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 have helped with this project. I hope this book will give you food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of its 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 2021

Chapter 3

BELGIUM

Elke Janssens and Dirk Van Gerven[1]

I OVERVIEW OF GOVERNANCE REGIME

Belgian corporate governance practices for listed companies have been partially codified in the new Code of Companies and Associations (CCA) and the Royal Decree of 29 April 2019 implementing the Code of Companies and Associations. The CCA contains mandatory provisions on, for example, the establishment of an audit and risk 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, formerly the Banking, Finance and Insurance Commission).

For existing companies, associations and foundations, the CCA has been applicable since 1 January 2020. The articles of association of existing legal entities must be brought into line with the CCA no later than 1 January 2024.

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 to 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 2020 (the 2020 Code),[2] published on 5 May 2019. The 2020 Code is an initiative of the non-government Corporate Governance Committee, composed of representatives from bodies such as the FSMA, the Federation of Belgian Enterprises, Euronext Brussels, the Belgian Institute of Chartered Accountants and the Central Economic Council. The FSMA monitors compliance by listed companies with the comply or explain principle applicable under the 2020 Code. The 2020 Code applies to companies incorporated in Belgium whose shares are admitted to trading on a regulated market (i.e., listed companies) as defined by the CCA.

By Royal Decree of 12 May 2019, the 2020 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 in another Member State of the European Economic Area (EEA). The CCA obliges these types of companies to adhere to the provisions of the 2020 Code or to explain in their corporate governance statement, which

1 Elke Janssens and Dirk Van Gerven are partners at NautaDutilh.
2 See www.corporategovernancecommittee.be.

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 are not required by law to comply with the 2020 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 adversely affect public opinion about a company.

The Belgian corporate governance rules have thus evolved in the past few years from soft law (the Lippens Code and the 2009 Code) to hard law (the CCA) and that process is continuing. The 2020 Code is a thorough overhaul of the 2009 Code, incorporating numerous regulatory changes, at both the European and Belgian levels. European legislation is indeed often the driving force behind Belgian legislative proposals.

The Shareholder Rights Directive II (SRD II)[3] was implemented in Belgian law by way of the Act of 28 April 2020, which made several changes to the CCA.

This chapter focuses solely on the corporate governance rules applicable to listed companies.

II CORPORATE LEADERSHIP

i Board structure and practices

Listed companies usually take the form of a limited company (NV/SA).[4] 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 members (or two if there are only two shareholders in the company and the articles of association do not provide for a higher number).

The CCA allows the board of directors to delegate daily management of the company, and external representation of the company for daily management matters, to another person, who may also be a director. Limitations on the powers of the daily management matters, 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 chief executive officer (CEO), managing director or general manager. The board of directors still has authority to make decisions with respect to the delegated powers.

The CCA allows companies to adopt a two-tier governance model if their articles of association provide for this possibility. This model existed under the old Belgian Company Code, whereby the board of directors delegated (some of) its powers to a management committee, except those reserved to it by law and general corporate policy.

Under the new rules, however, the intention is to create a more clearly delineated two-tier system using two newly introduced bodies: the management board and the supervisory board.

3 Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

4 Since most listed companies in Belgium take the form of an NV/SA (*naamloze venootschap/société anonyme*), the governance structures of other corporate forms are not discussed in this chapter.

The supervisory board is responsible for general corporate policy, overall strategy and supervision of the management board. It holds the same powers as the board of directors under the one-tier model, provided the powers are reserved to it pursuant to the CCA. The supervisory board must have at least three members, who make decisions jointly (i.e., by majority vote). Its members are appointed and dismissed by the general meeting.

The management board exercises all management powers, provided these have not been reserved to the supervisory board in accordance with the CCA. Like the supervisory board, the management board is a collegial body consisting of at least three members. The supervisory board is responsible for appointing and removing the members of the management board.

The aim of the two-tier model is to entrust exclusive powers to the aforementioned bodies through the articles of association and by law. In this regard, membership of both boards is prohibited. The CEO, for instance, cannot be a member of the supervisory board. Very few listed companies have adopted a two-tier governance structure.

The CCA has also introduced the possibility of a having sole director. This means that the company is no longer managed by a board. Instead, all powers are held by a single director, which can be either a natural person or a legal entity. For listed companies, however, only an NV/SA with a board is eligible to serve as a sole director.[5]

The most common governance structure in listed companies 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 and the chief legal officer. Together, these individuals form the company's executive management. The powers of the executive managers, other than the CEO, to represent the company 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 daily management matters) and other executive managers (within the limits of their specific powers), the company can be represented externally by a majority of its directors acting jointly, or by one or more directors pursuant to a provision to this effect in its articles of association. The company will be bound by any acts performed or obligations incurred by these directors, even if the internal decision was not made by the competent corporate body (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 (acting in good faith) and have internal effect only, even if published in the Annexes to the *Belgian Official Gazette* (*Moniteur belge/Belgisch Staatsblad*).

In this model, the board of directors still holds 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 2020 Code indicates that the board of directors is responsible for determining the company's values and strategy, its risk appetite and key policies. 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

5 See Code of Companies and Associations [CCA], Article 7:101, Section 1(3).

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 approve the framework of internal control and risk management proposed by the executive management and review the implementation of this framework;

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 in accordance with applicable law;

d ensure that the company presents an integrated view of its performance in its annual report and that the report contains sufficient information on issues of societal concern and relevant environmental and social indicators;

e ensure that there is a process in place to monitor the company's compliance with laws and other regulations, and the application of internal guidelines relating thereto; and

f approve a code of conduct (or several activity-specific codes of conduct), setting out the expectations for the company's leadership and employees in terms of responsible and ethical behaviour. The board should verify compliance with the code of conduct at least once a year.

The 2020 Code states that the board of directors should reach 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 both the board and 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, as a minimum:

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 that are based on a framework approved by the board of directors;

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 required disclosure of the financial statements and other material financial and non-financial information;

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

f provide the board of directors with all information necessary in a timely fashion for the board of directors to carry out its duties; and

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

The 2020 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. A majority of the board should be made up of non-executive directors, at least three of whom are independent based on the criteria set out in Clause 3.5 of the 2020 Code. Article 7:87 of the CCA defines 'independent' as not having a relationship with the company and not being an 'important' shareholder. The board's composition should ensure that decisions are made 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 drafted the 2020 Code, issued an additional recommendation stating that, within seven years, at least 30 per cent of board members should be women.

Article 7:86 of the CCA stipulates that at least one-third (rounded to the nearest whole number) of the 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 less-represented gender to drop below the statutory minimum.

For companies whose securities are admitted to trading on a regulated market for the first time, this requirement should be met as from the first day of the sixth financial year following the admission to trading.[6]

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 will be suspended. These benefits will be reintroduced once the board meets the gender diversity requirement.

The 2020 Code assigns a clear role to the chair of the board of directors. The chair and the CEO should not be the same individual and there should be a clear division between duties that concern 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. Once decisions are made, all board members should be supportive of their execution. The chair[7] determines the agenda for board meetings, after consultation with the CEO and the company secretary, 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 (or, as the case may be, the chair and the CEO) is responsible for ensuring that the directors receive accurate, timely and clear information prior to meetings and, where necessary, between meetings. All directors should receive the same information.

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

7 In the two-tier structure, the chair of the supervisory board and the CEO should set the agenda for their respective meetings, in consultation with the company secretary.

The CCA obliges companies[8] 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.[9] 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 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 2020 Code provides for practically the same requirements with respect to the remuneration committee. The 2020 Code further specifies, however, that the remuneration committee should have at least three members and should advise the board on the adoption of a remuneration policy. In addition to a remuneration committee, the CCA obliges companies whose securities are listed on a regulated market[10] to set up an audit and risk committee composed of non-executive directors. At least one member should be independent,[11] and at least one member must possess the requisite level of expertise in the field of accountancy and auditing. The audit and risk 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 financial statements, consolidated financial statements and short-form financial statements (intended for publication). The audit and risk committee should:

a monitor the financial reporting process;
b monitor the effectiveness of the company's internal control and risk management systems;
c monitor the internal audit (if any) and its effectiveness;

8 There is an exception for small listed companies that meet the criteria set out in the CCA, Article 7:100, Section 4. 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 chair 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 3(5) of the Act of 3 August 2012 on institutions for collective investments that meet the conditions of Directive 2009/65/EC 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.

9 In accordance with the requirements set out in Clause 3.5 of the 2020 Code and CCA, Article 7:87.

10 There is an exception for small listed companies that meet the criteria set out in the CCA, Article 7:99, Section 3. 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 chair of the board is an executive director, he or she cannot chair board meetings when the board is acting as the audit committee. There is also an exception for public undertakings for collective investment with variable capital, within the meaning of Article 3(5) of the Act of 3 August 2012 on institutions for collective investment that meet the conditions of Directive 2009/65/EC, 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.

11 In accordance with the requirements set out in Clause 3.5 of the 2020 Code and CCA, Article 7:87.

d monitor the audit of the annual and consolidated financial statements, including the follow-up of any questions and recommendations by the statutory auditor; and

e 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 and risk committee on key matters arising from the audit of the financial statements, in particular on material deficiencies in internal control of the financial reporting process. The statutory auditor shall confirm to the audit and risk committee annually, in writing, its independence from the company, inform the audit committee annually 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 appointment or reappointment of the statutory auditor or external auditor, which should be placed on the agenda of the annual general meeting.

The audit and risk committee meets whenever it deems it necessary to perform its duties properly and at least four times a year. The audit and risk committee reports regularly to the board of directors on the performance of its duties, and in any case when the board of directors prepares the financial statements, the consolidated financial statements and, where appropriate, the short-form financial statements intended for publication.

The 2020 Code provides that the audit and risk committee should review the specific arrangements for raising concerns – in confidence – about possible improprieties in financial reporting or other matters. The audit committee should agree on arrangements whereby staff may inform the chair of the audit committee directly. If deemed necessary, arrangements should be made for the proportionate and independent investigation of these matters and for the appropriate follow-up actions.

The 2020 Code also calls for the establishment of an independent internal audit function with resources and skills adapted to the company's nature, size and complexity. If the company does not have an internal audit function, the need for such a function should be reviewed at least annually.

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 Belgian Company Code and subsequently the CCA.

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 general meeting of shareholders determines the overall remuneration for the board of directors as a whole, while the board itself decides how to distribute this total amount between its members.

The CCA 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 for 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* pursuant to the CCA but does have the power to vote on the remuneration report in which the remuneration policy is described.[12] 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, if there is none, the employee representatives on the health and safety committee 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 this 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 frame. If this is not the case, the executive's variable remuneration cannot be taken into account to determine his or her severance package.[13]

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 the 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 granted to a director or executive manager of a listed company shall only vest, and options or 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.[14]

The general meeting of shareholders should also approve in advance[15] 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.[16] 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

12 The 2020 Code provides that the remuneration policy should be submitted for approval to the general meeting of shareholders.

13 CCA, Article 7:90.

14 CCA, Article 7:91.

15 This rule applies to any agreements entered into or renewed as of 3 May 2010.

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

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 health and safety committee or, if there is no such committee, the union representatives.[17]

The aforementioned provisions of the CCA are supplemented by the principles and best practices of the 2020 Code with regard to the level and structure of executive remuneration. The board should adopt a remuneration policy based on the advice of the remuneration committee to achieve the following objectives:

a to attract, reward and retain the necessary talent;
b to promote the achievement of strategic objectives in accordance with the company's risk appetite and behavioural norms; and
c to promote sustainable value creation.

The board needs to ensure that the remuneration policy is consistent with the company's overall remuneration framework. The remuneration policy should be in line with and support the company's business strategy, long-term interests and sustainability (and explain how it contributes to these components), and contain the information set out in Article 7:89/1 of the CCA, namely:

a the components of fixed and variable remuneration, including bonuses and other advantages;
b an explanation of how the remuneration and employment conditions of employees have been taken into account;
c clear, comprehensive and variable criteria for the variable remuneration, including financial and non-financial performance criteria, with an explanation of how these criteria support the company's business strategy, long-term interests and sustainability, the methods used to determine whether the performance criteria have been satisfied and information about waiting periods and the right for the company to claim reimbursement;
d the periods during which the company grants shares that form part of the remuneration package and the conditions for the grant of shares, including an explanation of how the grant of shares supports the company's business strategy, long-term interests and sustainability;
e the term of contracts and severance packages;
f the decision-making process to approve, change and implement the remuneration policy, including measures to prevent conflicts of interest; and
g the time of review of, and any changes to, the remuneration policy, an explanation of past significant changes, and how the votes and positions of shareholders have been taken into account, as from the last vote on the policy.

The remuneration policy must be submitted to the general meeting of shareholders for approval. As long as no remuneration policy has been approved, directors and other high-level managers can continue to be paid in accordance with past remuneration practices. Approval of the remuneration policy is also required in the event of a material change, and in any event every four years. The approved remuneration policy should be published on the company's website. Derogations from the remuneration policy are authorised if justified by exceptional circumstances and necessary to safeguard the company's long-term interests and

17 CCA, Article 7:92.

sustainability or required to ensure the survival of the company, provided the derogation is granted in accordance with a procedure laid down in the remuneration policy and only relates to components for which derogations are possible under the remuneration policy.

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.[18] The 2009 Code added 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 2020 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. The 2020 Code also stipulates that non-executive board members should receive a portion of their remuneration in the form of shares in the company. These should be held until at least one year after the non-executive board member leaves the board and at least three years from the time of award. No stock options should be granted to non-executive board members.

With regard to executive board members, the remuneration policy should describe the various components of their remuneration and determine an appropriate balance between fixed and variable remuneration, and cash and deferred remuneration. The variable remuneration for executive directors should be structured to link reward to overall corporate and individual performance, and to align the interests of the executive with the company's sustainable value-creation objectives. When the company grants short-term variable remuneration to its executive management, this remuneration should be subject to a cap.

Following the financial crisis, executive remuneration plans (such as stock options and incentive schemes) were found to be overly focused on short-term performance. The additional requirements concerning the remuneration policy result from the 2020 Code's broader emphasis on sustainable value creation and long-term growth.

ii Directors

The 2020 Code indicates that both executive and non-executive directors, regardless of whether the latter are independent, should exercise independence of judgement in their decision-making. Directors should make sure they receive detailed and accurate information and should study this information carefully 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.

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. A non-executive director 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 chair of the board as they arise.

18 id.

Pursuant to the CCA, a director can be either a natural person or a legal entity. In the latter case, a permanent representative should be appointed 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 being represented. The directors of autonomous government companies and any legal entities over which the state exerts direct or indirect influence[19] must be natural persons if they are remunerated for the directorship.[20] 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., Proximus)[21] must ensure that its remunerated directors are natural persons.

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

Board members should place the company's interests above their own. They have a duty to look after the interests of all shareholders equally and should act according to the principles of reasonableness and fairness. Board members should inform the board of any conflict of interest that could, in their opinion, affect their judgement. In particular, at the beginning of each board meeting, board members should declare whether they have any conflicts of interest regarding the items on the agenda. When board members make a decision, they should disregard their personal interests and should not use business opportunities intended for the company for their own benefit.

In the event of a potential conflict of interest, the board should, under the leadership of its chair, decide which procedure it will follow to protect the interests of the company and all its shareholders. In the next annual report, the board should explain why it chose this procedure. However, if there is a substantial conflict of interest, the board should carefully consider communicating as soon as possible on the selected procedure, the most important considerations and the conclusions. This disclosure should be effected through two different documents: the Corporate Governance Charter, posted on the company's website, and the Corporate Governance Statement, a specific section of the annual report. The CCA indicates a specific procedure to be followed when directors have a pecuniary conflict of interest with the company. A director with a conflict of interest of a financial nature cannot participate in the deliberations or vote on the decision in question. Information on the pecuniary conflict of interest should be included in the board of directors' annual report and the statutory auditor's report.

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 (a 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.

19 Holding directly or indirectly a majority of the share capital or voting rights, or 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.

20 Act of 19 December 2012 on the remuneration of employees and office holders in institutions of public utility, autonomous government companies and legal entities over which the state exerts, directly or indirectly, a preponderant influence, published in the *Moniteur belge/Belgisch Staatsblad* on 28 January 2013, entered into force on 1 August 2013.

21 The largest of Belgium's three mobile telecommunications companies.

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 board of directors 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 of an NV/SA cannot exceed six years by law, the 2020 Code advises setting the maximum term of directors at four years. This can be done by including a provision to this effect in the articles of association or by a decision of the general meeting of shareholders on the appointment of the director. The 2020 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 nomination committee should lead the nomination process and recommend suitable candidates to the board. The board should then make appointment or re-appointment proposals to the general meeting of shareholders. 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 this 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.[22]

III DISCLOSURE

Companies whose securities are listed on a regulated market[23] must publish a financial report annually and biannually.[24] This type of listed company is also obliged to make *ad hoc* disclosures if the information in question can be considered inside information. The annual financial report must contain:

a the financial statements and consolidated financial statements;
b the board's annual report (including the CCA's requirements, such as the corporate governance statement and remuneration report);
c a number of specific items that could have consequences in the event of a takeover[25] (e.g., shareholder agreements or limitations on the transferability of shares and securities);
d the statutory auditor's report; and
e a declaration by the issuer on the faithful nature of the financial statements and report.

If the issuer decides to make a disclosure 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 the 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

22 Clause 3.5 of the 2020 Code and CCA, Article 7:87.
23 Some of the provisions also apply to companies whose securities or shares are listed on certain multilateral trading facilities.
24 The latter is applicable to companies whose shares or debt instruments are listed.
25 Act of 1 April 2007 on public takeover bids.

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 2020 Code indicates that the company should draw up a corporate governance charter describing the main aspects of its corporate governance policy, such as its governance structure, the terms of reference of the board and its committees as well as other important topics. It should contain the minimum information set out in the 2020 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 as a minimum:

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 (or provisions of the company's articles) on conflicts of interest;
c the measures taken by the company 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;
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 shareholder 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 2020 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 2020 Code. If the company has not complied in full 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 CCA has made a corporate governance statement mandatory.

Pursuant to the CCA, the following items[26] should be disclosed in the corporate governance statement in the company's annual report:

a a statement that the company has adopted the 2020 Code as its reference code and the place where the 2020 Code can be consulted, as well as relevant information on the corporate governance practices applicable in addition to the 2020 Code and the place where these can be consulted;
b if the company does not fully comply with the 2020 Code, an indication of the provisions of the 2020 Code that were not complied with during the year and an explanation for the non-compliance;

26 These requirements are applicable to companies whose shares are listed on a regulated market. The requirements in points (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 a multilateral trading facility. The requirement set out in point (c) is also applicable to companies whose securities are listed on a regulated market.

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;
- information about 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 about 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;

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 from the other members;
k important agreements whose implementation or conditions could change in the event of a change in control and their consequences (unless otherwise published); and
l agreements with directors or employees that provide for compensation in the event that a director or employee is dismissed further to a takeover bid.

The CCA 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 CCA:

a a description of the company's remuneration, including benefits of any kind that have been granted in accordance with the remuneration policy to directors and executive managers (within the limits of the General Data Protection Regulation);
b the remuneration and other benefits granted directly or indirectly to directors and executive managers by the company or separately by a company that falls within the same scope of consolidation, indicating (for executive managers, excluding the CEO and directors, collectively):
- 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;

c the proportion of fixed and variable remuneration (for the executive managers, excluding the CEO and directors, collectively);

d an explanation of how the total amount of remuneration is in line with the remuneration policy and how it supports the company's business strategy, long-term interests and sustainability (for executive managers, excluding the CEO and directors, collectively);

e information about how the performance criteria have been applied (for executive managers, excluding the CEO and directors, collectively);

f the number and key features of shares, share options or any other rights to acquire shares granted, exercised or expired during the financial year (individually);

g if a director or an executive manager 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 (individually);

h whether the company has the right to recover any variable remuneration granted on the basis of incorrect financial data (for executive managers, excluding the CEO and directors, collectively); and

i information about any derogations from the remuneration policy (for executive managers, excluding the CEO and directors, collectively).

Furthermore, the remuneration report discusses the annual change in remuneration, the development of performance criteria and the average remuneration of employees other than directors and managers for at least five financial years, presented in a manner that permits comparison, and mentions the ratio between the highest remuneration of a member of management and the lowest remuneration of an employee.

IV CORPORATE RESPONSIBILITY

The Belgian corporate governance rules do not specifically cover corporate responsibility, with the exception of Article 7:86 of the CCA, which 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 from the rest. Moreover, the 2020 Code mentions that the composition of the board should ensure sufficient expertise in the company's areas of activity as well as sufficient diversity of skills, background, age and gender.

The 2020 Code is characterised by a stronger emphasis on the creation of sustainable value. This entails an explicit focus on the long term, on responsible behaviour at all levels of the company and the permanent consideration of the legitimate interests of stakeholders. More explicit expectations are also formulated in terms of diversity, talent development and succession planning, and in relation to the company's annual reporting on non-financial matters.

Unlike financial institutions, which are subject to specific rules on compliance and risk management, there are currently only a limited number of rules on compliance and risk management applicable to listed companies. The main provision of the 2020 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 once a year. 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 2020 Code further indicates that the audit and risk committee should review the specific arrangements for raising concerns – in confidence – about possible improprieties in financial reporting or other matters. The audit and risk committee should agree on arrangements whereby staff may inform the chair of the audit committee directly. If deemed necessary, arrangements should be made for the proportionate and independent investigation of such matters, appropriate follow-up actions and procedures whereby staff can inform the chair of the audit committee directly. It should be noted that the rules on personal data protection should be respected when establishing a whistle-blowing scheme.

V SHAREHOLDERS

i Shareholder rights and powers

The basic rule is that each share of the same value carries one vote. If shares do not have the same value or if there is no value mentioned, they 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.[27]

The CCA introduced new rules on multiple voting rights. For listed companies, this possibility is limited and only loyalty shares may be issued with double voting rights (a maximum of two votes per share). The CCA provides for an opt-in for companies that wish to issue loyalty shares. It should be noted, however, that one vote per share remains the default rule.

The issuance of shares with double voting rights requires a change to the company's articles of association, which must be approved by a two-thirds majority of shareholders at the general meeting (unless the articles of association provide for a higher majority for this decision). Notably, this threshold is lower than the three-quarters majority required for any other type of amendment to the articles of association.

The rules apply only to shares that have been registered in the name of the same shareholder for an uninterrupted period of at least two years. This two-year period runs from the day on which the shares are registered, even if registration took place before the provision introducing double voting rights was adopted and before the company was listed. Shares converted into dematerialised form or to which title is transferred lose their double voting rights.

However, share transfers resulting from a succession, liquidation of matrimonial assets, or transfer for valuable consideration or free of charge to a beneficiary do not result in the loss of double voting rights and do not interrupt the required two-year holding period. The same applies in the event of a transfer of shares between companies controlled by the same shareholder (intragroup transfers), or jointly controlled by the same group of shareholders,

27 Except as mentioned in the CCA, Article 7:155.

natural or legal persons, or between a company and its controlling shareholder or shareholders. Controlling shareholders often have the right to appoint a majority of the company's directors, meaning that they exercise *de facto* influence on the company's management.

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[28] to the board of directors, such as approval of the financial statements 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 its directors, winding-up of the company, or a merger or division. 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.

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, however, including a shareholder, may seek to invalidate a decision of the general meeting because of:

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 CCA (Article 2:42).

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 between them (CCA, Articles 2:60 to 2:69). The involuntary winding-up of the company can be requested as a last resort (CCA, Article 7:230).

One or more shareholders who, individually or collectively, hold 10 per cent 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 it is also possible for these shareholders to determine the agenda for the meeting. Pursuant to Article 7:130 of the CCA, 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 does not apply to meetings held on second call; namely 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, are duty-bound to answer these questions. There is an exception to this rule, however: 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. 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 to obtain 100 per cent of all voting securities or securities that allow their holders to acquire voting securities.

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

ii Shareholder duties and responsibilities

The 2020 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 2020 Code. In addition, it is recommended to enter into a relationship agreement with the majority shareholders.

The 2020 Code specifically mentions certain best practices with regard to institutional investors, namely that the company should discuss with institutional investors the implementation of their policy on the exercise of voting rights in the relevant financial year and ask institutional investors and their voting agencies for explanations about their voting behaviour.

Furthermore, the board should encourage shareholders, in particular institutional investors, to provide their assessment of the company's corporate governance prior to the annual general meeting and at least through participation in the general meeting. The general rule that minority shareholders can seek to invalidate a resolution of the general meeting for abuse by the majority of its rights still applies. This request must be made within six months of when 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 interests or the voter abused his or her rights, meaning voting rights were exercised in an obviously unreasonable manner.

iii Shareholder activism

The general meeting of shareholders 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. The remuneration policy must explain the extent to which the votes and positions of shareholders with respect to the policy, as expressed at meetings since the last vote on the remuneration policy, have been taken into account.

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

Resolutions of the board of directors can be invalidated on the same grounds as resolutions of the general meeting of shareholders; a claim to invalidate a board resolution must be lodged with the court within six months of the date the decision became enforceable against the claimant or the date on which the claimant was informed of the decision.

Directors can be held liable, in accordance with the CCA, for shortcomings in their management of the company, violations of rules of law or the company's articles of association and, in certain cases, breach of their general duty of care (the relevant standard is how a reasonably prudent director would have acted under the same circumstances). Directors are jointly liable for any violation of the law or the articles of association. To avoid liability, directors must disclose the violation to the board of directors. The overall liability for negligence, with the exception of recurring negligence and gross negligence, is capped at €12 million. 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. A decision should be approved by a majority of the votes cast. No action can be taken if the general meeting has already discharged the directors. It is also possible for minority shareholders to initiate proceedings on behalf of the company if they represent at least

1 per cent of the voting securities or held at least €1.25 million of the company's capital on the date the general meeting voted to discharge the directors. Minority shareholders who 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 representing 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 CCA provides for the possibility to solicit proxies for certain shareholder meetings. However, this solicitation should comply with the requirements of the CCA.[29] A public solicitation of proxies (i.e., when advertisements or intermediaries are used or if more than 150 shareholders are targeted) should be approved by the FSMA and a number of requirements should be met.[30] Proxy solicitation is mostly done by associations that defend (minority) shareholder rights. Further to the SRD II, proxy advisers are subject to the CCA and must adopt a code of conduct, which must be made public (Article 7:146/1 et seq.).

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,[31] class actions are now possible in Belgium. However, certain limitations apply. A class action may be brought against a company, by a consumer, only for breach of a contractual obligation or a specific law. This possibility is not available for violations of the CCA. Thus, shareholders who would like to introduce a claim against (current or former) directors cannot bring a class action under Belgian law. Only investors that take part in the proceedings against that company have the right to claim damages.

iv Takeover defences

In general, the following measures can be taken by the target company to frustrate a takeover bid

Capital increase with the issuance of new shares

In general, only the general meeting of shareholders is entitled to increase a company's share capital, unless the board of directors has been authorised to do so (pursuant to the CCA). However, such an authorisation is not valid in the context of a takeover bid, during which the board, in general, cannot increase the share capital by means of a contribution in kind or in cash with the cancellation or restriction of the shareholders' pre-emptive right. However, the

29 CCA, Article 7:144 CCA.

30 id., at Article 7:145 and Article 8:1 of the Royal Decree implementing the CCA.

31 Code of Economic Law, Article XII.35 et seq.

general meeting may authorise the board of directors to increase the share capital during the offer period by means of a contribution in kind or in cash with cancellation or restriction of the shareholders' pre-emptive right, provided:

a the board has been specifically authorised to do so within the past three years;
b the newly issued shares are fully paid up;
c the number of new shares does not exceed 10 per cent of the number of existing shares; and
d the subscription price is at least equal to the offer price.

Acquisition of own shares by the company

In general, the general meeting of shareholders must authorise the acquisition of own shares by the company unless the board of directors has been authorised to do so (pursuant to the CCA). As an exception to this rule, the board may acquire own shares to avoid serious, imminent harm to the company, provided the articles of association so allow (for a maximum of three years). In this case, other conditions governing the acquisition of own shares also apply.

Poison pill

In general, certain advance measures are available to protect companies against potential takeover bids. However, pursuant to Article 7:151 of the CCA, only the general meeting of shareholders (thus not the board) can grant rights to third parties liable to have a significant effect on the company's assets or give rise to a significant debt or obligation on behalf of the company, when the exercise of the rights depends on the launch of a takeover bid or a change in control. To be valid, the resolution to this effect should be filed with the clerk's office (of the competent court) prior to the FSMA's notification of the bid to the company, and a mention of the filing must be published in the Annexes to the *Belgian Official Gazette*. During the offer period, only the target company's (general meeting of) shareholders can take decisions or execute transactions that could have a significant impact on the composition of the company's assets or liabilities or enter into transactions without effective compensation. Such decisions and transactions cannot, in any case, be made subject to the outcome of the bid. Decisions that have been sufficiently implemented prior to receipt of the FSMA's notification can be further executed by the board; however, the FSMA and the bidder should be immediately notified of any such decisions, which should also be made public.

Issuance of convertible bonds or subscription rights (warrants)

These instruments may be issued by the general meeting of shareholders and may, for example, be convertible or exercisable upon the launch of a takeover bid. It is also possible to create a pyramidal ownership structure or issue share certificates.

Alternative bids

As a general rule, in keeping with the Takeover Directive, the target company's board of directors must act in the company's interests. It may, therefore, seek an alternative bidder (or white knight). Belgian law specifically provides that the target company need not inform the FSMA of the fact that it is searching for an alternative bidder (although it should inform the bidder and the FSMA of any decision in relation to the issuance of shares or that is liable to frustrate the bid).

Belgium has opted out of the provisions of the Takeover Directive aimed at restricting the use of defensive measures by the board of directors. Nevertheless, companies with their registered office in Belgium whose shares are (at least partially) listed on a regulated market may voluntarily include these restrictions in their articles of association (i.e., opt-in).

In this regard, a company may provide in its articles of association that:

a during the offer period, the board of directors (or the body to whom the relevant powers have been delegated) may not take any action (other than seeking alternative bids) liable to result in frustration of the bid without the prior consent of the general meeting of shareholders;

b any decisions taken prior to the offer period that are not yet fully implemented and that could frustrate the bid can only be further implemented with the prior consent of the general meeting of shareholders (except for those taken in the ordinary course of business);

c restrictions on share transfers expressed in the articles of association or a shareholders' agreement shall not apply to the bidder during the acceptance period or after the bid if the bidder holds at least 75 per cent of the target's share capital;

d restrictions on voting rights expressed in either the articles of association or a shareholders' agreement shall not apply at a general meeting held during the offer period and shares with double voting rights shall carry only one vote for the purpose of adopting measures to frustrate the bid or after the offer if, as a result of the offer, the bidder holds at least 75 per cent of the target's capital; and

e provisions of the articles allowing a shareholder to appoint or remove a director shall not apply at the first general meeting called by the bidder after the offer, provided the bidder holds at least 75 per cent of the target's capital as a result of its bid.

If the rights set out above in respect of a poison pill, issuance of convertible bonds or subscription right, or alternative bid cannot be exercised, reasonable compensation should be paid to their holders.

The company may also stipulate in its articles of association that these provisions shall apply only to the extent that the bidder or the company controlling the bidder is subject to the same restrictions on the application of defensive measures (the reciprocity rule).

v Contact with shareholders

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

The Royal Decree of 14 November 2007[32] 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 CCA (e.g., financial statements 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 EEA Member States (the company should use media that are expected to ensure disclosure in all EEA Member States). Any inside information should be disclosed simultaneously, insofar 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.

32 Royal Decree of 14 November 2007 on the obligations of issuers of financial instruments traded on a regulated market, *Moniteur belge/Belgisch Staatsblad*, 3 December 2007.

The 2020 Code stipulates that the board should ensure an effective dialogue with shareholders and potential shareholders through appropriate investor relation programmes, so as to achieve a better understanding of their objectives and concerns. Feedback from this dialogue should be provided to the board, at least once a year. Individual meetings with institutional investors are also encouraged 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, to avoid the unequal treatment of shareholders.

Individual directors have 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 shareholders. Some scholars argue, however, that directors representing a controlling shareholder can consult with that shareholder on decisions to be made 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 directors can inform the persons they represent of information they can then use for their own purposes (e.g., to determine whether to sell or purchase shares). In addition, confidential information should be disclosed only with the approval of the board of directors and subject to agreed confidentiality obligations.

In addition to this general duty of confidentiality, it is also forbidden for anyone in possession of inside information (e.g., a director), *inter alia*, to disclose this information 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 disclosed immediately. However, a company can decide, at its own risk, to postpone the disclosure of inside information if the disclosure could harm the company's legitimate interests, provided 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 or the communications department). If the disclosure of inside information is postponed, the company should take the necessary measures, *inter alia*, to bar access to this information to all persons who do not need it to perform their duties.

Based on the foregoing, in our opinion, directors cannot disclose inside information to shareholders further to a confidentiality agreement. The only exception to this rule is if a third party or a shareholder requests information from the company 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

Belgian company law underwent substantial changes during the past year. In addition, the SRD II was implemented in Belgium in 2020. No major changes are expected in the coming year.

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